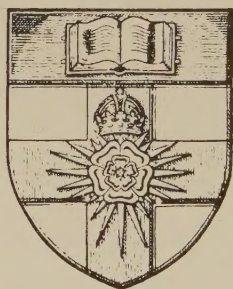


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Incorporating the

LAW TIMES
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LAW JOURNAL
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1961
VOLUME 2

Consulting Editor for Taxation Cases

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LONDON

BUTTERWORTHS

ALL ENGLAND
LAW REPORTS

1961
VOLUME 1

©

Butterworth & Co. (Publishers) Ltd.
1961

Printed in Great Britain by R. J. ACFORD LTD., Industrial Estate, Chichester, Sussex.



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HALSBURY'S LAWS OF ENGLAND, HAILSHAM EDITION

The reference 34 HALSBURY'S LAWS (2nd Edn.) 30, para. 26, refers to paragraph 26 on page 30 of Volume 34 of the second edition of Halsbury's Laws of England, of which Viscount Hailsham was Editor-in-Chief.

HALSBURY'S STATUTES OF ENGLAND, SECOND EDITION

The reference 26 HALSBURY'S STATUTES (2nd Edn.) 138, refers to page 138 of Volume 26 of the second edition of Halsbury's Statutes.

ENGLISH AND EMPIRE DIGEST

The reference 24 DIGEST 602, 6028, refers to case No. 6028 on page 602 of Volume 24 of the Digest.

There are three cumulative supplements to the Digest, described as Digest Supp., 2nd Digest Supp. and 3rd Digest Supp.; of these the first two include cases up to December 31, 1939, and December 31, 1951, respectively.

The reference 31 DIGEST (Repl.) 244, 3794, refers to case No. 3794 on page 244 of Digest Replacement Volume 31.

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CORRIGENDA

- [1961] 1 All E.R.
p. 789 *Re M. (AN INFANT)*. Case referred to *Re C. (an infant)*: delete all references following 3rd Digest Supp.
- [1961] 2 All E.R.
p. 192 *TSAKIROGLOU & Co., LTD. v. NOBLE & THORL G.M.B.H.* Line B.1: for “obligation of the buyer” read “obligation of the seller”, line C.4: for “obligations of the buyers” read “obligations of the sellers”. Page 193, line D.6: for “relevance is permissible” read “difference is permissible”. Page 195, line A.3: for “sellers” read “seller’s”; line A.4: for “... they can . . . will be conveyed” read “... he could . . . would be conveyed”.
- p. 381 *HENTY & CONSTABLE (BREWERS), LTD. v. INLAND REVENUE COMRS.* Solicitors: after “*Robins, Hay & Waters*” read “agents for *Raper & Co., Chichester*”.
- p. 438 *CAFFOOR v. COMMISSIONER OF INCOME TAX, COLOMBO*. Counsel for the appellants: read “*E. F. N. Gratiaen, Q.C. (Ceylon), M. P. Nolan, M. Sanmuganathan and S. Basnayake* (of the Ceylon Bar) for the appellants” instead of as printed.
- p. 504 *ATTORNEY-GENERAL OF THE GAMBIA v. N’JIE*. Line G.4: for “On appeal by the appellant” read “On appeal by the respondent”.
- p. 896 *MORRISON ROSE & PARTNERS v. HILLMAN*. Solicitors: for “*Howard, Kennedy & Co.*” read “*Jelson & Co.*”

THE ALL ENGLAND LAW REPORTS

INCORPORATING THE
LAW TIMES REPORTS
AND THE
LAW JOURNAL REPORTS

Re ST. JAMES', BISHAMPTON.
Re ST. EDBURGA'S, ABBERTON.

[WORCESTER CONSISTORY COURT (Chancellor Peter Boydell), September 27, 28, 29, 1960.]

Ecclesiastical Law—Faculty—Petitioner—Interest of petitioner in suit—Minister of Aviation petitioning for faculty—Danger to Crown property.

In the course of their use of an airport, aircraft flew over two churches which were approximately one and two miles respectively from the runway of the airport. The airport was in a different parish from the churches. The aircraft and airport belonged to the Crown. The Minister of Aviation sought a faculty to place on the tower of one of the churches a mast and a warning light; and a further faculty to remove the spire of the other church. The aircraft and airport were, for the purposes of the petitions, regarded as the property of the Minister. The petitions were unopposed. On the preliminary point whether or not the Minister was entitled to present either petition,

Held: the Minister had a sufficient personal interest to entitle him to present the petitions.

Hansard v. St. Matthew, Bethnal Green (Parishioners) ((1878), 4 P.D. 46) applied.

[As to the necessity for a petitioner for a faculty to have an interest in the suit, see 13 HALSBURY'S LAWS (3rd Edn.), 515, para. 1107, note (e); and for cases on the subject, see 19 DIGEST 328, 1361-1364.]

Cases referred to:

Hansard v. St. Matthew, Bethnal Green (Parishioners), (1878), 4 P.D. 46; sub nom. *Re St. Matthew's, Bethnal Green*, 42 J.P. 408; 7 Digest 553, 307.

Lee v. Fagg, (1874), L.R. 6 P.C. 38; 43 L.J.Eccl. 17; 30 L.T. 800; 38 J.P. 96; affg. *S.C.* sub nom. *Fagg v. Lee*, (1873), L.R. 4 A. & E. 135; 19 Digest 328, 1363.

Noble v. Reast, [1904] P. 34; 19 Digest 328, 1364.

Petitions.

In these cases the Minister of Aviation petitioned for a faculty.

In the case of St. James', Bishampton, the Minister sought a faculty to place on the tower of the church, which was between one and one and a half miles from the north-east end of the runway of Pershore airport, a mast approximately twelve feet nine inches high and to place on that mast a warning light. The costs would be paid by the Minister.

In the case of St. Edburga's, Abberton, which was about two miles from the north-east end of the runway, the Minister sought a faculty to remove the spire of the church. Both petitions were unopposed and were heard together. The case is reported on the preliminary point which arose, namely, whether the Minister was entitled to present the petitions.

J. F. E. Stephenson, Q.C., for the Minister.

E. Garth Moore as *amicus curiae*.

THE CHANCELLOR: These two petitions, which are presented by Her Majesty's Minister of Aviation, concern the airfield at Pershore in this diocese. Before I consider the evidence I must first dispose of a preliminary point of law, namely, whether the Minister is entitled to present either of these petitions. In 13 HALSBURY'S LAWS (3rd Edn.), p. 515, para. 1107, is to be found the following statement of the law:

"Proceedings on an application for a faculty are instituted in the consistory court of the diocese, and are commenced by a petition, which is usually presented by the incumbent and churchwardens, with or without the addition of other parishioners; but it may be presented by any parishioner or person having a personal interest. Mere volunteers with no real interest will not, however, be heard. An archdeacon is deemed to have an interest as such in any parish within the limits of his archdeaconry and any person whose name is entered on the electoral roll of the parish concerned as a non-resident elector is deemed to have an interest as though he were a parishioner of that parish."

The question which arises on these petitions is whether the Minister has a sufficient personal interest or whether, on the other hand, he is a mere volunteer with no real interest.

Pershore airfield and the aircraft which use it are the property of the Crown. Therefore for the purpose of these petitions both the airfield and the aircraft can be regarded as the property of the Minister. No part of the airfield is within the boundaries of either the parish of Bishampton or the parish of Abberton. The airfield is in a neighbouring parish. The church at Bishampton is approximately one and a half miles from the nearest end of the main runway of the airfield. The church at Abberton is approximately two miles from the nearest end of the main runway. Counsel for the Minister has argued that the Minister has a sufficient personal interest in that his property, namely, his aircraft, are engaged in their lawful errands from Pershore airfield over the area of the diocese in general and over the parishes and churches of Bishampton and Abberton in particular, and that those two churches constitute a danger to the aircraft. In support of his argument counsel has cited three reported cases.

The first case, *Lee v. Fagg* (1), concerned a monition and not a petition for a faculty. It was held that Mr. Lee, the petitioner, had no sufficient interest to entitle him to promote the proceedings. SIR ROBERT COLLIER, who delivered the judgment of the Judicial Committee said (2):

"The application for this monition appears to have been made by a gentleman described as Mr. John Benjamin Lee, of No. 2, Broad Sanctuary, in the city of Westminster, and their Lordships cannot take cognisance of any other description of that gentleman. Mr. Lee does not state that he has any interest in the suit."

The second case cited was *Noble v. Reast* (3). This also was a monition case. The promoter, Mr. Noble, declared himself to be the secretary to the Archbishop of York and sought a monition ordering the removal of certain ornaments. The Consistory Court of York held that the promoter had no sufficient interest merely as secretary to the archbishop and his petition was, therefore, dismissed.

The third case cited was *Hansard v. St. Matthew, Bethnal Green (Parishioners)* (4). The headnote of this case, which was heard in the Consistory Court of London, is in the following terms:

"The vicar and churchwardens of a parish church petitioned the ordinary

(1) (1874), L.R. 6 P.C. 38.

(3) [1904] P. 34.

(2) (1874), L.R. 6 P.C. at p. 40.

(4) (1878), 4 P.D. 46.

A for a grant of a faculty, authorising them to erect in a part of the parish
churchyard closed for burials under Order in Council, a mortuary, portions
of which would be appropriated to a post-mortem room; to rooms for
holding coroner's inquests, and living rooms for the keeper of the mortuary.
B The grant of the faculty was opposed by a non-resident owner of freehold
property in the immediate vicinity of the site of the proposed mortuary,
on the ground that the proposed appropriation and use of the churchyard
would be contrary to ecclesiastical law.

C "The court, being of opinion that it was requisite for the health of the
parish that a mortuary should be provided, and also that the churchyard was
the most suitable site for its erection, decided that it had jurisdiction to
grant a faculty for the erection of a mortuary on a portion of the churchyard,
with a room to be appropriated to post-mortem examinations.

"Observations as to what interest is sufficient to confer a locus standi
on opponents in causes of faculty."

The Chancellor, DR. TRISTRAM, in the course of his judgment, said (5):

D "The result of the decisions appears to come to this, that to entitle a person
to oppose the granting of a faculty he must show some interest in the subject-
matter of the application. In some cases the interest required will be that
of a resident parishioner or ratepayer; in others it may be of a different
description . . . The true test of interest in a case of this nature may be,
whether the building in question may by possibility be injurious to any
E person as the owner or occupier of property in the neighbourhood, and if it
be shown that it might become so, I think that this would give a locus standi
to such owner or occupier, whether he be or be not a resident or ratepayer
in the parish, to oppose the faculty. In the present case, independently of
any general interest Mr. Merceron or Mr. Wilson may have with a view to
the protection of the tenants present or future of their property, Mr.
Merceron is owner of certain houses in Fuller Street. These houses form part
F of a small block of houses, the front houses of the block being in Church Row,
immediately opposite to, and about thirty-two feet from, the proposed
building. As one of the purposes of the mortuary is the reception of bodies
of persons who have died from infectious diseases, and as Mr. Merceron's
houses in Fuller Street are just at the back of, and in close connexion with,
the houses in Church Row, and not more than seventy yards from the
G site of the proposed building, it occurred to me, especially on inspection,
that on this ground, if not on any other, the court ought not to hold that
Mr. Merceron was without a possible interest in this suit; for if, whether
owing to the close proximity of the mortuary, or to want of proper pre-
cautions, infection was to spread from the mortuary to the houses in Church
Row, this might be injurious to Mr. Merceron's houses in Fuller Street."

H In that case Mr. Merceron was a party opponent.

I In the present suits the Minister is petitioner. For the purpose of deciding
whether a party has a sufficient personal interest to participate in faculty pro-
ceedings counsel who appeared as amicus curiae has not suggested that any
distinction should be drawn between a party opponent and a petitioner. Indeed,
petitions are commonly presented by, and faculties are commonly granted to,
persons who are neither resident in the parish nor on the electoral roll of the
parish nor (unlike, I will assume, Mr. Merceron) ratepayers in respect of property
within the parish. For example, it is not uncommon for a faculty to be granted
to a person who lacks those qualifications but who wishes to instal within the
church a memorial tablet to a deceased parishioner. In all the circumstances I
have reached the conclusion that the Minister has a sufficient personal interest
to entitle him to present these petitions.

[The CHANCELLOR then dealt with the facts and granted the faculty in the

case of St. James', Bishampton. In the case of St. Edburga's, Abberton, he said: "In my judgment, looking at the evidence as a whole, the risk of serious danger is not only small but is not great enough to justify the removal of the spire of this living church". The CHANCELLOR accordingly rejected the petition.]

Orders accordingly.

Solicitors: *Treasury Solicitor* (for the Minister); *Lee, Bolton & Lee.*

[*Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.*]

ENGLAND v. ENGLAND AND EASTER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), June 21, 1960, March 6, 1961.]

Divorce—Discretionary bars—Delay—Petition by husband based on wife's recent adultery with co-respondent—Husband's acquiescence in wife's previous adultery with another man during a previous period of six years—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 4 (2), proviso (i).

The parties were married in 1946 and in 1952 the wife left the husband. From 1952 until 1958, so far as the husband's knowledge went, the wife lived in adultery with another man. The husband refused to take her back because of this adultery, but he took no steps to obtain a divorce or decree of judicial separation because he was not interested in doing so. In 1958 the wife began to live in adultery with the co-respondent and had continued to do so until the date of the petition, and a child had been born to the wife and the co-respondent. In 1960 the husband presented a petition for divorce on the ground of the wife's adultery with the co-respondent. The suit was undefended but the question arose whether or not the failure to petition for relief in respect of the wife's adultery between 1952 and 1958 constituted such delay as would debar the husband from obtaining relief on the present petition.

Held: (i) the husband's acquiescence in the situation from 1952 until 1958 constituted unreasonable delay within the meaning of the Matrimonial Causes Act, 1950, s. 4 (2), proviso (i).

Rutter v. Rutter ((1920), 123 L.T. 585) considered and explained.

(ii) notwithstanding this delay the court's discretion would be exercised in favour of the husband and he would be granted a decree, having regard to the facts that the wife and the co-respondent wished to marry each other and, if they married, their child would thereby be legitimated, and the present case was not one where the husband had to ask for the court's discretion in respect of adultery by him.

Blunt v. Blunt ([1943] 2 All E.R. 76) applied.

Lowe v. Lowe ([1952] 2 All E.R. 671) distinguished.

[As to delay as a discretionary bar where petition based on a charge of recent adultery but earlier adultery is not complained of, see 12 HALSBURY'S LAWS (3rd Edn.) 309, para. 617; and for a case on the subject, see 27 DIGEST (Repl.) 414, 3435.]

For the Matrimonial Causes Act, 1950, s. 4 (2), see 29 HALSBURY'S STATUTES (2nd Edn.) 394.]

Cases referred to:

Blunt v. Blunt, [1943] 2 All E.R. 76; [1943] A.C. 517; 112 L.J.P. 58; 169 L.T. 33; 27 Digest (Repl.) 429, 3589.

Johnson v. Johnson, [1901] P. 193; 70 L.J.P. 44; 84 L.T. 725; 27 Digest (Repl.) 421, 3521.

Lowe v. Lowe, [1952] 2 All E.R. 671; [1952] P. 376; 3rd Digest Supp.

Rutter v. Rutter, (1920), 123 L.T. 585; 27 Digest (Repl.) 414, 3435.

A **Petition.**

In this case the husband presented a petition, dated Apr. 21, 1960, for divorce on the ground of the wife's adultery with the co-respondent from July, 1958, until the date of the petition. The suit was not defended and came before KARMINSKI, J., on June 21, 1960, when it was adjourned for legal argument by the Queen's Proctor on the question of delay. The facts appear in the judgment.

B *P. N. Garland* for the husband.

Colin Duncan for the Queen's Proctor.

KARMINSKI, J.: When the matter came before me as an undefended suit it was apparent that there was some delay in so far as the husband was concerned in coming to the court for a remedy, not in respect of the adultery alleged in the petition, but in respect of adultery which I am satisfied the wife committed with another man much earlier.

The husband and the wife were married in October, 1946. The marriage does not seem to have been very happy because the husband complained of the wife's interest in men other than himself. In 1952 the wife left, and, soon after her leaving, the husband discovered that she had gone to live with another man in India. Later she returned to this country and lived with the same man here. She later asked the husband to take her back but he refused because she had committed adultery with the other man. The husband was at all material times in a position to take proceedings in regard to this adultery but he did not do so. Although he knew that his wife was living with this other man, and indeed had assumed his name, he took no steps whatsoever. The first man seems to have died in or about 1958. The husband said that so far as his knowledge went, the wife had lived with this man from 1952 to 1958 but he took no steps to divorce his wife or to obtain a decree of judicial separation on the ground of her adultery. In evidence he was asked why he took no steps and his answer was: "Well, I was not interested in ever getting married again and I didn't see why I should go through the proceedings". He said that it was nothing to do with his financial position, and that there was nothing to prevent his coming to the court to get relief, although he was largely employed abroad.

The first man having died, the wife soon afterwards set up an association with a man called Easter, the present co-respondent. I am satisfied on the evidence before me that the wife and the co-respondent have lived together since 1958 as man and wife, and that there is a child born of that union. So far as the husband is concerned he seems to have learned of the association of the wife and the co-respondent as a result of the birth of the child, and he then proceeded to take action and brought the present petition with proper despatch. So far as the adultery with the first man is concerned it is common ground that the husband did nothing, although he was well aware that the wife was living in adultery with the first man for five or six years. The point that arose in argument was whether or not that delay was a bar to relief having regard to the fact that there was no delay in bringing the present suit alleging adultery between the wife and the co-respondent.

Counsel for the husband, who argued the case with great care, called my attention to the brief report of *Rutter v. Rutter* (1). That case was briefly referred to, but I think in a very guarded manner, in *RAYDEN ON DIVORCE* (8th Edn.), at p. 257:

"But failure to take action in respect of a matrimonial offence, though one of the same kind, is not necessarily delay as to the reasonableness of which the court has to decide in a petition which also alleges a subsequent recent matrimonial offence, if the latter is proved and is one which entitles the petitioner to the relief claimed."

One of the authorities cited in support of that is *Rutter v. Rutter* (2). It will be observed that the learned editors of *RAYDEN* use the guarded phrase "not necessarily".

As far as I know *Rutter v. Rutter* (2) stands alone as support for that proposition, if indeed it does support it. In that case the wife had taken no steps to terminate the marriage on the grounds of adultery and desertion for two years until after the husband had committed adultery with another woman. The facts were briefly these: The spouses had been married in 1902, the husband, who was a Roman Catholic, had been earlier married to a woman called Neil and had been divorced by her. In August, 1914, he deserted the wife and resumed cohabitation with his former wife. He seems to have lived with her for a little under five years and then left her and started to live in adultery with the second woman named Craven. The wife had, therefore, taken no steps to terminate her marriage on the grounds of the adultery of the husband with his former wife until after he had cohabited with another woman. The report briefly summarises the argument of counsel for the wife, and also contains one observation only of *SIR HENRY DUKE*, P. Counsel is reported as having said (3) that

"partly owing to want of means, and partly because she felt that from the point of view of the respondent's church his returning to his first wife was not in the same category as ordinary adultery, the petitioner had refrained from taking proceedings with regard to that, but, when she heard of the adultery with Lillian Craven, took advice, and filed her petition."

Then follows a single sentence of the President (3): "If you can prove adultery with the second woman, the question of delay falls".

It would appear that that was not a judgment but an observation addressed to counsel by the court *arguendo*, and I am satisfied that that is what the learned President was doing. He was saying no more than that having regard to the particular circumstances of that case the delay there was not culpable delay, but a delay properly explained by the particular facts of that case. In fact, the delay in *Rutter v. Rutter* (2) was not perhaps as serious as at first sight appears. The desertion by the husband had commenced only in August, 1914, and in the existing state of the law at that time the wife had to prove a matrimonial offence in addition to adultery. She would not, as I understand it, have been able to bring a petition before August, 1916, at the very earliest. The report does not say when the petition in fact was filed, but as it was tried in April, 1920, I assume that it was presented some time prior to that date.

I do not myself think that *SIR HENRY DUKE*, P., who was of course concerned with the particular facts of that case, can have meant that if adultery with a second woman is proved the question of delay in respect of earlier matrimonial offences does not arise. I would be most hesitant to differ from so eminent a judge as *LORD MERRIVALE*, but if he had meant that when adultery with a second woman is proved the question of delay falls, I should be compelled reluctantly to differ from that view. As I am now convinced that he meant nothing of the kind, the question of my disagreement does not arise.

I now return to the facts of the present case. This is a case where a petitioner took no action at all in regularising the situation between himself and his adulterous wife, because he was not interested in marrying again and did not see why he should go through the proceedings. It is, of course, open to him to take that course if he so desires, but if he does so, proceedings based on subsequent adultery with another man must be tainted by that delay. It has been said again and again that there are strong reasons why, if adultery is known, proceedings shall be taken as soon as possible, *Johnson v. Johnson* (4). The history of this principle is set out at length in *Lowe v. Lowe* (5), and I do not

(2) (1920), 123 L.T. 585.

(4) [1901] P. 193.

(3) (1920), 123 L.T. at p. 585.

(5) [1952] 2 All E.R. 671; [1952] P. 376.

A think that it is necessary to add to what was said there. This is a real case of acquiescence by the husband in the position in which he found himself in 1952. The husband saw no reason then to rid himself of this adulterous wife, but the situation changed in 1959 when he found that she had not only contracted another adulterous association, but had borne a child as a result. I have no hesitation in coming to the conclusion that the delay in bringing the present
B proceedings was on all the facts culpable.

I have now to decide whether I can, in the exercise of my discretion, say that notwithstanding that culpable delay, the discretion of the court should be exercised in the husband's favour and that the marriage should be brought to an end. The principles on which the court's discretion can be exercised were set out in five categories by VISCOUNT SIMON, L.C., in *Blunt v. Blunt* (6). The first four of those categories do not apply in this case, the fifth in my view does. There (7) LORD SIMON advanced considerations of a general character:

“... the interest of the community at large, to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down.”

D The present case, unlike *Lowe v. Lowe* (8), is not a case where the husband has had to ask for the exercise of the discretion of the court in respect of his own adultery. Nor in this particular case do I have to consider the question of his re-marriage. On the other hand, I am entitled to consider the position of the wife, who is now living in adultery with the co-respondent, and of the child of that union. The wife told the inquiry agent, in a statement which has
E been put in in evidence, that she is hoping to marry the co-respondent, and it appears that he wishes to marry her. Lastly I have to consider the position of the child. If the wife and co-respondent marry the child of this union will become legitimate, notwithstanding the fact that it was born before their marriage (9). That, in my view, is a very important matter, and it is a matter which I have
F considered. Although the husband was the sole author of his own difficulties, yet, taking what I hope is a proper view of the matter, I think that I can exercise the discretion of the court in his favour and I do so. The result, therefore, will be that there will be a decree on the grounds of adultery between the wife and the co-respondent.

Decree nisi.

Solicitors: *Hatton, Asplin, Jewers & Glenny*, Grays Thurrock, Essex (for the husband); *Queen's Proctor*.

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

(6) [1943] 2 All E.R. 76; [1943] A.C. 517.

(7) [1943] 2 All E.R. at p. 78; [1943] A.C. at p. 525.

(8) [1952] 2 All E.R. 671; [1952] P. 376.

(9) See the Legitimacy Act, 1959, s. 1 (2); 39 HALSBURY'S STATUTES (2nd Edn.) 31.

NOTE.

Re WHOLESALE CONFECTIONERS' ALLIANCE OF GREAT BRITAIN AND NORTHERN IRELAND'S AGREEMENT (No. 2).

[RESTRICTIVE PRACTICES COURT (Russell, J., Sir Stanford Cooper and Mr. W. L. Heywood), March 8, 1961.]

Restrictive Trade Practices—Injunction—Restrictions declared contrary to public interest—Form of order—Whether trade association should be included in order restraining the enforcing of the restrictions or making new agreement with like restrictions—Whether trade association “carrying on business”—Restrictive Trade Practices Act, 1956 (4 & 5 Eliz. 2 c. 68), s. 6 (1), s. 20 (3).

Restrictive Trade Practices—Injunction—Recommendations by trade association restrained—Form of order—Scope of recommendations restrained—Restrictive Trade Practices Act, 1956 (4 & 5 Eliz. 2 c. 68), s. 6 (7), s. 20 (4).

Restrictive Trade Practices—Court—Practice—Service—Order—Service of order by post and not by personal service—Recorded delivery service.

[For the Restrictive Trade Practices Act, 1956, s. 6 and s. 20, see 36 HALSBURY'S STATUTES (2nd Edn.) 937, 952.]

Application.

Application by the Registrar of Restrictive Trading Agreements for an order under s. 20 (3) and (4) of the Restrictive Trade Practices Act, 1956, following on the judgment of the Restrictive Practices Court given on Dec. 9, 1960, and reported [1961] 1 All E.R. 116.

G. T. Aldous, Q.C., and B. J. H. Clauson for the Wholesale Confectioners' Alliance of Great Britain and Northern Ireland.

Neville Faulks, Q.C., and Arthur Bagnall for the Registrar.

RUSSELL, J., delivered the following judgment of the court: The points arising on the order in this case have occupied a good deal of time, but I think that we can deal with them fairly shortly. The Registrar put forward a form of order, and in two respects the Alliance take objection to it. The first relevant part of the order is designed to come within s. 20 (3) of the Restrictive Trade Practices Act, 1956 (1), and is in this form:

“This court doth order that the Alliance [that is the Wholesale Confectioners' Alliance of Great Britain and Northern Ireland], the members [those are the territorial associations which together are the direct members of the Alliance] the local associations [the local associations are associations of actual wholesalers who are the direct members of three of the four members of the Alliance] and the represented parties [who are the actual wholesalers themselves] and each of them be restrained from doing any of the following acts whether by themselves or by their respective servants or agents that is to say (a) giving effect to or enforcing or purporting to enforce the said agreement in respect of any of the said restrictions, (b) making any other agreement to which Part 1 of the said Act applies to the like effect as the said agreement in respect of the said restrictions or any of them.”

The restrictions were defined in the judgment (2) and are to be incorporated in a schedule to the order.

(1) Section 20 (3) is as follows: “Where any such restrictions are found by the court to be contrary to the public interest, the agreement shall be void in respect of those restrictions; and without prejudice to the foregoing provision the court may, upon the application of the Registrar, make such order as appears to the court to be proper for restraining all or any of the persons party to the agreement who carry on business in the United Kingdom—(a) from giving effect to, or enforcing or purporting to enforce, the agreement in respect of those restrictions; (b) from making any other agreement (whether with the same parties or with other parties) to the like effect.”

(2) [1961] 1 All E.R. at p. 122.

A The point taken here by the Alliance is that the first part should be limited to the actual wholesalers themselves, on the ground that the Alliance itself is not a party to the agreement which is to be found by force of the statute in its constitution, but only the ultimate represented parties, and also on the ground that the Alliance and the other associations cannot correctly be described as "carrying on business in the United Kingdom", because "carrying on business in the United Kingdom" must, it is said, surely have the colour of carrying on business as referred to in s. 6 (1), which

"... applies to any agreement between two or more persons carrying on business within the United Kingdom in the production or supply of goods, or in the application to goods of any process of manufacture, whether with or without other parties, being an agreement under which restrictions are accepted..."

C It is, perhaps, rather an academic point, because, in the case of any association which is a member of an agreement, the Act itself provides, by s. 6 (6):

D "This Part of this Act shall apply in relation to any agreement made by a trade association as if the agreement were made between all persons who are members of the association or are represented thereon by such members and, where any restriction is accepted thereunder on the part of the association, as if the like restriction were accepted by each of those persons."

E So, in any particular case, the actual people who are affected by the agreement and the real true parties to the agreement can be dealt with under s. 20 (3), and any association whose activities are essentially those of making recommendations to members and (if I may so phrase it) any possible sub-members can be dealt with under sub-s. (4) by restraining the association from making any other recommendations. It is not necessary to restrain an association from enforcing the restrictions because, if it is not allowed to make any recommendations as to restrictions, it obviously cannot take any step which would involve an enforcement of the restrictions; for example, writing to a member and saying "If you do not comply with the price list, you will be turned out of the association". That would plainly be, of course, the strongest possible form of recommendation.

F The first matter appears to me really to be rather academic. I am inclined to think that it is correct to say that the represented parties alone should be referred to in the first part of the order. I do not think that the Alliance or the local associations carry on business in the United Kingdom in the sense in which, G in our view, that phrase is used in the context of this Act, in particular against the background of s. 6 (1).

The second part of the draft order to which objection is taken is this:

H "This court doth order that the Alliance and the members and the local associations and each of them acting on behalf of the Alliance be restrained from doing the following act whether by themselves or by their respective servants or agents that is to say making any recommendation as to the action to be taken by the represented parties or any of them or by any other persons who are for the time being members of or represented on the Alliance in respect of the prices at which goods are to be acquired or the prices at which goods are to be supplied by the represented parties or any of them or any I such other persons as aforesaid."

It was argued for the Alliance that any order made under s. 20 (4) must be limited to restraining recommendations that persons should comply with the actual restrictions which have been condemned, and those restrictions only. In our view, that is a wrong construction of sub-s. (4). The language of that subsection is this:

"Where any restrictions accepted under a term implied by virtue of s. 6 (7) of this Act in an agreement for the constitution of a trade association

are found by the court to be contrary to the public interest, the court may, without prejudice to its powers under the last foregoing subsection, make such order as appears to the court to be proper for restraining the association or any person acting on its behalf from making any recommendation to which that term would apply.” A

If one reads back to s. 6 (7), one finds that the term which is implied is a term by which each member B

“agreed to comply with those recommendations and any subsequent recommendations made to them by or on behalf of the association as to the action to be taken by them in relation to the same class of goods or process of manufacture and in respect of the same matter.”

Therefore, in our view, the powers of the court under s. 20 (4) are not limited to the actual and precise restrictions which are condemned in the particular judgment. The powers extend, in our judgment, more widely than that. How widely they extend, how widely the court in any particular case would consider an order to be proper under that section, we need not go into now, because it was accepted for the Alliance that, if the full width of their argument on this matter was not accepted, then it would be proper and appropriate, in the view of the Alliance, that this part of the order should read: C

“This court doth order that the Alliance and the members and the local associations and each of them acting on behalf of the Alliance be restrained from doing the following act whether by themselves or by their respective servant or agents that is to say making any recommendation as in the said restrictions or to the like effect as to the action to be taken”, E

and so on. Counsel for the Registrar is perfectly prepared in this particular case to accept that such a limitation would be appropriate and proper. Accordingly, so far as the form of order is concerned, in our judgment, the draft order put forward on the part of the Registrar is in the right form, with that addition in that place in the last paragraph of it. F

The other point which was canvassed is a matter which was raised by the Registrar. There being some two thousand odd wholesalers who are parties to this agreement and these restrictions in England, Scotland and Northern Ireland, the Registrar wishes to avoid the burden of following out the normal processes of individual service of the restraining order on each of these two thousand odd wholesalers. It appears to us that it is not desirable that the matter, it being an order for an injunction, should be dealt with on the basis of advertisement in newspapers, although the actual representation order and the notice of the intention to make a representation order was dealt with in that sort of way, but with the addition of an undertaking by the Alliance to make sure that a copy of the “Wholesale Confectioner” containing the notification would be sent to every wholesaler. We are not in the position at this juncture in which the Alliance is prepared to give any similar undertaking about notification of the restraining order, and, indeed, we see no particular reason why the Alliance should, at this juncture, go to that expense. In our view, it would be appropriate to direct that the service of the order may be made by posting to each wholesaler a copy of the order. The purpose, this being a negative injunction, is to make it as difficult as possible for any wholesaler who subsequently breaks the order to plead that he in fact did not know of it. On the other hand, it does not seem to us necessary that one should go through the business of personal service in any shape or form. Anything less than service of a copy by post, in our view, would be undesirable and, indeed, would not be considered except for the large number of persons concerned. It will involve some expense, but a trivial amount when compared with the expense which the investigation of these matters normally involves, and, perhaps, not very large in comparison with the expense of the hearing today. The posting may be by the new system, recorded delivery G
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A service, but if, on closer inquiry, the Registrar thinks that that system is not as satisfactory as registered post, he may make an informal application to vary the order to permit of that.

Order accordingly.

Solicitors: *Stafford Clark & Co.* (for the Wholesale Confectioners' Alliance of Great Britain and Northern Ireland); *Treasury Solicitor*.
B [Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

PRACTICE DIRECTION.

C PROBATE, DIVORCE AND ADMIRALTY DIVISION.

Contempt of Court—Appeal—Notice of appeal—Service—Probate, Divorce and Admiralty Division—R.S.C., Ord. 58, r. 20 (1).

The President has approved the following direction.

The proper officer of the court on whom notice of appeal is to be served pursuant to R.S.C., Ord. 58, r. 20 (1)*, in the case of an appeal under s. 13† of the Administration of Justice Act, 1960, from an order or decision of the Probate, Divorce and Admiralty Division of the High Court in a probate or divorce cause or matter is the Senior Registrar of the Principal Probate Registry or in his absence the next senior registrar, and such service may be effected by leaving a copy of the notice of appeal with the Secretary, Room 48, Principal Probate Registry, Somerset House, Strand, London, W.C.2.

E Mar. 7, 1961. B. LONG,
Senior Registrar.

PRACTICE DIRECTION.

F RESTRICTIVE PRACTICES COURT.

Contempt of Court—Committal order—Execution—Restrictive Practices Court—Procedure.

Contempt of Court—Appeal—Notice of appeal—Service—Restrictive Practices Court—R.S.C., Ord. 58, r. 20 (1).

G By virtue of the authority conferred on this court by para. 10 of the Schedule to the Restrictive Trade Practices Act, 1956, I hereby give the following directions:

Any committal order‡ made in the Restrictive Practices Court may be executed on the authority of a warrant signed by the presiding judge, or one of the judges sitting as a member of the court making the order.

H Notices of appeal which by R.S.C., Ord. 58, r. 20 (1)*, are required to be served on "the proper officer of the court from whose order or decision the appeal is brought" may, in the case of appeals from the Restrictive Practices Court in England and Wales, be served on the Clerk of the Court and may be effected by leaving a copy of the notice of appeal in Room 100, Bankruptcy Buildings, Carey Street, London, W.C.2.

I Mar. 6, 1961. KENNETH DIPLOCK,
President of the Restrictive Practices Court.

* Rule 20 (1) was added to R.S.C., Ord. 58, by the Rules of the Supreme Court (No. 4), 1960 (S.I. 1960 No. 2327) in consequence of the provisions of the Administration of Justice Act, 1960, s. 13.

† Section 13 gave a general right of appeal in cases of contempt of court.

‡ As regards the power to commit, see p. 96, post.

CANE (VALUATION OFFICER) v. ROYAL COLLEGE OF MUSIC AND ANOTHER.

[COURT OF APPEAL (Holroyd Pearce, Harman and Davies, L.JJ.), January 30, 31, February 1, 2, 14, 1961.]

Rates—Exemption—Fine arts—Music—“Annual voluntary contributions”—Unconditional legacies, benefactions for special purposes—Gift for scholarships and prizes at a college, gifts in kind—Government grants—Percentage of total income—Scientific Societies Act, 1843 (6 & 7 Vict. c. 36), s. 1.

The Royal College of Music was an educational charity incorporated by royal charter in 1883. It occupied the building known as the Royal College of Music, South Kensington, and this building had been given to the college. The hereditament was assessed for the rating year 1956 at £10,000 gross value, £8,330 rateable value. The college had previously enjoyed exemption from assessment for rates under s. 1 of the Scientific Societies Act, 1843, as a society instituted for the purposes of the fine arts exclusively and “supported wholly or in part by annual voluntary contributions”. The revenue of the college for the years 1951-1957 showed a fairly consistent pattern. Among the sources of revenue were gifts in kind such as instruments, opera costumes, and an autographed letter of Beethoven. In the relevant year the college had £8,196 gross receipts from catering and £2,000 in respect of concerts conducted on behalf of the London County Council and as reimbursement by the council of fees for junior exhibitions granted by the college. On a preliminary point of law the Lands Tribunal decided that the college was not supported by annual voluntary contributions, because the proportion of the college's income so derived was insignificant (under two per cent.). In reaching this determination the tribunal took into consideration as part of the total income of the college the gross catering receipts and the receipts from the London County Council concerts (£77) and the junior exhibitions repayments (£1,922), but in computing annual voluntary contributions excluded the items referred to in paras. (a)-(e) of (ii) below, save as regards certain of the scholarships referred to in para. (c). On appeal,

Held: (i) the college was entitled to exemption from rates because, for the reasons stated in paras. (ii) and (iii) below, the proportion of total income of the college constituted by annual voluntary contributions was substantially higher than the tribunal had found and not so small as to be negligible or derisory; the question should not be decided as a matter of percentages (see p. 25, letter E, post; cf. p. 29, letter I, post), though it was proper to ascertain the approximate total income of the college and the total amount arising from annual voluntary contributions, but regard should be had to such factors as that the college was provided by benefaction and its purposes were within the spirit and intention of s. 1 of the Scientific Societies Act, 1843 (see p. 26, letter F, post).

(ii) in determining whether contributions were annual they should be viewed from the point of view of the recipient (*London Library v. Cane*, [1959] 3 All E.R. 726 followed); and the following should properly be regarded as annual voluntary subscriptions—

(a) *unconditional legacies*, provided that they were received with sufficient regularity to justify the college in looking to them year by year as possible revenue; this was a question of fact, and here they might be so regarded as they were moderate in size and came from annual mortality among a wide class of benefactors (see p. 19, letter G, and p. 29, letter A, post), about £500 annually being properly allowable for annual voluntary contributions of this character.

A (b) *conditional legacies and annual payments from trust funds*. When a capital benefaction came to the college, or (per HARMAN, L.J.) to trustees for the college, it was a voluntary contribution in the year of its receipt, but (per HOLROYD PEARCE, L.J.) if it remained in the hands of trustees and only its fruit came to the college, that fruit was a voluntary contribution in each year of receipt; capital given to the college, however, could be taken into account only once, and the subsequent income of such past benefactions was inadmissible (see p. 21, letter F, and p. 29, letters A and F, post).

B (c) *scholarships and prizes*, which should be taken into account as annual voluntary contributions whether given to pay the college fees of a holder or to be devoted to his maintenance (see p. 22, letters D and G, and p. 29, letter G, post).

C (d) *gifts in kind*, if, as in the present case, there was a regular intake of such gifts (see p. 23, letters A and B, and p. 28, letter I, post).

London Library v. Cane ([1959] 3 All E.R. 726) followed.

But *annual government grants* could not be held to be annual voluntary contributions, although there was great force in the contention that such acts of bounty to a royal corporation should be regarded as annual voluntary contributions (see p. 24, letters E to I, and p. 29, letter H, post).

D *Battersea Metropolitan Borough v. British Iron & Steel Research Asscn.* ([1949] 1 K.B. 434) and *British Launderers' Research Asscn. v. Hendon Borough Rating Authority* ([1949] 1 All E.R. 21) followed with reluctance.

(iii) in computing the total income of the college for the purpose of comparison with aggregate annual voluntary contributions—

E (a) catering receipts should not be wholly disregarded, but it was material that they were collateral and that the receipts and expenditure were approximately self-balancing (see p. 25, letter D, post).

(b) the London County Council concerts and exhibitions items should be wholly disregarded, the council's payments being substantially reimbursements (see p. 25, letter D, post).

F Appeal allowed.

[As to annual voluntary contributions of societies under the Scientific Societies Act, 1843, see 24 HALSBURY'S LAWS (3rd Edn.) 339, para. 667; and for cases on the subject, see 38 DIGEST (Repl.) 586, 587, 646-660.]

G Cases referred to:

Battersea Metropolitan Borough v. British Iron & Steel Research Asscn., [1949] 1 K.B. 434; [1949] L.J.R. 646; 38 Digest (Repl.) 583, 627.

Bradford Library Society v. Bradford (Churchwardens), (1858), 1 E. & E. 88; 23 J.P. 485; 120 E.R. 841; sub nom. *R. v. Bradford Library & Literary Society*, 28 L.J.M.C. 73; 32 L.T.O.S. 105; 38 Digest (Repl.) 579, 609.

H *British Launderers' Research Asscn. v. Hendon Borough Rating Authority*, [1949] 1 All E.R. 21; [1949] 1 K.B. 462; [1949] L.J.R. 416; 113 J.P. 72; 38 Digest (Repl.) 583, 627.

British Non-Ferrous Metals Research Asscn. v. St. Pancras, (1932), 16 R. & I.T. 136.

I *Hornsey School of Art v. Edmonton Union*, (1905), 94 L.T. 203; 70 J.P. 121; 38 Digest (Repl.) 587, 652.

Institution of Mechanical Engineers v. Cane (Valuation Officer), [1960] 3 All E.R. 715; [1960] 3 W.L.R. 978.

Jacobs v. London County Council, [1950] 1 All E.R. 737; [1950] A.C. 361; 114 J.P. 204; 36 Digest (Repl.) 49, 260.

Jenner Institute of Preventive Medicine v. St. George's, Hanover Square, Assessment Committee & Surveyor of Taxes, (1900), 69 L.J.Q.B. 814; 83 L.T. 344; 38 Digest (Repl.) 585, 638.

- Liverpool Corpn. v. West Derby Union*, (1905), 92 L.T. 467; 69 J.P. 277; 38 A Digest (Repl.) 579, 611.
- London Library v. Cane (Valuation Officer)*, [1959] 3 All E.R. 726; [1960] 1 Q.B. 373; [1959] 3 W.L.R. 929; 5 R.R.C. 275; 38 Digest (Repl.) 586, 645.
- Nonentities Society v. Linley*, (1954), 47 R. & I.T. 426; 25 D.R.A. 305.
- Royal College of Music v. Westminster Vestry*, [1898] 1 Q.B. 304, 809; 67 B L.J.Q.B. 540; 78 L.T. 441; 62 J.P. 357; 38 Digest (Repl.) 587, 669.
- Russell Institution v. St. Giles' Vestry*, (1854), 3 E. & B. 416; 23 L.J.M.C. 65; 118 E.R. 1198; sub nom. *R. v. Russell Institution (Governors)*, 22 L.T.O.S. 237; 18 J.P. 149; 38 Digest (Repl.) 579, 608.
- St. Anne (Churchwardens) v. Linnean Society*, (1854), 3 E. & B. 793; 118 E.R. 1338; sub nom. *R. v. Linnean Society of London*, 23 L.T.O.S. 186; 18 J.P. C 504; sub nom. *Linnean Society of London v. St. Anne's, Westminster (Churchwardens & Overseers)*, 23 L.J.M.C. 148; 38 Digest (Repl.) 580, 614.
- St. Marylebone Vestry v. Zoological Society*, (1854), 3 E. & B. 807; 118 E.R. 1343; sub nom. *R. v. Zoological Society of London*, 23 L.J.M.C. 139; 23 L.T.O.S. 171; 18 J.P. 489; 38 Digest (Repl.) 585, 641. D
- Savoy Overseers v. Art Union of London*, [1896] A.C. 296; 65 L.J.M.C. 161; 74 L.T. 497; 60 J.P. 660; 38 Digest (Repl.) 587, 653.
- Westminster City Council v. Royal United Service Institution*, [1938] 2 All E.R. 545; 38 Digest (Repl.) 580, 613.

Case Stated.

The appellant college was the occupier of a hereditament described as Royal College of Music, Prince Consort Road, South Kensington, which was assessed at £10,000 gross value, £8,330 rateable value in the valuation list for Westminster City. It appealed by way of Case Stated against a decision of the Lands Tribunal (ERSKINE SIMES, Esq., Q.C.) given on June 8, 1959 ((1959), 5 R.R.C. 150) on a preliminary point of law arising out of an appeal by the college against a decision of a local valuation court of Central London Local Valuation Panel. Reversing the decision of the local valuation court, the tribunal held that the college was not exempt from rates under s. 1 of the Scientific Societies Act, 1843, on the ground that it was not supported wholly or in part by annual voluntary contributions. The sole issue which was argued before the tribunal, and which was the issue on the present appeal was whether the college was supported wholly or in part by annual voluntary contributions. E

The college was created and incorporated by royal charter in 1883 and its purposes as defined by the charter were— F

“First, the advancement of the art of music by means of a central teaching and examining body charged with the duty of providing musical instruction of the highest class, and of rewarding with academical degrees and certificates of proficiency and otherwise persons, whether educated or not at the college, who on examination may prove themselves worthy of such distinctions and evidences of attainment; and, secondly, the promotion and supervision of such musical instruction in schools and elsewhere, as may be thought most conducive to the cultivation and dissemination of the arts of music in the United Kingdom; and, lastly, generally the encouragement and promotion of the cultivation of music as an art throughout our dominions.” G H

Further provisions of the charter are set out at p. 27, letter E, post. The buildings of the college stood on land demised to the college by the Commissioners for the Exhibition of 1851 for 999 years from June 24, 1890, at a nominal annual rent of £5, and were originally erected from funds provided by a benefactor and had since been enlarged and improved at the expense of private I

A benefactors. The college received in each year gifts of books and music, instruments, pictures and miscellaneous articles connected with its activities but, following the decision of the President of the Lands Tribunal in *London Library v. Cane* (Valuation Officer) and *Westminster City Council* ((1958), 4 R.R.C. 239) in respect of gifts of books to that institution, the tribunal was satisfied that the value of such gifts in kind could not be treated as annual voluntary contributions within the Act of 1843. The income of the college as shown in the revenue account for the year ended Aug. 31, 1956, amounted to £72,155, so the tribunal found, and was derived from:

	Annual subscriptions	£648
	Donations and Legacies	300
	Dividends and Interest	9,636
C	Fees from Pupils	32,406
	Transfers from Astor Fund	381
	Leverhulme A/c	480
	Miscellaneous Trusts Fund	10
	Ernest Palmer Fund	240
	Government Grant	14,125
D	Cash for Prizes and Maintenance	113
	Sundry Receipts	402
	Junior Exhibitions Fees	1,922
	Associated Board of Royal Schools of Music	9,000
	Grant from Palmer Fund for Opera Study	200
	Amount received for L.C.C. Concerts	77
E	Amount transferred from Patron's Fund	80

This revenue account and that of the years from 1951 to 1957 both inclusive were analysed in tables appended to the reply of the college. There was no dispute before the tribunal that the annual subscriptions were properly to be regarded as annual voluntary contributions and that government grants should be excluded in the light of the judgment of JENKINS, J., in *Battersea Metropolitan Borough v. British Iron & Steel Research Assn.**, but it was submitted for the college that that decision was wrong, with a view to keeping the point open in subsequent proceedings. The tribunal found that the item "Donations and Legacies" in fact included only legacies and in relation to that item followed and adopted the view expressed by the President in the *London Library Case*, that "they are the antithesis of an annual voluntary contribution"†. In the tables attached to the reply of the college there were, in addition to annual subscriptions and donations and legacies, two further items, viz., annual contributions specified in the Table B (a) (iii) and receipts from trusts whose trustees had discretion to apply income outside the college (Patron's and Palmer Funds), which were included as annual voluntary contributions. Table B (a) (iii) set out a list of prizes, scholarships and exhibitions in respect of which moneys had been received during the years 1951-1957 in some cases to found a prize or scholarship, in some cases to augment the fund providing a prize or scholarship and in some cases annual or periodical gifts for some prize or scholarship. Counsel for the college did not contend before the tribunal that certain of the items included in Table B (a) (iii) should be regarded as annual voluntary contributions, but he sought to include a number of such items which the tribunal described as follows.

"1. *The Parry Scholarship*. This is an annual payment made by the trustees of the Parry Little Organ Book Fund of the royalties received by them in the year from the sale of a work entitled 'A Little Organ Book' which is invested by the college and added to the Foundation Fund which is used for the purpose of an open scholarship known as the Hubert Parry Scholarship, which covers the fees of the holder.

* [1949] 1 K.B. at p. 459.

† (1958), 4 R.R.C. at p. 250.

" 2. *The Morrison Prize* is an annual prize, to be awarded to the most distinguished pianist each year, of a sum representing the interest on £700 less 5 per cent. for administration and is derived from two transactions both made on the same day. First a straightforward covenant of £100 per annum for seven years, and secondly an immediate loan to the college by the covenantor of £647 10s. free of interest repayable by annual instalments of £100 for a period of six years and a final instalment of £47 10s.

" 3. *The McGown Prize* which consisted of a gift of £5,000 to be invested and the interest to be devoted to helping students of the college who are in need.

" 4. *The Tankard Prize* is a prize derived from the interest on the sum of £500 which was given for the purpose.

" 5. *The Somervell Prize* is an annual prize of £10 and represents the interest on £400 2½ per cent. Savings Bonds transferred to the college by the Donor.

" 6. *The Astor Fund* is a sum of £16,700 given to the college in 1935 on trust to apply the income derived therefrom 'for the benefit and assistance of those of its pupils who in the judgment of the director . . . it is desirable should receive financial assistance in order to complete to the full advantage the courses of instruction which they have commenced or of those who having completed their courses of instruction the director . . . considers it is desirable should receive financial assistance in order to enable the full advantage of such courses to be obtained when they leave the college'.

" 7. *The Blower Prize* is the interest on a sum of £171 13s. subscribed and invested in the names of the trustees who under a declaration of trust made in 1915 are to apply the income in providing an annual prize for proficiency in singing to a pupil or pupils of the college.

" 8. *The Chappell Prize* is an annual sum of five guineas which is given to the college by Messrs. Chappell for a prize to a piano pupil. The prize winner is also given a medal by Messrs. Chappell.

" 9. *The Eldee Exhibition* is derived from the interest on a sum of money invested in the names of trustees 'to assist female vocalists to study develop and receive training in their art either in the United Kingdom or abroad'. The holder is to be nominated alternatively by the Royal Academy of Music and by the college.

" 10. *The Leverhulme Fund* is a grant of £500 per annum by the Leverhulme Trustees to provide scholarships at the college. Part of these scholarships are in discharge of college fees and part for the maintenance of scholars during the college term.

" 11. *The Lyttleton Scholarship* is a grant by covenant of £120 per annum to be applied in establishing and maintaining a scholarship.

" 12. *The Maas Prize* is an exhibition of £10 per annum paid by the trustees to the pupil of a school of music selected by the examiners appointed by the trustees and the sum is to be appropriated to the cost of a year's instruction in the selected institution.

" 13. *The Stern Prize* is a sum of £5 5s. given annually by the Court of the Musicians Company as trustees to a student of the violoncello at the college to assist him in his studies.

" 14. *The Warrender Prize* is an annual gift of £5 from the Musicians' Benevolent Fund as trustees to be given to a student of the college 'either to help with music or towards travelling or other expenses at the discretion of the Principal'."

The two trusts of which the trustees have discretion to apply income outside the college were summarised by the tribunal as follows:

"*The Patron's Fund* is administered by the college as trustees under Trust Deeds of 1903, 1906, 1909 and 1912. The income of this fund is

applicable to any of the purposes specified in cl. 5 of the Trust Deed of 1912 which include the provision of concerts either at the college or elsewhere of works by selected British composers, the assistance of such composers in publishing approved works or obtaining performances of them, the assistance of British musical students by grants to aid them in advancing their musical education otherwise than by payments of fees at any musical college or academy in the United Kingdom. The deed provides that the fund is to be 'primarily applicable for the benefit of . . . past or present pupils of the college but the benefit thereof may be extended to any other British subjects'. The deed also provides that the income thereof is not to be brought into the general revenue account of the college.

"*The Ernest Palmer Fund* is similarly administered by the college as trustees under a Trust Deed of 1924. The income of this fund is applicable to all or any of the purposes specified in cl. 3 of the Trust Deed, which may be summarised as the maintenance of the opera theatre in the college and the performance of operas therein, and to the provision of exhibitions to be held by British subjects for opera training at the college and towards the expenses of occasional rehearsals of opera for executive artists on the plan of the rehearsals held under the Patron's Fund."

The amounts appearing in the accounts of the college as from London County Council concerts and from catering represented the difference between the gross takings and the expenditure on these items.

The tribunal found, in the result, that the only sums which were entitled to be regarded as annual voluntary contributions were:

Annual subscriptions	..	..	..	..	..	..	..	£650
Maas Prize	..	..	..	..	..	..	..	£10
Lyttleton Scholarship	..	..	..	..	..	..	..	£120
Leverhulme Fund	..	..	..	..	..	..	..	£350
Making a total of								£1,130

The total income for 1956 was £72,155 and to this amount the tribunal thought that there must be added the gross receipts from catering which amounted in that year to £8,196. The proportion therefore of the total income represented by what the tribunal found to be annual voluntary contributions was something under two per cent. The revenue account of the college for the year 1956 showed that after a transfer to the pensions capital fund account of £4,536 the cash balance at the end of the year had been increased by about £900.

Having regard to the proportion which the annual voluntary contributions bore to the gross income the tribunal found that this insignificant proportion could not properly be regarded as even partial support for the purposes of s. 1 of the Act of 1843. In those circumstances the preliminary question of law was answered by saying that the college was not exempt under s. 1 of the Scientific Societies Act, 1843.

The college appealed and on the appeal contended that it was entitled to exemption, because it was supported wholly or in part by annual voluntary contributions, parts of its revenue which the tribunal had excluded from being annual voluntary contributions being in law, in the contention of the college, annual voluntary contributions within the meaning of s. 1 of the Act of 1843.

R. M. Bell for the college.

W. L. Roots, Q.C., and *J. R. Phillips* for the valuation officer.

R. W. Bell for the rating authority.

Cur. adv. vult.

Feb. 14. The following judgments were read.

HOLROYD PEARCE, L.J.: The Royal College of Music is an educational charity. It was incorporated by royal charter in 1883. In 1890 Crown land was

let to it at a nominal rent. The original building was erected from funds provided by a private benefactor and it was afterwards enlarged and improved at the expense of other private benefactors. The college appeals against a decision of the Lands Tribunal which deprives it of the exemption from rates which formerly it had enjoyed under s. 1 of the Scientific Societies Act, 1843. That section, so far as is material to this appeal, is as follows:

"... no person or persons shall be assessed or rated, or liable to be assessed or rated ... in respect of any land, houses, or buildings ... belonging to any society instituted for purposes of science, literature, or the fine arts exclusively ... provided that such society shall be supported wholly or in part by annual voluntary contributions ..."

The Lands Tribunal held that the college was not so supported wholly or in part.

The right of the college to exemption was challenged in this court in *Royal College of Music v. Westminster Vestry* (1), where the rating authority unsuccessfully argued inter alia that the college was not a society instituted for the purpose of the fine arts exclusively. That point therefore is not open to the valuation officer in this court, but it has been reserved for argument if the case reaches the House of Lords. That decision did not deal with the proviso to the section since no point was then taken on it. The Lands Tribunal held here that the only sums entitled to be regarded as annual voluntary contributions in 1956 amounted to £1,130. Against this it found that the total income was £80,351. The proportion of the total income, therefore, represented by the annual voluntary contributions was under two per cent. Following the construction of the section adopted by JENKINS, J., in *Battersea Metropolitan Borough v. British Iron & Steel Research Assn.* (2), it held that this was an insignificant proportion which could not properly be regarded as even partial support.

Counsel for the college seeks to attack the decision in three main directions. First, he seeks to show that the tribunal underestimated the amount of annual voluntary contributions by wrongly excluding various contributions or classes of contributions which should properly be included. Secondly, he seeks to show that the tribunal has inflated the total income of the college by including an item of £8,196 gross receipts for catering and a sum of £2,000 in respect of concerts conducted on behalf of London County Council and receipts from London County Council in reimbursement of fees for junior exhibitions granted by the college, both of which should for this purpose be disregarded. If either of these contentions is right the proportion of annual voluntary contributions to total income must pro tanto increase. Finally he argues that in any event the final question is not one of percentage or arithmetic. One must apply the section in the light of the manifest intention of the legislature. The statute, he argues, clearly intended to exempt such a corporation as this, which was instituted for the purpose of the fine arts exclusively and owes its origin and its life blood to public and private generosity.

There are various sources of benefit to the college which are set out with care and clarity in the decision. As one might imagine, some of those sources involve much detail and many figures. But, in order to decide which of such sources can on principle be regarded as annual voluntary contributions, and which must be excluded, it is not necessary to investigate the details.

The tribunal, following a decision of the President of the Lands Tribunal in *London Library v. Cane (Valuation Officer)* (3), held that the word "annual" in connexion with voluntary contributions must be construed in relation to the contributor rather than the receiver. The *London Library* case (3), however, was subsequently taken to this court, which held that one should consider the receiver's point of view when deciding whether contributions were annual

(1) [1898] 1 Q.B. 304, *affd.* C.A., [1898] 1 Q.B. 809. (2) [1949] 1 K.B. at p. 457.

(3) (1958), 4 R.R.C. 239.

A (London Library v. Cane (4)). HODSON, L.J., giving the judgment of the court, said (4):

B “In our judgment the receiver must be considered when deciding whether contributions are annual . . . It [a society] may look for support, not only to regular annual subscriptions, but to the proceeds of street collections and the many other ways of raising money for charities and similar organisations. It may well be that legacies of varying amounts are left to the society from time to time. Clearly a legacy will come only once from a particular person, but legacies may come to a society with sufficient frequency to justify it in looking to them year by year as probable revenue. We are not of course considering legacies of large sums which the tribunal might think should properly be regarded as capital endowment. Annual voluntary contributions are in our judgment voluntary contributions which the society may reasonably expect to receive year by year and on which it may reasonably rely wholly or in part for the provision of the necessary annual expenditure of the society.”

D Those remarks are obiter but I entirely agree with them (save for the sentence dealing with legacies of large sums as to which I feel doubt) and I adopt them for the purposes of the present case.

E In that case (5) the court used the annual figures of the preceding five years which “showed a reasonably consistent pattern”. In the present case we have been provided with prepared schedules of the figures of the years 1951 to 1957. They too show a reasonably consistent pattern and enable one to come to a fair conclusion about the various sources of revenue. Although 1956 is the rating year in question one can better form a true picture of the college’s position by studying also a few years immediately preceding it, and the year that follows it. The statute was intending to benefit institutions of a certain class. Over a period of years those exempted by the section might cease to be within it, and those not within it might gain admittance. But it can never have been intended that one lean year in respect of voluntary contributions should cast out an institution which on its recent average accounts was hitherto within it, or that one fortunate and fortuitous year should bring it within an exemption to which in normal years it would have no right.

F Applying that dictum of this court in the *London Library* case (6), it follows that the tribunal was wrong in holding that legacies could not be annual voluntary contributions. It becomes a question of fact whether in the present case legacies which were not earmarked for particular funds or purposes came with sufficient regularity to justify the college in looking to them year by year as possible revenue. In my judgment they did. It is to be noted that the government in granting annual aid to the college has insisted that these legacies should be treated in the accounts as revenue, and not as capital. The legacies are moderate in size and plainly come from the annual mortality among a wide class of benefactors.

H Counsel for the valuation officer argues that a bequest producing a payment of £1,500 in 1955 and a further payment of £300 in 1956 was so large as to constitute a capital endowment, and should therefore not be considered among annual voluntary contributions. He relies on the sentence of HODSON, L.J., in the passage which I have quoted (6):

I “We are not of course considering legacies of large sums which the tribunal might think should properly be regarded as capital endowment.”

I feel some doubts about the validity of that sentence without some further qualification; but in my judgment there is in any event no reason for its application in this case. The year 1956 was a lean year in comparison with those

(4) [1959] 3 All E.R. 726 at p. 731; [1960] 1 Q.B. 373 at p. 386.

(5) [1959] 3 All E.R. 726; [1960] 1 Q.B. 373.

(6) [1959] 3 All E.R. at p. 731; [1960] 1 Q.B. at p. 386.

which went before and that which went after. In my judgment one can fairly A
for this purpose put the annual value of contributions by unconditional legacies
in the region of £500.

The further question arose whether legacies with conditions attached, or funds B
given to trustees whose trust deed compelled them to make annual payments
to the college for particular purposes, were annual voluntary contributions
either as to the capital sums or as to the interest that came from them. The
tribunal held that neither the capital payments nor the annual payments
therefrom came within the words "annual voluntary contributions". It is
not an easy question.

In *Bradford Library Society v. Bradford (Churchwardens)* (7) and in *St. Anne*
(*Churchwardens*) v. *Linnean Society* (8), the court took the view that, when an C
obligation to pay was incurred by a voluntary engagement, the payment was
voluntary within the meaning of the section even if the payer no longer had the
power to withdraw from the obligation. In *Savoy Overseers v. Art Union of*
London (9), the House of Lords laid down a wider approach to the problem.
LORD HALSBURY, L.C., takes the word as meaning not "voluntary" as opposed
to "compulsory", but "voluntary" as opposed to something which involves
valuable consideration (10): D

"It is manifest that if used in the former sense every purchase is voluntary,
since no one can be compelled to buy; but if in the latter sense, there are a
great many institutions which the legislature may well have intended to
encourage, because if people gave their money without receiving anything
in return towards the encouragement of objects which the legislature
approved, there would be a reason why the legislature should exempt such E
institutions from rating, since they would pro tanto relieve the national
funds from burdens to which, but for such voluntary contributions, the
legislature itself might be called upon to contribute if such institutions were
to exist at all. This consideration would seem to show that it is in the latter
sense that the word is used, and, if so, it is fatal to the claim of the art union
to be relieved from the burden in question." F

LORD HERSCHELL says (11):

"The expression 'supported by voluntary contributions' has long been
well known in connexion with hospitals and other institutions; I think the
essential idea conveyed by them is that the payments are a gratuitous offer-
ing for the benefit of others, and not the price of an advantage purchased G
by the contributor."

LORD MACNAGHTEN and LORD SHAND spoke to the like effect (12).

In *Institution of Mechanical Engineers v. Cane (Valuation Officer)* (13) LORD
RADCLIFFE said (14):

"As I understand the matter, the major effect of the decision of this
House in *Savoy Overseers v. Art Union of London* (15) was to put an end to H
the controversy that had persisted until then whether the emphasis of the
word 'voluntary' turned on the distinction between 'voluntary' and
'compulsory'. It was held that that was not the point. Accordingly, any
considerations that give weight to that distinction are now illegitimate."

Therefore, one may approach the problem by equating the word "voluntary" I
to "gratuitous". And in that sense all the payments with which this case is
concerned were voluntary payments.

It is argued by the respondents that, if one regards payments by independent
trustees of a trust in favour of the college or some scholarship at the college as
annual voluntary payments, one must also apply that principle to trusts where

(7) (1858), 1 E. & E. at p. 95.

(8) (1854), 3 E. & B. at p. 804.

(9) [1896] A.C. 296. (10) [1896] A.C. at p. 305.

(11) [1896] A.C. at p. 310.

(12) [1896] A.C. at p. 312 and p. 314.

(13) [1960] 3 All E.R. 715.

(14) [1960] 3 All E.R. at p. 726.

(15) [1896] A.C. 296.

the college is the trustee, since it is, qua trustee, in no different position from independent trustees. If that be so, the income from all endowments comes within the section, however old the endowments may be. That cannot, in my judgment, have been intended. The section was directing itself to contemporary beneficence. A society was only to be exempted if it commanded contemporary support from some part of the community. Moreover, it would be an abuse of language to say that various old foundations endowed by medieval benefactors are today supported by annual voluntary contributions.

On the other hand it offends one's common sense to hold that, although there is an annual flow of money to the college (or to trustees) for the formation of trusts that help the college to perform its functions, they are to be disregarded altogether as contributions simply because the benefit is to accrue from interest in future years and not in the year in which they are received. The Lands Tribunal held that they could not be regarded as annual voluntary contributions either when they are received or in later years when they bear annual fruit. Neither side has been able to find any case that is directly helpful on this point. Counsel for the valuation officer relies on the passage by HAWKINS, J., in *Royal College of Music v. Westminster Vestry* (16), where, in referring to the item which represented the college's income from dividends and interest which was largely made up of income from scholarship trusts and the like, he observed (17):

"It can hardly be said that the interest and dividends, £4,639, were annual voluntary contributions, for they were interest and dividends of moneys or securities already belonging to the society. Such invested moneys were, however, in part made up of donations made to the college upon trust for scholarships, exhibitions, prizes, and maintenance of scholars."

I do not think, however, that very much weight can be put on those words which were not intended to be a pronouncement on any matter in dispute.

In my judgment it is wrong to exclude this continuing stream of beneficence as not coming within the words annual voluntary contributions. The payments are all voluntary. When the capital comes into the hands of the college it is in that year a voluntary contribution. When the capital remains in the hands of the trustees, and only its fruit comes into the hands of the college, that fruit is a contribution in each year of receipt. I see no reason why one should regard the college qua trustee as a technical separate entity for this purpose. When it receives a sum of money, whether with or without a trust, for its purposes, the college is receiving a voluntary contribution. But, as capital contributions are counted when first they are given, the interest on such benefactions cannot again be counted as contributions in subsequent years. Thus past or ancient benefactions, unless in the hands of separate trustees, are disregarded for this purpose. In this case there are no ancient benefactions in the hands of separate trustees, and their existence is always very rare.

It follows that one should include as annual voluntary contributions the annual payments from independent trustees in account B (a) (iii) (2). Whether the capital benefactions listed in account B (a) (iii) (1) can be described as annual is a question of fact. If, looking at them from the college's point of view, one can reasonably say that they are an annual source of benefit, then they come within the words of the proviso. On the figures before us in account B (a) (iii) (1), there is in my judgment enough continuity of flow to constitute them "annual" contributions.

Moreover, I do not think that, in order to hold that these are annual contributions, one is compelled to scrutinise them separately as a distinct class. There is in this case a constant annual flow of moneys which comes from various sources, subscriptions, gifts, gifts for scholarships, legacies with conditions, legacies with no conditions. If one of the component tributaries should temporarily run dry, I see no reason on the facts of this case why, when it flows again, it

should be disqualified from counting as part of the uninterrupted stream of other annual voluntary contributions. I would therefore include the capital sums set out in account B (a) (iii) (1) and the income sums in B (a) (iii) (2) in the year of receipt. The tribunal rightly held that payments, whether for scholarships or otherwise, by trustees who were at liberty to devote their funds each year to one or other of named institutions or to any institution within a generally described class, were voluntary contributions.

On a cross-notice, it was argued that all scholarships must be disregarded. For they are directed to the pupil and not the college. Moreover, it is argued that support means only the provision of that which is strictly necessary to the functioning of a society and does not include benefits which enable it to function better. I cannot assent to that argument. It is admittedly a question of degree. But where, as here, a corporation has purposes of which quality and excellence are the key-notes, it cannot be that only those things constitute support which enable it to drag out a mediocre existence. The provision of that which will enable it to excel must also be within the meaning of support. I share the Lands Tribunal's view on that point, and the point raised in the cross-notice fails.

But the tribunal went on to hold that, although scholarships used to pay the holders fees to the college might be regarded as "contributions", scholarships (or some part of scholarships) devoted to the maintenance of a pupil cannot be so regarded. Moreover, prizes which a pupil is free to spend as he chooses were not, it held, a contribution to the support of the college, but a mere encouragement of the pupil. With all respect I find myself unable to share that view. One of the essentials to the success of such a college is the provision of prizes and scholarships. A college needs to attract both quantity and quality of human material for its educational purposes. Incentives to the pupils are desirable and even necessary to any teaching establishment. The provisions in the charter "As to pupils" support this view; not must one forget the college's duty as laid down in the charter to promote the cultivation of music as an art. The fact that a scholarship provides for the pupil's maintenance which the college is not able to provide is part of its attraction. It is irrelevant that the college does not financially receive immediate benefit from that fact. Such scholarships would be a wise and proper provision out of the college's own funds. Their provision by a benefactor contributes to the support of the college. The argument that the scholarships are for the benefit and support of the pupil does not meet this point. Those who provide scholarships are no doubt moved by beneficence to both pupil and college. From a practical point of view scholarships are necessary to the college. Their provision is in all but the narrowest sense support of the college not only in its educational duties but also in its duty to promote the cultivation of music as an art. In so far, therefore, as scholarships were excluded from or diminished in the tribunal's calculations by reason of the fact that they provided external maintenance for pupils, such exclusion or diminution was in my judgment incorrect.

All gifts in kind were excluded from consideration by the tribunal following the decision of the President of the Lands Tribunal in the *London Library* case (18). On that point this court expressed a different view (*London Library v. Cane* (19)). HODSON, L.J., said (20):

"We are unable to see why gifts of this kind [new books] which help the library year by year to fulfil its purpose, should not be regarded as contributions because they are gifts in kind and not in money. It may be, of course, that a gift might be made to the library of a rare book of great value . . . a gift in such a case might in certain circumstances be regarded rather in the nature of a capital endowment than a contribution to which the library might look for its partial support year by year."

(18) (1958), 4 R.R.C. 239.

(19) [1959] 3 All E.R. 726; [1960] 1 Q.B. 373.

(20) [1959] 3 All E.R. at p. 732; [1960] 1 Q.B. at p. 387.

Though these remarks are obiter, I agree with them and would adopt them in the present case *mutatis mutandis*.

The parties have very conveniently compiled a list of such gifts over seven years and agreed that their fair annual value is £600. These gifts could in a crisis be turned into money; but they are in their own identity useful for the purposes of the college. Some are valuable and rare; but the purposes of the college under its charter are not pedestrian. It aims specifically at the encouragement and promotion of the cultivation of music as an art. To possess valuable instruments, opera costumes, and even a valuable autograph letter of Beethoven is well within its purposes. Therefore, the regular annual intake of such gifts clearly helps it in its task. Can that help be described as, in part, supporting the college? In spite of the argument of counsel for the valuation officer I consider that it can. Support of an institution with high aesthetic purposes may extend to the provision of refinements which add value to its efforts and aid achievement of its aspirations.

The most important single contribution which is material is a government grant of £14,125. When the college's accounts were under discussion in the courts in 1898 (21) it was receiving an annual grant of £500 which was described in the Case Stated (22) as

“ . . . an annual subscription from Her Majesty out of an annual grant voluntarily voted to Her Majesty by Parliament, and available, by the terms of the vote, to Her Majesty for the purpose.”

This grant was included as a voluntary subscription in a list of items amounting to £1,632. HAWKINS, J., in the Divisional Court said (23): “ . . . the sum of £1,632 only was derived from annual subscriptions of a purely voluntary character . . . ” and thereby he inferentially approved of the grant being so described. Thereafter, government grants were held to be “ annual voluntary subscriptions ” by Divisional Courts in *Hornsey School of Art v. Edmonton Union* (24) (expressly following that dictum of HAWKINS, J. (23)); in *Westminster City Council v. Royal United Service Institution* (25) (following the latter case) and in *British Non-Ferrous Metals Research Assn. v. St. Pancras* (26). In one case, *Liverpool Corpn. v. West Derby Union* (27), it was held that the particular grant in that case was not a voluntary contribution; but I think it shows no exception to the principle. RIDLEY, J., who was a party to the decision, explained (in the *Hornsey School of Art* case (28)) the particular facts on which it had turned, and the reason for the court's decision. Indeed it was a wholly different kind of case from the present.

Thus for fifty years the courts held that a government grant could be and was (with that one exception) in particular cases an annual voluntary contribution; but in *Battersea Metropolitan Borough v. British Iron & Steel Research Assn.* (29), there is an expression of opinion to the contrary effect by JENKINS, J., with whom BUCKNILL, L.J., and DENNING, L.J., agreed. A similar opinion was expressed by DENNING, L.J. (with which BUCKNILL, L.J., and JENKINS, J., agreed) in *British Launderers' Research Assn. v. Hendon Borough Rating Authority* (30), which was decided immediately after the former case. Both those opinions might be said to be obiter in that the court before dealing with the proviso had already held that the respective societies were not within the section at all.

JENKINS, J., having referred to the grant in that case as containing a number

(21) [1898] 1 Q.B. 304, 809.

(23) [1898] 1 Q.B. at p. 311.

(25) [1938] 2 All E.R. 545.

(27) [1905], 69 J.P. 277.

(29) [1949] 1 K.B. at p. 452.

(30) [1949] 1 All E.R. at p. 26; [1949] 1 K.B. at p. 472.

(22) [1898] 1 Q.B. at p. 306.

(24) (1905), 94 L.T. 203.

(26) (1932), 16 R. & I.T. 136.

(28) (1905), 94 L.T. at p. 206.

of stipulations which were relied on as excluding it from the category of voluntary contributions said (31): A

"But I think the objection goes deeper. In my view, a grant out of public funds . . . at the expense of the general body of taxpayers, is not a 'voluntary contribution' within the meaning of the section or within any ordinarily accepted sense of that expression."

That case was wholly different from the present. There were a number of stipulations to secure that the results of the association's researches were made available as public interest might demand. Here the grant is a gratuitous act of bounty. B

DENNING, L.J., in the *British Launderers'* case (32), having given the opinion that voluntary contributions are payments made without compulsion and without any view to recompense save the gratitude of one's fellow men said (33): C

"They are payments made by private citizens for the public benefit, and out of a sense of public duty, thus relieving the state of an expenditure which otherwise it might have had to bear. They do not include government grants. No ordinary person would regard an institution which was supported only by government grants as being supported by voluntary contributions." D

I do not think that JENKINS, J., and DENNING, L.J., were envisaging such a case as the present. Trade research associations are very different from a body formed for the advancement of music by means of a central teaching and examining body and for generally encouraging the cultivation of music as an art.

Counsel for the college urges us to disregard those opinions. If the matter were res integra, I should see great force in his contention that in 1843 the words "voluntary contributions" would be understood as intended to cover an annual subscription given as an act of bounty by Her Majesty, with no conditions and no possible personal benefit, to a royal corporation for the promotion of one of the arts. It is true that government grants have increased enormously in scope, they are frequently hedged with conditions, they are usually the instruments of ulterior motives which the government for its own proper purposes intends to achieve. To such grants the section would not apply. Familiarity with them may have changed our views of government grants in general, and they are spoken of in different terms from those in which they were spoken of one hundred years ago. This grant, however, which is still technically made in the old form, is in its essence just such a grant as would have been made in 1843. To hold that it cannot be a voluntary contribution would seem to introduce into the section some words of limitation which are not there. E

In my judgment, however, we are bound by the decisions on this point in the two cases which I have cited (34). The observations were clearly intended to be decisions and not mere dicta. In *Jacobs v. London County Council* (35), LORD SIMONDS sets out clearly the rule which applies where a court has arrived at two conclusions either of which would have sufficed to decide the case. In the light of his opinion we must accept the deliberate conclusions of the court in the *British Iron & Steel Research Asscn.* (36) and the *British Launderers' Research Asscn.* (32) cases and hold that the government grant in this case was not a voluntary contribution. F

Counsel for the college argues that the catering receipts should be omitted from the total income since the catering is a collateral activity of convenience on which the college attempts to balance income and expenditure and avoids all but a trifling loss. The catering receipts are not the college's real income. Had G

(31) [1949] 1 K.B. at p. 459.

(32) [1949] 1 All E.R. 21; [1949] 1 K.B. 462.

(33) [1949] 1 All E.R. at p. 26; [1949] 1 K.B. at p. 472.

(34) *Battersea Metropolitan Borough v. British Iron & Steel Research Asscn.*, [1949] 1 K.B. 434; *British Launderers' Research Asscn. v. Hendon Borough Rating Authority*, [1949] 1 All E.R. 21; [1949] 1 K.B. 462.

(35) [1950] 1 All E.R. at p. 740; [1950] A.C. at p. 368. (36) [1949] 1 K.B. 434. I

this college (as some do) entrusted the catering to a caterer, no item in respect of it would have figured in the accounts except perhaps for some trifling subsidy or profit. So too with the concerts, which are almost entirely reimbursed by London County Council.

The Court of Appeal in a very different case refused to disregard the receipts from the sale of refreshments in estimating the total income of a society whose principal object was the running of a theatre (*Nonentities Society v. Linley* (37)). SOMERVELL, L.J., made clear that he was not laying down a principle of law and continued (38):

“It may be that one could cut out as it were some collateral item such as profits from the sale of refreshments, but I am quite clear that one cannot start cutting them down by setting against them the expenditure necessary to earn them, because by that process one would ultimately arrive at the net figure; whereas it is clear from the decision referred to, *supra* (the *British Iron & Steel Research Asscn.* case (39)), that *prima facie* one looks at the gross figure and sees what proportion the voluntary contributions bear to it.”

In this case I do not think that one is justified in wholly disregarding the catering receipts, but the fact that they are collateral and approximately self-balancing receipts and expenditure should be borne in mind, and could be a relevant consideration in a doubtful case. The London County Council concerts and contributions in respect of junior exhibitions, however, should in my view be wholly disregarded. If the college undertook a project costing £80,000 a year on indemnity and reimbursement from a local authority, it would be absurd to say that thereby it had doubled its income.

In my view, however, this case does not fall to be decided by percentages. It is true that in approaching the problem the court will no doubt ascertain approximately the total income and the total amount arising from annual voluntary contributions. It may well think it desirable to find the percentage or the proportion that the latter bears to the former. It may use that percentage as the basis of its opinion that the voluntary contributions are too small to justify a finding that a society is “supported in part” by them. This has been the method of approach in cases dealing with trade societies; but it does not of necessity supply the answer to the problem in all cases.

The present case stands on a different footing. No case comparable to this has been reported or has been, so far as I know, before the court on this point. The *London Library* case (40) is the most comparable case; but the London Library was not within the section, and it was not a charity. Nor do I read the cases dealing with trade societies (41) or the London Library (40) as importing a gloss into the statute or doing other than suggesting a method of approach proper to the particular case. In the *London Library* case (40) HODSON, L.J., there said (42):

“[Counsel for the library] has submitted that the proviso is satisfied if the contributions are not so small as to come within the *de minimis* rule and we think that a reasonable statement of the principle laid down by DENNING, L.J., and JENKINS, J., and accepted by SOMERVELL, L.J.”

That, as he there points out, may be a difficult question of fact.

As a result of the various views that I have expressed as to what may properly constitute annual voluntary contributions, the total amount of such contributions is substantially larger than that found by the tribunal. In the result the

(37) (1954), 25 D.R.A. 305.

(38) (1954), 25 D.R.A. at p. 313.

(39) [1949] 1 K.B. 434.

(40) [1959] 3 All E.R. 726; [1960] 1 Q.B. 373.

(41) *Buttersea Metropolitan Borough v. British Iron & Steel Research Asscn.*, [1949] 1 K.B. 434; *British Launderers' Research Asscn. v. Hendon Borough Rating Authority*, [1949] 1 All E.R. 21; [1949] 1 K.B. 462.

(42) [1959] 3 All E.R. at p. 731; [1960] 1 Q.B. at p. 385.

percentage relation of annual voluntary contributions to total revenue has been substantially increased. I have not calculated the exact percentage since in my view that is not the deciding factor. A

There is, I think, force in the approach of the local valuation court to this matter. It said:

"We have referred closely to each of those cases but find none which is at all comparable. We are here considering a college which has been given its buildings and virtually given the land upon which to build them. It has over the years been supported to the extent of something over a quarter of a million pounds in one way or another and is continuing to receive some support year by year. B

"This college, over the years, has received nearly a quarter of a million pounds in cash in support of its objects; its annual interest and dividends on that invested capital sum amounts to nearly £10,000; its buildings were presented to it and the land upon which the buildings stand is let to it at £5 per annum. We note that the valuation officer, having assigned a gross value of £10,000 to that land and buildings, considers they are annually worth that amount, taking one year with another. C

"We consider that we would not be placing a reasonable construction upon the section if we ignored those important past and future considerations and decided this appeal purely upon the percentage relationship of the college's annual subscriptions to its total revenue. . . . In the light of all these considerations we find that this college is supported in part by annual voluntary contributions." D

The college is devoted to the art of music. Its purposes under its charter are the giving of doctorates and degrees of distinction, the promotion of musical instruction, and the encouragement of the cultivation of music as an art. Its land was provided by benefaction, its buildings have arisen from benefaction, a large and constant sustenance has come from benefaction. It lies clearly within the spirit and intention of the statute. It also lies clearly within the literal wording of the statute, since it is supported in part by annual voluntary contributions. That part is not so small as to be negligible or derisory. It is a genuine and appreciable part of the total support of the college. To hold that the college is not within the statute is to defeat both the spirit and the letter of it. E

In my judgment the college is entitled to the exemption and the Temple of Calliope is not a hereditament within the Rating and Valuation Acts. F

HARMAN, L.J.: This appeal is concerned with the Scientific Societies Act, 1843, of which the long title is G

"An Act to exempt from . . . rates, land and buildings occupied by scientific or literary societies."

The Act recites that:

" . . . it is expedient that societies established exclusively for purposes of science, literature, or the fine arts should be exempt from . . . rates in respect of land and buildings occupied by them for the transaction of their business, and for carrying into effect their purposes . . . " H

In the enacting part of the statute there is introduced the proviso which alone has concerned us here I

" . . . that such society shall be supported wholly or in part by annual voluntary contributions . . . "

A number of scientific societies such as the Linnean Society (43) and the Royal United Service Institution (44) have brought themselves within the

(43) *St. Anne (Churchwardens) v. Linnean Society*, (1854), 3 E. & B. 793.

(44) *Westminster City Council v. Royal United Service Institution*, [1938] 2 All E.R. 545.

exemption, and so indeed has the Royal College of Music with which we are here concerned (45). Many other bodies have failed to qualify such as the Jenner Institute (46), the Russell Institution (47), the Zoological Society (48) and most recently the London Library (49).

The Royal College of Music was founded by a charter granted by Queen Victoria in 1883. That document recites that she was moved to do so by a petition presented to her by the Prince of Wales showing

“that it is expedient that a Royal College of Music should be formed on a more permanent and extended basis than any existing musical institution.”

Her Majesty then states that “being desirous of promoting the advancement of the art of music by the establishment of the said college” she makes a grant creating a corporation the purposes of which are stated as follows:

“The purposes for which the corporation is founded are, first, the advancement of the art of music by means of a central teaching and examining body charged with the duty of providing musical instruction of the highest class, and of rewarding with academical degrees and certificates of proficiency and otherwise persons, whether educated or not at the college, who on examination may prove themselves worthy of such distinctions and evidences of attainment; and, secondly, the promotion and supervision of such musical instruction in schools and elsewhere, as may be thought most conducive to the cultivation and dissemination of the art of music in the United Kingdom; and, lastly, generally the encouragement and promotion of the cultivation of music as an art throughout our dominions.”

There are further provisions of the charter to which I call attention.

“As to the pupils. The pupils shall consist of scholars, exhibitioners, and students. The scholars and exhibitioners shall be pupils who have obtained scholarships and exhibitions entitling them wholly or partially to the privileges of gratuitous education and maintenance, or one of such privileges, or to some description of aid in their education. The students shall be pupils who have obtained neither scholarships nor exhibitions.

“A person becoming entitled to a scholarship or exhibition who declines to accept the emoluments thereof by reason of his being able to pay for his education or maintenance, may bear the title of honorary scholar or honorary exhibitioner, or such other title as may be determined by the council. The council may cause medals, prizes, or other like rewards to be conferred on deserving pupils.

“As to the donors. Annual subscribers to the funds of the college of £10 or upwards during the period of their subscriptions, and contributors at one time of £50 or upwards, or its equivalent, shall be deemed to be donors within the meaning of this our charter.”

Then a further passage:

“The council may establish scholarships, exhibitions, and fellowships. They may make terms with any donors as to the appropriation of their donations for a building fund, or the endowment of fellowships, scholarships, or exhibitions, or otherwise as they may think expedient.”

And in the regulations I find this:

“While the finance committee recognise the propriety of excluding from capital or permanent investment account annual subscriptions and other moneys intended for the current maintenance of the college, they are of

(45) *Royal College of Music v. Westminster Vestry*, [1898] 1 Q.B. 304, 809.

(46) *Jenner Institute of Preventive Medicine v. St. George's, Hanover Square, Assessment Committee & Surveyor of Taxes*, (1900), 69 L.J.Q.B. 814.

(47) *Russell Institution v. St. Giles' Vestry*, (1854), 3 E. & B. 416.

(48) *St. Marylebone Vestry v. Zoological Society*, (1854), 3 E. & B. 807.

(49) *London Library v. Cane*, [1959] 3 All E.R. 726; [1960] 1 Q.B. 373,

opinion that no scholarship should depend on any such temporary sources of revenue.” A

This then is clearly an educational charity. The land on which the buildings stand was the gift of the Commissioners of the Exhibition of 1851. The buildings which rose on that site owe their existence to beneficence. The college has ever since its foundation been actively carrying out its objects, and at any rate since the case in 1898 (50) it has never been suggested that it is chargeable to rates until the present proposal. B

The college provides a regular academic course for students of music. The teaching is provided free to scholars and partly free to exhibitioners. Fees are charged to ordinary students and amounted in the last year of which we have a record to £37,000, but this sum falls far short of the expenditures, which are between £70,000 and £80,000 a year. Against this is a government grant of about £14,000. Something over £9,000 is drawn from fees paid to the examining board for examination of outside students in conjunction with the Royal Academy of Music in Marylebone Road. For the rest, the college depends on private munificence present and past, and it would seem on the face of it to be a shining example of an institution devoted to the furtherance of the fine arts—“ All arts constantly aspire to the condition of music ”—and supported in part by voluntary contributions, and so to be clearly within the policy of Parliament in passing the Act of 1843 which is still maintained on the statute book. It is said, however, that the contributions are neither voluntary nor annual, and that therefore the college is excluded by the proviso. C

I turn, therefore, to an examination of these three words and ask what are annual voluntary contributions. D

(a) *Annual*. Gifts qualify if from the point of view of the donee their recurrence year by year can be reasonably relied on, even though the donor be in every case different. In other words, whether a gift is annual does not depend on whether one donor only makes the gift, but on whether the donee annually receives such a regular flow of gifts as enables him to rely on them as a source of income. That was the opinion of this court in the *London Library* case (51) with which I agree. E

(b) *Voluntary*. A contribution is voluntary if it be gratuitous. This is clearly the law as laid down by LORD HALSBURY, L.C., in *Savoy Overseers v. Art Union of London* (52) and confirmed recently by LORD RADCLIFFE in *Institution of Mechanical Engineers v. Cane* (53). It is therefore idle to argue on this topic that a gift is not voluntary because it issues from a trust where the trustees are not free agents. Voluntary here is not the antithesis of compulsory, but is apt to exclude annual subscriptions even though made without compulsion such as those to the Zoo or a professional society, or the Art Union in LORD HALSBURY's case (54), where the subscriber expects a return for his money, not indeed in cash but in prestige perhaps, or some other more material form. F

(c) *Contributions*. This comprises all gifts satisfying the first two conditions. Contributions are to be credited when the money or money's worth reaches the hands of the corporation or the hands of trustees for it. G

Which of the sources of the college's income satisfy the above conditions? In my judgment on the facts and figures before us the following do: (i) Subscriptions whether paid yearly or in one sum so as to make the payer a donor within the terms of the charter. (ii) Gifts in kind which can be converted into money and of which the college might dispose if it chose to do so. The value of these in recent years has been agreed between the parties at £600. I rely in this connexion on the *London Library* case (51). (iii) Gifts or covenants to subscribe money for H

(50) *Royal College of Music v. Westminster Vestry*, [1898] 1 Q.B. 304, 809.

(51) [1959] 3 All E.R. 726; [1960] 1 Q.B. 373.

(52) [1896] A.C. at p. 305.

(53) [1960] 3 All E.R. at p. 726.

(54) [1896] A.C. 296.

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the general purposes of the society, as and when received. (iv) Testamentary benefactions for the like general purposes, no conditions being attached. These should be credited in the year of receipt. (v) Testamentary or other benefactions for specific purposes, conditions being attached whether indicating a particular object such as a prize or being earmarked as an endowment to provide out of income for general or specific purposes, such as scholarships or the purchase of equipment or the like. In contributions in this category the capital sum should be counted to the college's credit in the year when received either by the college or by trustees for it. (vi) Grants by trustees of outside funds having discretionary powers such as grants here made by the trustees of the will of the late Lord Leverhulme. Sums in this category should be credited when received by the college.

Under what conditions does a benefaction rank as being "in support of" the college? One, I think, that enriches the college itself or relieves it of a burden or furthers its objects or powers. Having regard to the portions of the charter which I have read, it is clear that it is part of the college's business to establish scholarships, and to make terms with donors for their endowment. It is clear, too, that the college may reward deserving pupils as it chooses. In my opinion, therefore, not only a scholarship which pays or partly pays a student's fees, but one which or part of which is payable to him year by year to maintain himself while under tuition supports the college. There is, for instance, a scholarship known as the Octavia Scholarship which is a subvention to a scholar taking a course of musical instruction abroad. In my judgment this is clearly money spent in support of the college, for this is a kind of scholarship which the college itself could endow.

Logically there is much to be said for counting the income of endowment funds as received or applied year by year, for the very object of the donors of such funds was precisely to provide an annual income, but this would involve treating the income of all endowments in this way, however far back their source, and, the desire to contribute having arisen when the gift was made, it seems to me right to treat a contribution as made in the year when it first became effective as a source of income. According to the tribunal, the college cannot be credited either with the capital or with the income. This I reject; but I think the college cannot count both, and I prefer the view that the original gift and not its subsequent income should rank as a contribution.

I regard as altogether too narrow the tribunal's view that only gifts that go direct to the college in aid of fees should rank. In my judgment scholarship moneys should rank, though a part, as in the Leverhulme case, or indeed the whole, is paid to the scholar for his own purposes.

As to the government grant I desire to add nothing to what HOLROYD PEARCE, L.J., has said. I confess that, if the matter were *res integra*, I should hold this to be an annual voluntary contribution as it was held to be by HAWKINS, J., in the 1898 proceedings (55) but I agree that the decisions of the Court of Appeal on this subject in *Battersea Metropolitan Borough v. British Iron & Steel Research Assn.* (56) and *British Launderers' Research Assn. v. Hendon Borough Rating Authority* (57) cannot be classed as obiter, notwithstanding the fact that there were other reasons on which the decisions rested. In my view, therefore, we are bound in this respect. For my part I much prefer the approach of the local valuation court to this matter to the cheeseparing and niggardly view of the valuation officer which was accepted by the Lands Tribunal.

Even if this is a matter of adding up percentages, the proportion contributed to this college by annual voluntary contributions, if I have rightly construed those words and applied them to the facts of the case, is far above the point where they can be disregarded as so minimal or unsubstantial as to be treated as

(55) *Royal College of Music v. Westminster Vestry*, [1898] 1 Q.B. 304, 809.

(56) [1949] 1 K.B. 434.

(57) [1949] 1 All E.R. 21; [1949] 1 K.B. 462.

nothing when considering the words "in part". For these reasons, as well as for those given by my Lord, with which I altogether concur, I would allow this appeal. A

DAVIES, L.J.: I agree that this appeal should be allowed, and I have nothing to add.

Appeal allowed. Leave to appeal to the House of Lords granted. B

Solicitors: Boodle, Hatfield & Co. (for the college); Solicitor of Inland Revenue (for the valuation officer); Allen & Son (for the rating authority).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

LLOYDS BANK, LTD. v. LAKE.

[QUEEN'S BENCH DIVISION (His Honour Sir Brett Cloutman, V.C., Q.C.)
(Senior Official Referee), November 24, 25, 28, 29, December 5, 1960.] C

Landlord and Tenant—Repair—Damages for failure to repair—Failure to deliver up in repair—Measure of damages—Underlease—Diminution in value of reversion—Reversion momentary or notional—Underlessee without notice that the demise was an underlease—Landlord liable to head lessor under repairing covenant in head lease—Whether landlord's surveyor's and solicitors' charges for schedule of dilapidations on both head lease and underlease recoverable from underlessee—Landlord and Tenant Act, 1927 (17 & 18 Geo. 5 c. 36), s. 18 (1). D
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By a lease dated Apr. 4, 1921, premises were demised to F. for a term of twenty-one years, and F. covenanted to keep the interior of them in good and tenantable repair and so to yield them up at the expiration or sooner determination of the term. By a supplementary deed C., the freeholder of the premises, extended F.'s term for a further twenty-one years from Mar. 25, 1942, if F. should so long live, subject to the covenants in the lease dated Apr. 4, 1921. By a "lease" dated Dec. 31, 1946, F., as "lessor" demised the premises to the defendant and his brother jointly for a term of fourteen years from Nov. 25, 1946, provided that on the death of F. the term should forthwith cease and absolutely determine, and the defendant and his brother jointly and severally covenanted at all times during the term to repair the messuage and buildings and the boundary walls and fences and at the expiration or sooner determination of the term to deliver up the premises in such good and tenantable repair. F. died on Aug. 6, 1957. By notices served respectively under the head lease, dated Apr. 4, 1921, by C.'s executors on the executors of F. (the plaintiffs in the action), and under the lease dated Dec. 31, 1946, by the plaintiffs on the defendant (the surviving joint tenant under that lease), F.'s reversionary lease and the defendant's lease were determined on the same day, Dec. 25, 1957. A schedule of dilapidations under the covenants in the head lease was served by C.'s executors on the plaintiffs; this claim was settled by the plaintiffs for £715. The plaintiffs, having served their own schedule of dilapidations (amounting to £1,397) on the defendant in respect of his breaches of the repairing covenant in the lease dated Dec. 31, 1946, brought an action against him for the breaches, limiting their claim for dilapidations to £715, viz., the amount payable by them on the covenants in the head lease, but also claiming by way of damages the surveyor's and solicitors' charges that they had incurred in respect both of the head lessor's claim against them and of the plaintiffs' own schedule of dilapidations and claim against the defendant. It was found on the evidence that £715 was a fair and reasonable estimate of the damage from the defendant's breaches of the repairing covenant, F
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Held: (i) the plaintiffs were entitled to recover damages for the defendant's breaches of repairing covenant, because the fact that the plaintiffs' reversion on the defendant's tenancy was only momentary and notional did not prevent its being valued, and, since it had not been proved that the defendant had notice that the lease to him was an underlease, the damages ought to be assessed independently from those paid by the plaintiffs under the head lease; in the circumstances of the present case the amount recoverable by the plaintiffs was £715.

Ebbetts v. Conquest ([1895] 2 Ch. 377) applied.

Espir v. Basil Street Hotel, Ltd. ([1936] 3 All E.R. 91) distinguished.

(ii) the surveyor's and solicitors' charges arising from the schedule served on the plaintiffs under the head lease were not recoverable as damages from the defendant because in the absence of notice of the head lease to the defendant (see (i)) this loss did not flow naturally from the defendant's breaches of covenant in the underlease.

Clare v. Dobson ([1911] 1 K.B. 35) and *Hadley v. Baxendale* ((1854), 9 Exch. 341) applied.

(iii) the surveyor's and solicitors' charges arising on the schedule served on the defendant were also not recoverable in the absence of any express provision in the lease to the defendant making him liable for those charges.

Maud v. Sandars ([1943] 2 All E.R. 783) followed.

[As to damages for breach of covenant to repair after the determination of the term, see 23 HALSBURY'S LAWS (3rd Edn.) 590, para. 1276; and for cases on the subject, see 31 DIGEST (Repl.) 373-376, 5035-5052.]

For the Landlord and Tenant Act, 1927, s. 18 (1), see 13 HALSBURY'S STATUTES (2nd Edn.) 902.]

Cases referred to:

Clare v. Dobson, [1911] 1 K.B. 35; 80 L.J.K.B. 158; 103 L.T. 506; 31 Digest (Repl.) 554, 6736.

Ebbetts v. Conquest, [1895] 2 Ch. 377; 64 L.J. Ch. 702; 73 L.T. 69; *affd.* sub nom. *H.L.*, *Conquest v. Ebbetts*, [1896] A.C. 490; 65 L.J.Ch. 808; 75 L.T. 36; 31 Digest (Repl.) 371, 5025.

Espir v. Basil Street Hotel, Ltd., [1936] 3 All E.R. 91; 31 Digest (Repl.) 372, 5026.

Hadley v. Baxendale, (1854), 9 Exch. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 156 E.R. 145; 17 Digest (Repl.) 91, 99.

Jaquin v. Holland, [1960] 1 All E.R. 402; [1960] 1 W.L.R. 263.

Maud v. Sandars, [1943] 2 All E.R. 783; 169 L.T. 398; 31 Digest (Repl.) 379, 5071.

Penley v. Watts, (1841), 7 M. & W. 601; 10 L.J.Ex. 229; 151 E.R. 907; 30 Digest (Repl.) 519, 1583.

Proudfoot v. Hart, (1890), 25 Q.B.D. 42; 59 L.J.Q.B. 389; 63 L.T. 171; 55 J.P. 20; 31 Digest (Repl.) 359, 4900.

Skinner's Co. v. Knight, [1891] 2 Q.B. 542; 60 L.J.Q.B. 629; 65 L.T. 240; 56 J.P. 36; 31 Digest (Repl.) 547, 6685.

Action.

This was an action transferred to an Official Referee for trial pursuant to an order of Master GRUNDY dated Oct. 12, 1959.

By a lease dated Apr. 4, 1921, one George Coussmaker demised to Vera Flood-Page premises known as Glaziers, Normandy, in the county of Surrey, comprising a cottage and garden and a small piece of land adjoining thereto, for a term of twenty-one years from Mar. 25, 1921. Vera Flood-Page, as lessee, entered into the following covenants under the lease:

"(2) To maintain and keep in good and tenantable repair and condition the interior of the said cottage and the outbuildings belonging thereto and

also the hedges, ditches, gates, posts, rails, fences and fixtures on the said premises (damage by fire storm or tempest alone excepted).

"(4) To keep the land, orchards, gardens and grounds in good order clean and free from weeds and properly cropped and manured. To prune at proper seasons of the year all fruit trees and bushes and to replace those which die or become unprofitable with others of healthy and suitable kinds and to properly guard and protect the same.

"(5) To keep and leave all pathways in good order and [to] clean and scour all ditches and watercourses as often as necessary.

"(6) In the seventh fourteenth and last year of the said term to paint with two coats of good oil and white lead paint all such parts of the inside of the said cottage where before painted and whiten and colour all such parts thereof where before whitened and coloured.

"(8) At the expiration or sooner determination of the said term quietly to yield up the demised premises with all improvements and additions thereto in good and tenantable repair and condition in accordance with the covenants hereinbefore contained."

Coussmaker, the lessor, covenanted as follows: "To maintain and keep the roof and outside walls of the said premises (except the gates) and the main drains in good and tenantable repair and condition." By a supplementary deed dated Dec. 31, 1935, the term demised to Vera Flood-Page by the lease dated Apr. 4, 1921, was extended by the freeholder, Macclesfield Forbes Coussmaker, for a further term of twenty-one years from Mar. 25, 1942, if Vera Flood-Page should so long live, and the extended term was made subject to the same covenants as were contained in the lease dated Apr. 4, 1921. By a "Lease" dated Dec. 31, 1946, Vera Flood-Page as "lessor" demised the premises to lessees, Arthur Rayden Lake and Geoffrey David Lake, jointly, for a term of fourteen years from Nov. 25, 1946, with the proviso that on the death of Vera Flood-Page the term should forthwith cease and be absolutely determined. The lessees jointly and severally covenanted with Vera Flood-Page as follows:

"(10) From time to time and at all times during the said term to repair cleanse maintain and keep the said messuage and buildings and premises and the fixtures therein and the boundary walls fences drains ditches and appurtenances thereof with all necessary reparations and cleansings whatsoever (damage by fire excepted).

"(11) And also will once in every third year of the said term paint the outside wood and iron work of the said demised premises with three coats of good oil and white lead paint in a good and workmanlike manner.

"(12) And also will once in every seven years of the said term paint all the inside wood and iron work usually painted with three coats of good oil and white lead paint in a proper and workmanlike manner.

"(13) And also will . . . at all times during the said term maintain the gardens and pleasure grounds of the said premises in good order and carefully preserve the timber trees and all ornamental and fruit trees bushes and shrubs which are now or may at any time during the said term be growing on the demised premises (damage by fire excepted).

"(14) And also will deliver up to the lessor at the expiration or other determination of the term the said premises in such good tenantable repair and condition as aforesaid . . . together with the fixtures and fittings therein."

Vera Flood-Page died on Aug. 6, 1957. By two notices served respectively by the executors of Macclesfield Forbes Coussmaker on the executors of Vera Flood-Page and by the latter on Arthur Rayden Lake (the surviving joint tenant under the lease dated Dec. 31, 1946), both of which notices expired on Dec. 25, 1957, the terms created by the lease dated Apr. 4, 1921, and the lease dated Dec. 31, 1946, were determined on Dec. 25, 1957. Arthur Rayden Lake vacated the premises, which in fact were occupied by his sister-in-law on June 24, 1958. The executors

of Coussmaker (hereafter referred to as "the head lessors") then served the executors of Vera Flood-Page (hereafter referred to as "the plaintiffs") with a schedule of dilapidations dated July 2, 1958, and claimed £1,000 for dilapidations from the plaintiffs. The schedule included items of external repairs to the roof for which Vera Flood-Page was not liable under the lease of Apr. 4, 1921, and items of repair to boundary fences for which she may not have been liable. The schedule also included items of treatment and repair for woodworm. After negotiations this claim was settled for £715. Meanwhile, in January, 1958, the plaintiffs prepared their own schedule against Arthur Rayden Lake (hereafter referred to as "the defendant"). The plaintiffs' schedule also included items of external roof repairs, for which the defendant was liable under the lease dated Dec. 31, 1946, and generally provided for the proper treatment of all timber affected by woodworm or rot. The cost of repairs and decorations set out in the schedule was estimated by a firm of builders at £907 13s. The cost of disinfecting the premises from woodworm was estimated at between £430 and £490. In the result the plaintiffs claimed from the defendant the total sum of £1,397 13s., comprising £907 13s. for dilapidations, £430 for disinfection and £60 for restoring the garden.

In the present action the plaintiffs limited their claim against the defendant for breach of covenant to deliver up the premises in repair to £715, viz., the amount the plaintiffs had agreed to pay for breaches of covenant to the head lessors. The plaintiffs also claimed in the action surveyor's fees comprising £42 10s. in relation to the settlement of the head lessors' claim and £73 10s. for preparing the plaintiffs' own claim against the defendant, and solicitors' costs of £73, covering both the head lessors' claim against the plaintiffs and the latter's claim against the defendant. The defendant contended that the plaintiffs were not entitled to recover the sum payable by them under the head lease; that the plaintiffs had not suffered any diminution in the value of their reversion on the defendant's lease by reason of the breaches of covenant* since their reversion was determined at the same moment as the defendant's lease, and that the plaintiffs were not entitled to recover as damages their surveyor's and solicitors' charges in respect of either of the schedules of dilapidation.

Frank Whitworth for the plaintiffs.

A. T. Hoolahan for the defendant.

Cur. adv. vult.

Dec. 5. **SIR BRETT CLOUTMAN, V.C., Q.C.**, referred to the repairing covenants in the head lease dated Apr. 4, 1921, and in the lease dated Dec. 31, 1946, and to the schedule of dilapidations served under each lease. His Honour expressed the opinion that since the plaintiffs could look to the head lessors, under the lease dated Apr. 4, 1921, for repairs relating to the roof and exterior and boundary walls they could not include these items as part of the damage which they had suffered from the defendant's breaches of covenant and the schedule would be adjusted accordingly. His Honour went on to hold, applying the principle in *Proudfoot v. Hart* (1) that, although the cottage was old the plaintiffs could claim for disinfection of woodworm, since in the present case the infestation was bad enough to require taking up and replacing floorboards, and a tenant wishing to live in an old house would not want to take the risk of his furniture being riddled with worm. Independently of the settlement of £715 reached between the head lessors and the plaintiffs, His Honour found that £715 was a fair and reasonable estimate of the damage suffered by the plaintiffs from the defendant's breaches of repairing covenants, and that this sum did not exceed the

* Damages for breach of covenant to leave or put premises in repair at the termination of a lease are limited by s. 18 (1) of the Landlord and Tenant Act, 1927, to the amount, if any, by which the value of the reversion (whether immediate or not) in the premises is diminished owing to the breach of covenant.

(1) (1890), 25 Q.B.D. 42.

diminution to the value of the plaintiffs' reversion (2) caused by the defendant's breaches. His HONOUR continued: But then counsel for the defendant says that in the circumstances of this case the plaintiffs' reversion is not to be confused with Coussmaker, the head lessor's reversion. The plaintiffs' reversionary interest on the expiry of the defendant's lease is momentary and notional, since at the same time the plaintiffs yielded up their interest to the head lessor. The saleable value of the plaintiffs' reversion is, therefore, nil, and it is still nil if the property is not in repair. And if it be said that the plaintiffs are liable to the head lessor because of the defendant's breaches, then on the authority of *Ebbetts v. Conquest* (3) this is not to be taken into consideration in the absence of notice to the defendant of the plaintiffs' own head lease. And if the plaintiffs' liability is not to be taken into account, there is only nominal damage to a nominal reversion (see *Espir v. Basil Street Hotel, Ltd.* (4)).

Now I am greatly indebted to counsel for the defendant's careful arguments and industry in the defence of this claim, and I will add that this reasoning is ingenious and almost attractive; but I have no doubt at all that it is wrong. As a matter of simple logic it will not do to say that because the value of property in repair is nil, therefore, the value is still nil if it is out of repair due to the breaches of the outgoing tenant. Not at all. The value is minus £X, which is what the tenant must pay someone to take over, first, the fag end of the lease, and later the last moment of the lease. Certainly the reversion on the defendant's lease is only momentary and notional (see per DEVLIN, L.J., in *Jaquin v. Holland* (5)), but this need not prevent it from being valued. In *Espir v. Basil Street Hotel, Ltd.* (4) the sub-tenant had acquired the head landlord's reversion of the lease of the mesne tenant. In those circumstances, any diminution in the value of the mesne tenant's reversion of fifteen days of the lease of the sub-tenant was only nominal, and I do not think that case helps at all.

Then, as to the argument on the plaintiffs' side that the defendant is liable to them for the sum that they had to pay the freeholder, because he had notice of the fact that Miss Flood-Page was herself a tenant, and the defendant's denial of any such notice, both parties rely on *Ebbetts v. Conquest* (3). The plaintiffs say that the defendant had such notice from the fact that his sub-lease was expressed to determine on Miss Flood-Page's death. The defendant says that his lease is not expressed to be an underlease, and that it by no means follows, merely because it is determinable on the lady's death, that it is an underlease. In the course of argument I put the case of a landlord who wished to ensure that on his death his estate would be quickly wound up, and suggested that he might limit his grant to his own life. I still think that it is not an unreasonable possibility.

In the circumstances, the plaintiffs have not satisfied me that the defendant had notice that his was an underlease. It follows that the damages for breach of repairing covenants on the defendant's lease must be assessed independently from those on the head lease.

Now up to this point the argument seems academic, since for the reasons which I have given I assess the damage to the reversion on the defendant's lease at the figure of £715, which is the same as the sum agreed on the head lease; but the matter does not end there. In the first place, the plaintiffs seek to add to their claim their own solicitors' costs of £73, of which it was agreed that £40 10s. was attributable to the claim against the defendant, and £32 10s. to negotiating the settlement of the claim by Coussmaker, the freeholder's executors, against the plaintiffs. In addition the plaintiffs claim £73 10s. their own surveyor's fee on the schedule of dilapidations on the defendant's lease, and a further £42 10s., their surveyor's fee for settling the Coussmaker claim on the head lease.

(2) The measure of damages for breach of covenant to repair laid down by s. 18 (1) of the Landlord and Tenant Act, 1927.

(3) [1895] 2 Ch. 377.

(4) [1936] 3 All E.R. 91.

(5) [1960] 1 All E.R. at p. 409.

In so far as these further claims relate to the head lease and depend on the question of notice of the head lease, and this must cover the £32 10s. legal costs and the £42 10s. surveyor's fee, they must fail in the absence of notice. It would be otherwise if there were notice of the head lease and a covenant by the sub-lessee to indemnify his lessor against the head landlord's claims (see *Clare v. Dobson* (6)). Furthermore, the defendant's covenants are not by any means the same as the covenants in the head lease, even though I accept that the damages due to the breach of the former are justly limited to the amount for which the claim on the latter was settled. In spite of this, the measure of damages was necessarily different, and the costs incurred by the plaintiffs vis-à-vis Coussmaker's executors are not the necessary consequence of the defendant's breaches of his own covenants (see *Penley v. Watts* (7)). However, the basic ground on which I reject this part of the claim is that the plaintiffs have not satisfied me that the defendant had notice in any shape or form of the head lease, and this part of their loss does not flow naturally from the defendant's breach (see *Clare v. Dobson* (6) and *Hadley v. Baxendale* (8)).

There remains now the final question whether the plaintiffs can recover their own solicitors' costs before action against the defendant, £40 10s., and £73 10s., their surveyor's fee in respect of the schedule for breaches of the defendant's lease. In *Maud v. Sandars* (9) LEWIS, J., did not think the surveyor's fee in such a case was recoverable as damages. No doubt in a case of relief from forfeiture the court may require a defendant to pay solicitors' and surveyors' charges as a condition of relief; but that is not this case (see *Skinners' Co. v. Knight* (10); FOA'S LAW OF LANDLORD AND TENANT (8th Edn.), p. 666; and WOODFALL ON LANDLORD AND TENANT (26th Edn.), p. 962). In HILL AND REDMAN'S LAW OF LANDLORD AND TENANT (11th Edn.), p. 205, it is said that the cost of the schedule is not itself recoverable as damages, but at the same time the correctness of the decision in *Maud v. Sandars* (9) is somewhat doubted (see HILL AND REDMAN, p. 206). In a strictly drawn lease there is often found a specific provision making the lessee liable for such expenses, and in such a case the amount is included in the damages (see WOODFALL, pp. 737 and 962); but that is precisely because the law and the practice are as LEWIS, J., stated. In this state of the authorities and of the practice, as I know it, I must follow the decision in *Maud v. Sandars* (9), and if a different practice is to be laid down, this must be by the Court of Appeal.

For these reasons I must disallow the claim to include in the plaintiffs' damages their own solicitors' and surveyor's charges in respect of the schedule on the defendant's lease. The plaintiffs are entitled to recover the sum of £715.

Judgment for the plaintiffs for £715.

Solicitors: *Edwin Coe & Calder Woods*, agents for *Tomkins & Bowes*, Bexhill-on-Sea (for the plaintiffs); *Lindus & Hortin* (for the defendant).

[Reported by WENDY SHOCKETT, Barrister-at-Law.]

(6) [1911] 1 K.B. 35.

(7) (1841), 7 M. & W. 601.

(8) (1854), 9 Exch. 341.

(9) [1943] 2 All E.R. 783.

(10) [1891] 2 Q.B. 542.

PAYNE AND OTHERS *v.* BRADLEY.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Winn and Widgery, JJ.), February 15, 16, 1961.]

Gaming—Lottery—Exemption—Purposes other than “private gain”—Tombola played at club and profits paid into general funds used to meet general expenses of club—Whether profits were applied for purposes other than purposes of “private gain”—Other exemptions—Betting and Lotteries Act, 1934 (24 & 25 Geo. 5 c. 58), s. 21, s. 22, s. 23, s. 24—Small Lotteries and Gaming Act, 1956 (4 & 5 Eliz. 2 c. 45), s. 1, s. 4.

On a number of days in April and May, 1960, the appellants, who were the directors or trustees of a friendly and trade societies' club, held sessions of tombola at the premises of the club. Sets of tickets were sold for 2s. 6d., each ticket enabling the holder to take part in a session; sales of tickets were not confined to members of the club. The prizes were sums of money, and the proceeds of each session, after payment of prizes, were paid into the general funds used to meet the general expenses of the club and thus to finance the amenities and activities that it provided. Under the rules of the club no surplus was divisible among members individually. The appellants, being charged under s. 22 (1) of the Betting and Lotteries Act, 1934, with using premises for purposes connected with the conduct of a lottery, contended that the lottery (viz., the tombola sessions) was lawful (by virtue of s. 4 (1), (3), of the Small Lotteries and Gaming Act, 1956) because the whole of the proceeds (after payment of lawful expenses) were applied “for purposes other than purposes of private gain” within s. 4 (1) (c). On appeal against conviction,

Held: “private gain” in s. 4 (1) (c) of the Small Lotteries and Gaming Act, 1956, referred to private gain to the organisers of the lottery or game or those whom they represented; and the appellants were rightly convicted because the society or the individual members got by means of the tombola sessions a private gain, notwithstanding that the net proceeds were paid into the general funds of the society (see p. 40, letter H, post).

Per CURIAM: there would have been exemption (by virtue of s. 24 of the Betting and Lotteries Act, 1934) if the sale of tickets had been confined to members (see p. 39, letter I, to p. 40, letter A, post).

Appeal dismissed.

[**Editorial Note.** Section 4 (3) of the Small Lotteries and Gaming Act, 1956, which provided the exception on which the appellants relied in the present case, was repealed as from Jan. 1, 1961, by the Betting and Gaming Act, 1960, s. 15 and Sch. 6, Pt. 1. Both s. 23 and s. 24 of the Betting and Lotteries Act, 1934, are amended by s. 23 (1) (4), s. 29 (2) and Sch. 5 to, and s. 22 is modified by s. 21 of, the Act of 1960. The words “purposes other than private gain” have, however, application at the present time as they are used in the saving for entertainments provided by s. 20 of the Act of 1960.

As to lawful and unlawful lotteries, see 18 HALSBURY'S LAWS (3rd Edn.) 238-248, paras. 460-474; and for cases on the subject, see 25 DIGEST 452-456, 429-449.

For the Betting and Lotteries Act, 1934, s. 21, s. 22, s. 23, s. 24, see 10 HALSBURY'S STATUTES (2nd Edn.) 801-805.

For the Small Lotteries and Gaming Act, 1956, s. 1, s. 4, see 36 HALSBURY'S LAWS (2nd Edn.) 362, 367.]

Case Stated.

This was an appeal by way of Case Stated by the stipendiary magistrate and two justices of the peace for the county borough of Huddersfield before whom the appellants were convicted of offences against s. 22 (1) of the Betting and Lotteries Act, 1934.

A On July 27, 1960, informations were preferred by the respondent, David Bradley, against the appellants, Harry Vincent Payne and nineteen other persons that they, on Apr. 27 and Apr. 30, 1960, and on May 4, 7, 14 and 18, 1960, at Huddersfield, in connexion with a lottery promoted in Great Britain known as "tombola" did use premises occupied by them, viz., the main hall of the Huddersfield Friendly and Trade Societies' Club, situated at 9, Northumberland Street, B Huddersfield, for purposes connected with the conduct of the lottery, contrary to s. 22 (1) of the Betting and Lotteries Act, 1934. The justices heard the informations together, with the consent of the parties, on Aug. 24, 1960, and Sept. 13, 1960, and the following facts were found. On the several dates set out in the informations the twenty appellants were either trustees, or by virtue of the rules and an election, directors of the Huddersfield Friendly and Trade Societies' Club, and as such, subject to the powers of general meetings, had full power to superintend and conduct the business of the club. On each date sets of tickets were sold on the club premises for 2s. 6d.; on weekdays a set consisted of eight tickets and on Saturdays, three tickets. Each ticket entitled the holder to take part in one session of an amusement or entertainment known as tombola on occasions when other entertainment was provided. On each date, sessions D of tombola were held in the main hall of the club under the control of servants or agents of the club. On each occasion a substantial number of persons took part in the amusement; on certain dates estimated to be about two hundred. Tombola was conducted as follows: on each ticket was printed a series of numbers which varied from ticket to ticket. The person in charge of the proceedings drew out numbers from a bag and called out the numbers so drawn. The E holder of a ticket on which any such number was printed then crossed it out. The first holder of a ticket who was able in that manner to cross out all the numbers on his ticket was entitled to a prize. Occasionally a prize was given to a person holding a ticket bearing only one line of cancelled numbers. The tombola sessions were not promoted as an incident of any entertainment of the kind referred to in s. 23 (3) of the Betting and Lotteries Act, 1934. The prizes F were sums of money. The sale of tickets was not confined to members of the club. After payment of the prizes the proceeds of the playing of tombola were paid into the general funds of the club and appeared in the profit and loss account out of which the general expenses of the club were met. For the year 1959 such profits were shown in the accounts to be in the region of £900 while the membership fees amounted to £1,059. No certificate or other satisfactory G evidence of registration by the local authority under s. 1 of the Small Lotteries and Gaming Act, 1956, was produced although a witness stated that, in fact, the society was so registered. Returns under that Act were not made and the club did not purport to operate these sessions of tombola under the exemption of s. 1.

H It was contended on behalf of the appellants that tombola was a game within the meaning of s. 4 of the Small Lotteries and Gaming Act, 1956; the entertainment was promoted for raising money to be applied for purposes other than those of private gain; on all the dates mentioned in the informations the game was played at an entertainment in accordance with the conditions set out in s. 4 (1) of the Act and the entertainment was exempted under that section: all the proceeds of the payments made by the participants in the game, after making I deductions lawfully permitted, were applied for purposes other than those of private gain; "private gain" meant gain for the benefit of people personally and as private individuals and not as members of a properly constituted society, club or similar body of persons in a collective capacity.

It was contended on behalf of the respondent that tombola was a lottery inasmuch as the prizes were awarded by chance and there was no element of skill. Section 21 of the Betting and Lotteries Act, 1934, provided that all lotteries were unlawful, subject to exemptions provided by s. 23 and s. 24 of that

Act, and s. 1 and s. 4 of the Small Lotteries and Gaming Act, 1956. The exemption of certain small lotteries prescribed by s. 23 of the Betting and Lotteries Act, 1934, did not apply to this case as the entertainment provided was not of the character set out in s. 23 (3), the net proceeds were not devoted to purposes other than private gain and money prizes were given in the lottery. The exemption of certain private lotteries prescribed by s. 24 did not apply because the sale of tickets or chances was not confined to the classes of person referred therein. The exemption of certain small lotteries prescribed by s. 1 of the Small Lotteries and Gaming Act, 1956, did not apply inasmuch as the whole of the proceeds of the lottery after making the permitted deductions therefrom was not devoted to purposes other than private gain, no returns to the local authority had been made under s. 3 and the appellants did not purport to conduct the lottery in pursuance of that exemption. The exemption of small gaming parties prescribed by s. 4 (3) of the Betting and Lotteries Act, 1934, did not apply because tombola was not a game as the persons participating did not take any active part; and if it were a game, s. 23 was not complied with in that the net proceeds were paid into the general funds of the club. If a purpose were not for public gain it must be for private gain and in this case benefit was conferred on members of the club and not on the public.

The justices were of opinion that tombola as played on the occasions named in the informations was a game of pure chance with no element of skill and it was therefore a lottery. Section 23 and s. 24 of the Betting and Lotteries Act, 1934, and s. 1 of the Small Lotteries and Gaming Act, 1956, did not prescribe exemption from s. 22 of the former Act, as was conceded by the appellants. The fact that tombola was a lottery did not prevent it from being a game or the holding of a session from being a gaming party. The interpretation of the words "private gain" should determine whether the game was exempt by either s. 1 or s. 4 of the Small Lotteries and Gaming Act, 1956. The justices did not accept that a purpose which was not for public gain was necessarily for private gain, but in this case the payments made by the players were not applied for purposes other than those of private gain because the profits were paid into the general funds of the club; the total for 1959 of about £900 appeared in the profit and loss account and was used to meet the general expenses of the club. Although r. 3 of the club rules provided that no surplus should be divisible among the members individually, the profits from the playing of tombola were used to finance the amenities and social activities of the club, shared by club members, and this was a private gain.

P. M. O'Connor, Q.C., and A. E. Hutchinson for the appellants.

J. M. G. Griffith-Jones for the respondent.

LORD PARKER, C.J.: The appellants are either trustees or directors of a club called the Huddersfield Friendly and 'Trade Societies' Club. Under the rules of the club the objects are—

"... to afford the members the means of social intercourse, mutual helpfulness, mental and moral improvement, and rational recreation."

And it is provided that—

"All moneys received on account of contributions and donations, admission fees, fines, or otherwise, shall be applied according to the rules of the society, no surplus being divisible among the members individually..."

The membership

"... shall consist of an unlimited number of members... The fee of 9d. per member, per year, shall be charged for such membership... [and]... if at any time it appears to the directors, that the society is in such a position as to render it necessary to alter the fees for membership, they

A shall call a special meeting of the members, who shall have power by increasing or reducing the same, to alter such fees subject to the registration of the appropriate amendment of rules."

B On a number of days, the subject of the informations, the appellants held sessions in the main hall of the club whereat tombola was played. On each of the dates, sets of tickets were sold on the club premises for 2s. 6d., each ticket entitling the holder to take part in one session of tombola. These sessions were conducted as an entertainment on their own and were not incidental to any other form of entertainment. I find it unnecessary to describe the game; it is now only too well known. The prizes were sums of money and the sale of tickets was not confined to members of the club. Finally, after the payment of the prizes, the proceeds were all paid into the general funds of the club. Indeed, for the year C 1959 the profits from these sessions were shown in the accounts to be in the region of £900, while the membership fees amounted to £1,059.

D In order to decide this case it is necessary to look a little at the scheme of the Acts in question. The Betting and Lotteries Act, 1934, by s. 21 provides that: "Subject to the provisions of this Part of this Act, all lotteries are unlawful". It then provides by s. 22 for offences in connexion with lotteries, and the relevant offence with which these appellants were charged was this (sub-s. (1)):

E "Subject to the provisions of this section, every person who in connexion with any lottery promoted or proposed to be promoted either in Great Britain or elsewhere . . . (f) uses any premises, or causes or knowingly permits any premises to be used, for purposes connected with the promotion or conduct of the lottery . . . shall be guilty of an offence."

That, be it observed, applies to all lotteries whether lawful under the subsequent provisions of the Act or unlawful under the general provisions of s. 21.

F Section 22 (2) then provides that it shall be a defence to such a charge if it is proved that, to put it shortly, the lottery is exempted from illegality by the subsequent provisions of the Act. There are four relevant exceptions; the first two are to be found in the Betting and Lotteries Act, 1934, s. 23, s. 24, and the other two are to be found in the Small Lotteries and Gaming Act, 1956. Thus by s. 23 an exemption is provided in the case of lotteries promoted as an incident of an entertainment of a particular sort; and sub-s. (3) provides that the entertainments in question are bazaars, sales of work, fêtes and other entertainments of a similar character. If a lottery is promoted as an incident to such an entertainment, then subject to certain conditions it is lawful, and one of the conditions is that the whole of the proceeds of the entertainment including the proceeds of the lottery after deducting expenses and matters of that sort, shall be devoted "to purposes other than private gain". It is clear that the appellants cannot claim the benefit of that exemption, and indeed it is not suggested that they can, because the tombola, assuming it to be a lottery, was not promoted as an incident of any such entertainment, as indeed the justices specially found (1).

I The next exemption is provided by s. 24 dealing with what are called private lotteries. The essence of that provision is that societies, which include clubs, institutions, organisations or other associations of persons may conduct private lotteries in which the sale of tickets or chances by the promoters is confined, broadly speaking, to members of the society, and provided that that is done, and that certain other conditions are fulfilled, the private lottery is not to be deemed an unlawful lottery. In that case, be it observed, one of the conditions is that the whole of the proceeds after payment of expenses shall be devoted either to the provision of prizes or to purposes which are "purposes of the society". In other words, provided the lottery is kept private, a club or society within the meaning of the section may devote the proceeds, after payment of expenses, to their own purposes. Accordingly, the appellants, in my judgment, could have

(1) See p. 37, letter E, ante.

obtained the benefit of this exemption had they confined the sale of tickets to members. A

Turning to the Small Lotteries and Gaming Act, 1956, provision is made by s. 1 for a lottery being lawful if it is promoted by a society of much the same kind as that laid down for the purposes of s. 24 of the earlier Act, which has been registered by a local authority being a society established and conducted wholly or mainly for one or more of the following purposes, that is to say charitable purposes, participation in or support of athletic sports or games or cultural activities, and finally (sub-s. (1)) B

“(c) purposes not described in the foregoing paragraphs, and not being purposes of private gain or purposes of any commercial undertaking . . .” Subject to certain conditions the money raised can be applied for “purposes of the society”. By s. 1 (2) (d) it is made a condition that the whole proceeds, after deducting sums lawfully appropriated on account of expenses or for the provision of prizes, shall be applied to purposes of the society, being purposes described in paras. (a), (b) or (c) of s. 1 (1). Accordingly, as I read it, a society, if it is of a particular kind, namely established or conducted wholly or mainly for certain purposes, and which becomes registered by the local authority, can raise money which presumably will be paid over to the society in question, provided it is when so paid applied for one or other of the particular purposes. Pausing there, the appellants in this case cannot bring themselves within that exemption in particular because they were not registered by the local authority. C D

The final exemption, and the one relied on in this case, is to be found in s. 4 of the Small Lotteries and Gaming Act, 1956. So far as it is relevant, s. 4 (1) provides as follows: E

“This section applies to any entertainment promoted in Great Britain for raising money to be applied for purposes other than purposes of private gain, being an entertainment at which games of chance or of chance and skill combined are played in accordance with the following conditions, that is to say . . . (c) the whole of the proceeds of such payments . . . after deducting sums lawfully appropriated on account of expenses or for the provision of prizes or awards in respect of the games, are applied for purposes other than purposes of private gain.” F

Be it observed that that section is dealing with games, but by sub-s. (3) if, and in so far as, a game played at an entertainment under this section is a lottery, it is not to be deemed an unlawful lottery. G

It is, I think, conceded for the purposes of this case that tombola is a game; it is further conceded for the purposes of this case that the playing of the game was an entertainment. It is further clear that the game in question, as the justices found, is a lottery. But if the proceeds were applied for purposes other than purposes of private gain then that lottery would be a lawful lottery and there would be a defence to the charge. The sole question, therefore, in this case is whether the money which was paid into general funds of this society was or was not being applied for purposes other than purposes of private gain. For myself I am quite satisfied that looking at these various exemptions to which I have referred, the repeated reference there to private gain in connexion with the promotion of lotteries is clearly a reference to private gain to the organisers of the lottery or those whom they represent. Looked at in that way, whether one treats the appellants as the society, or as representing the members of the society, it seems to me impossible to contend that the society itself and the individual members did not by these means get a private gain. The real question is whether, that being the ordinary interpretation, as I would venture to think, there is anything in this section which would require that private gain should be given some other and more constricted meaning. H I

Counsel for the appellants, as I understand it, says that private gain in this connexion only occurs when money goes directly to the benefit or to the gain of

A an individual or individuals. In other words, he says that one must look beyond the society and see whether the money, having got into the coffers of the society, finds its way to individual members directly. He would add that since, under the rules, no surplus can be divided amongst the members, no member can directly get any pecuniary benefit from the sums so paid into the general funds of the society.

B For my part I am quite unable to give the words that meaning; I think that in every sense of the word this money was being paid to the private gain of the society, and of the individual members of the society. In these circumstances I have come to the conclusion that the justices were right in convicting as they did, and I would dismiss this appeal.

C WINN, J.: I agree.

WIDGERY, J.: I also agree.

Feb. 24. Counsel for the appellants applied under the Administration of Justice Act, 1960, s. 1, for leave to appeal to the House of Lords.

Counsel for the respondents did not oppose the application.

D LORD PARKER, C.J., giving the judgment of the court, certified that a point of law of general public importance was involved in the decision, and gave leave to appeal to the House of Lords.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Biddle, Thorne, Welsford & Barnes*, agents for *G. E. Hutchinson*, Huddersfield (for the appellants); *Sharpe, Pritchard & Co.*, agents for *Town clerk*, Huddersfield (for the respondent).

E [Reported by JENIFER SANDELL, Barrister-at-Law.]

Re PARAGON HOLDINGS, LTD.

[CHANCERY DIVISION (Buckley, J.), February 27, 1961.]

F *Company—Winding-up—Compulsory winding-up—Contributory—List of contributories—Dispensing with settlement of list of contributories—Discretion of court—Companies Act, 1948 (11 & 12 Geo. 6 c. 38), s. 257 (1), s. 265.*

G The liquidator of a company in compulsory liquidation had surplus assets amounting to £857,654 19s. 10d., after the payment of debts, available for distribution. The issued capital of the company, all of which was fully paid up, included 1,311,810 preference shares of 10s. each entitling their holders to preferential return of capital in a winding-up and priority for arrears of fixed cumulative preference dividend. The amount of capital to be repaid on these shares, together with arrears of the fixed preferential dividend down to Mar. 14, 1961, was £813,322 4s., and the fixed cumulative preferential dividend would accrue at the rate of £4,099 8s. monthly thereafter, if repayment were not made on that date. There were very many preference shareholders and some 213,000 preference shares had been the subject of transfers executed, but not registered, before the commencement of the winding-up. The liquidator prepared a schedule (similar to that envisaged by r. 120* of the Companies (Winding-Up) Rules, 1949, for inclusion in an order for distribution under s. 265† of the Companies Act, 1948) showing the persons who were entitled to preference shares as registered holders thereof, or were entitled to payment in respect of preference shares by virtue of transfers executed in their favour which had not been registered before the commencement of the winding-up, and showing the amount to be paid to each person. Save that the liquidator had obtained the authority of transferors of registered shares to make any payment to the transferees of the transferred shares, this list had been compiled solely by reference to the

* The terms of r. 120 are set out at p. 44, letter E, post.

† The terms of s. 265 are printed at p. 44, letter B, post.

register of members of the company. The liquidator applied to the court for an order dispensing with the settlement of a list of contributories under the proviso to s. 257 (1)* of the Companies Act, 1948, and for an order authorising him to make a first payment by way of return of assets in respect of the issued preference shares.

Held: an order to dispense with the settling of the list of contributories should not be made in the present case for the following reasons—

(i) the order of the court that was required before a distribution of surplus assets could be made under s. 265 of the Companies Act, 1948, would only be made where there was evidence that satisfied the court that the persons named as payees in the schedule to the proposed order were the proper recipients of the money to be distributed.

Re Phoenix Oil & Transport Co., Ltd. (No. 2) ([1958] 1 All E.R. 158) applied.

(ii) in the present case there were many transfers which had been executed but not registered before the commencement of the winding-up; moreover, there was a large class of preference shares which was held widely by a large number of shareholders, and there was, for example, the possibility that some of the shareholders had died; this, therefore, was a case where the evidence was not sufficient to satisfy the court that the persons whose names were set out in the schedule prepared by the liquidator were the only persons and the right persons to be paid the moneys that were to be distributed.

[As to a liquidator's duty to settle list of contributories, see 6 HALSBURY'S LAWS (3rd Edn.) 639, para. 1257; and for cases on the subject, see 10 DIGEST (Repl.) 958, 959, 6587-6596.]

For the Companies Act, 1948, s. 257 (1), s. 265, see 3 HALSBURY'S STATUTES (2nd Edn.) 663, 668.

For the Companies (Winding-Up) Rules, 1949, r. 120, see 4 HALSBURY'S STATUTORY INSTRUMENTS 159.]

Cases referred to:

Phoenix Oil & Transport Co., Ltd., Re, [1957] 3 All E.R. 218; [1958] Ch. 560; [1957] 3 W.L.R. 633; 3rd Digest Supp.

Phoenix Oil & Transport Co., Ltd., (No. 2), Re, [1958] 1 All E.R. 158; [1958] Ch. 565; [1958] 2 W.L.R. 126; 3rd Digest Supp.

Adjourned Summons.

This was an application by the liquidator, Samuel Rolleston Hogg, of Paragon Holdings, Ltd. under s. 257 (1) of the Companies Act, 1948, for an order dispensing with the settlement of a list of contributories of the company and for an order authorising him to make a first payment by way of return of assets of the company available for distribution amongst its members at the rate of 10s. per share together with all arrears of dividend calculated down to the date of payment, in respect of the 1,311,810 issued cumulative participating preference shares in the capital of the company, by paying to the persons named in the schedule exhibited to an affidavit sworn by the liquidator, the respective amounts specified therein which included arrears of dividend calculated to Mar. 14, 1961, together with such further amounts as should represent arrears of dividend accrued between the said date and the date of payment. The facts appear in the judgment.

R. B. S. Instone for the liquidator.

E. Blanshard Stamp as amicus curiae for the Board of Trade.

BUCKLEY, J.: On this summons the applicant, who is the liquidator of the company in its compulsory winding-up, asks for an order dispensing with the settlement of the list of contributories, and for an order authorising the liquidator

"to make a first payment by way of return of assets of the company

* Section 257 (1) is printed at p. 43, letter H, post.

A available for distribution amongst its members at the rate of 10s. per share together with all arrears of dividend calculated down to the date of payment " in respect of the issued cumulative participating preference shares of the company.

The company was ordered to be compulsorily wound up on May 19, 1958. I understand that it was to be wound up on the basis at that date that it was insolvent, but it has turned out to be solvent. All its debts have been paid, and the liquidator now has in hand a sum of £857,654 19s. 10d. available for distribution among the members of the company. The capital of the company includes a class of preference shares of the nominal value of 10s. each. Those shares conferred on the holders of them while the company was a going concern the right to a cumulative preferential dividend at the rate of seven and a half per cent., and also certain further participating rights which I need not specify, and conferred on the holders of those shares in the winding-up the right to the return of their capital in preference to any repayment of capital on the ordinary shares together with the arrears of the fixed cumulative preferential dividend down to the date of the return of the capital.

There are 1,311,810 preference shares in issue. The sum required to repay the capital with arrears of the fixed preferential dividend down to Mar. 14, 1961, is £813,322 4s., and the fixed cumulative preferential dividend will accrue at the rate of £4,099 8s. a month thereafter if repayment is not made on Mar. 14, 1961. The liquidator has prepared a schedule, which is in evidence (1), which shows the persons entitled to the preference shares either as being the registered holders thereof, or as persons in whose favour transfers have been executed, but had not been registered before the commencement of the winding-up. In respect of the last class of persons the liquidator says that he has the authority of the registered holders of the shares in question to make any payment which falls to be made in respect of those shares to the persons who are such transferees. The schedule is in a form which shows the name and address of each person to whom it is suggested payment should be made. It shows the number of shares of which that person is the registered holder, or in the case of somebody who is only interested as being the transferee of shares under a transfer which has not been registered it shows the number of shares of which that person claims to be transferee. It shows the amount payable in respect of those shares in repayment of capital, the amount payable in respect of the arrears of fixed cumulative preferential dividend, and the total amount which it is suggested should be paid to the person in question being the sum of the capital and the arrears of dividend.

The question is whether in those circumstances this is a case in which the court ought, under the proviso to s. 257 (1) of the Companies Act, 1948, to dispense with the settlement of the list of contributories. Subsection (1) provides:

"As soon as may be after making a winding-up order, the court shall settle a list of contributories, with power to rectify the register of members in all cases where rectification is required in pursuance of this Act, and shall cause the assets of the company to be collected, and applied in discharge of its liabilities: Provided that where it appears to the court that it will not be necessary to make calls on or adjust the rights of contributories, the court may dispense with the settlement of a list of contributories."

This is not a case in which there can be any question of making any calls, for all the issued share capital of the company is fully paid. Nor having regard to the decision of ROXBURGH, J., in *Re Phoenix Oil & Transport Co., Ltd.* (2), is it a case in which any adjustment of the rights of the contributories falls to be made. Consequently it is a case in which the court has jurisdiction, if in the court's

(1) The affidavit evidence on behalf of the liquidator included a statement that, save for the authorities obtained from transferors of preference shares to make payments to the transferees in respect of the shares transferred, the schedule had been compiled solely by reference to the register of members of the company.

(2) [1957] 3 All E.R. 218; [1958] Ch. 560.

discretion it seems right, to dispense with the settlement of a list. The settlement of a list of contributories is carried out in the manner directed by r. 80 to r. 85 of the Companies (Winding-Up) Rules, 1949, and it involves the sending of two lots of notices to all the contributories whose names it is proposed to put on the list. No doubt this is an onerous and fairly expensive process to carry out. To determine whether or not it is right in any particular case for the court to dispense with the settlement of the list, it is necessary to consider what subsequent steps have to be taken in the winding-up. A
B

In that connexion I refer to s. 265 of the Companies Act, 1948, which provides:

“The court shall adjust the rights of the contributories among themselves and distribute any surplus among the persons entitled thereto.”

In *Re Phoenix Oil & Transport Co., Ltd.*, (No. 2) (3), which was a decision of WYNN-PARRY, J., consequent on the order made by ROXBURGH, J., in *Re Phoenix Oil & Transport Co., Ltd.* (4), dispensing with the settlement of the list of contributories, WYNN-PARRY, J., held that s. 265 of the Act of 1948 required an order of the court before the liquidator of a company in compulsory liquidation was entitled to distribute the assets, whether or not any adjustment had to be made amongst the contributories. He further held that, although under r. 120 of the Companies (Winding-Up) Rules, 1949, the court might dispense in a suitable case with certain requirements, the case before him was not one where the liquidator could properly be authorised to make a return of capital before he had made inquiry as to the persons entitled, which he had to do at some stage before he was able to ascertain among whom the surplus should be distributed. In a winding-up by the court, therefore, an order of the court is required in every case to authorise the liquidator to distribute surplus assets amongst the persons entitled to participate in the surplus assets of the company. C
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Rule 120 of the Companies (Winding-Up) Rules, 1949, prescribes:

“Every order by which the liquidator in a winding-up by the court is authorised to make a return to contributories of the company shall, unless the court shall otherwise direct, contain or have appended thereto a schedule or list (which the liquidator shall prepare) setting out in a tabular form the full names and addresses of the person to whom the return is to be paid, and the amount of money payable to each person, and particulars of the transfers of shares (if any) which have been made or the variations in the list of contributories which have arisen since the date of the settlement of the list of contributories and such other information as may be requisite to enable the return to be made. The schedule or list shall be in the Form 70 in the appendix with such variations as circumstances shall require, and the liquidator shall send a notice of return to each contributory.” F
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That rule does not lay down any regulations about the evidence which is to support the liquidator's application to the court for an order under s. 265 of the Companies Act, 1948. It merely prescribes the form which this order shall take, unless the court otherwise directs. I apprehend that the court, when considering an application for an order under s. 265, would always require to be furnished with evidence satisfying it that the persons whose names were set out in the schedule referred to in the rule were in fact the proper persons to be the recipients of the money to be distributed. So that in the scheme of the Companies Act, 1948, and the Companies (Winding-Up) Rules, 1949, one finds that where a winding-up order has been made, the Act contemplates that normally the list of contributories will be settled in the way indicated in the rules, and that then, in due course, when the liquidation has been worked out, an application will be made under s. 265 for an order setting out in the schedule the details of the persons to whom any funds to be distributed are to be distributed, and the application for that order should be supported by evidence founded, no doubt, on the settling of the list of contributories and proving any facts which might need H
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(3) [1958] 1 All E.R. 158; [1958] Ch. 565.

(4) [1957] 3 All E.R. 218; [1958] Ch. 560.

to be proved to bring that position up to date, and to justify any variation between the list of contributories and the schedule to the order.

In the present case the class of shares on which the liquidator is anxious to make distribution is a large one and there appears to have been a large number of shareholders holding quite a small quantity of shares of that class. Some of those shares have, as I say, been the subject-matter of transfers which have been executed before the commencement of the winding-up but had not then been registered. The liquidator says that he has information about these shares, but as the evidence stands at the moment I do not think that the court should be satisfied that those persons, and only those persons, whose names are set out in the exhibited schedule are the right persons to receive any moneys which fall to be distributed.

It is perfectly true, I think, that the winding-up rule which deals with the procedure to be gone through in settling a list of contributories indicates that the matter which was primarily in the minds of those who were drafting the rules was that where partly paid shares are affected there would be persons who would be anxious to ensure that their names should not appear in the list of contributories because they would be anxious to avoid being called on to contribute to the assets of the company. But it has long been recognised that for the purposes of settling the list of contributories the contributories include not only the partly paid shareholders but all the persons who are entitled to participate in the winding-up and, of course, shareholders who have parted with their shares may in some circumstances be put on the list of contributories. The court ought not to be very ready to dispense with the settlement of a list because, even when dealing with shares that are all fully paid up, there are quite a number of possible circumstances that may come to the notice of the liquidator in the course of settling the list which have not previously been drawn to his attention. For instance, it seems to me not at all impossible that, in a case such as the present where as many as 213,000 shares were the subject-matter of transfers executed before the commencement of the winding-up which had not then been registered, on investigating the position on notices given to all the shareholders in the manner required by the rules, the liquidator might find that there were some other shares that had been similarly dealt with of which at the moment he is ignorant. Or he might find that somebody was anxious to say that the register had not been properly kept or something of that kind. Perhaps that is not very likely, but I think it is not impossible that when the process of settling the list of contributories is gone through some information may come to light of which the liquidator is at present ignorant. If one were dealing with a very simple case of a very small number of shareholders where it was possible to establish that the position was perfectly clear without going through the formalities of the rules which relate to the settlement of the list of contributories, then I think that would be the sort of case in which the court could properly dispense with the settlement of a list under s. 257, but not, in my view, in dealing with a company with a large class of shares held widely by a large number of shareholders. Indeed one of the things which the liquidator might discover when settling the list of contributories would be that some of those shareholders were dead; in which case he would have to discover their personal representatives before he could satisfy the court to whom he should make payment. Those are matters of a kind which I think the settlement of the list of contributories is calculated, among other things, to elucidate.

Accordingly, I think that this is not a case in which the court ought to dispense with the settlement of the list, and the matter should proceed in accordance with the rules.

Application refused.

Solicitors: *Allen & Overy* (for the liquidator); *Solicitor, Board of Trade.*

[*Reported by* JENIFER SANDELL, *Barrister-at-Law.*]

SOUTHEND-ON-SEA CORPORATION v. HODGSON (WICKFORD), LTD.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Winn and Widgery, J.J.), February 14, 15, 1961.]

Estoppel—Statutory discretion—Hindering exercise of discretion—Statement by officer of local planning authority that land had existing user right—Purchase of land on faith of statement—Subsequent enforcement notice served by authority calling on purchaser to cease such user—Whether authority estopped from proving that land had not been used for the period required to establish existing user right—Town and Country Planning Act, 1947 (10 & 11 Geo. 6 c. 51), s. 23 (1).

Town and Country Planning—Enforcement notice—Appeal against notice—Estoppel—Previous statement by officer of local planning authority that land had existing user right and that planning permission for this use was not needed—Purchase of land on faith of this statement—Notice requiring cesser of use—Town and Country Planning Act, 1947 (10 & 11 Geo. 6 c. 51), s. 23 (1).

A builder who was considering purchasing certain premises for use as a builder's yard wrote to the borough engineer and surveyor (an officer of the local planning authority) inquiring whether the premises "can still be used for a builder's yard". On Feb. 12, 1959, the builder received a reply from the borough engineer and surveyor's office that "the land . . . has an existing user right as a builder's yard, and no planning permission is therefore necessary". Relying on this reply the builder purchased the premises and used them as a builder's yard. Subsequently, the local planning authority informed the builder that it had decided that the premises did not have an existing user right as a builder's yard, and so could not be used as such without planning permission. On appeal by the builder against an enforcement notice, served by the local planning authority under s. 23 (1) of the Town and Country Planning Act, 1947*, calling on the builder to cease his user of the premises as a builder's yard, the builder contended that the local planning authority were estopped, by reason of the letter of Feb. 12, 1959, from showing that the premises had not been used as a builder's yard through the period necessary to give an existing user right.

Held: (i) estoppel could not be raised to hinder the exercise of a statutory discretion conferred on a public authority.

Maritime Electric Co., Ltd. v. General Dairies, Ltd. ([1937] 1 All E.R. 748) applied.

(ii) even if it were assumed in the present case that the letter of the borough engineer contained a representation of pure fact (viz., that the land had been used as a builder's yard long enough to attract an existing user right), yet, if the local planning authority were estopped from proving facts that would show that the enforcement notice was valid, it would be hindered in the exercise of its discretion under s. 23 of the Town and Country Planning Act, 1947, and, accordingly, no estoppel was raised by the letter.

Appeal allowed.

[As to the doctrine that estoppel cannot prevent performance of a statutory duty, see 15 HALSBURY'S LAWS (3rd Edn.) 176, para. 345, and 226, para. 427.

For the Town and Country Planning Act, 1947, s. 23, see 25 HALSBURY'S STATUTES (2nd Edn.) 524.]

Case referred to:

Maritime Electric Co., Ltd. v. General Dairies, Ltd., [1937] 1 All E.R. 748; [1937] A.C. 610; 106 L.J.P.C. 81; 156 L.T. 444; Digest Supp.

* The relevant part of s. 23 (1) is set out at p. 49, letter E, post, in the judgment of LORD PARKER, C.J.

Case Stated.

Southend-on-Sea Corporation, the local planning authority, appealed by Case Stated from a decision of the justices for the County Borough of Southend-on-Sea, sitting as a magistrates' court on June 13, 1960. The magistrates had refused to hear evidence which the appellants proposed to call on an appeal to the magistrates' court by the respondents under s. 23 (4) of the Town and Country Planning Act, 1947, against an enforcement notice dated Apr. 19, 1960, which had been served on them by the appellants, and had quashed the enforcement notice. The evidence which the appellants had proposed to call was that the respondents' land, to which the enforcement notice related, had been used formerly as a private garden and had first been used as a builder's yard less than four years immediately preceding the service of the notice. The facts are stated in the judgment of LORD PARKER, C.J.

N. C. Bridge for the appellants.

H. H. V. Forbes for the respondents.

LORD PARKER, C.J.: The respondents were minded to buy premises at 37, Eastwood Road North, Leigh-on-Sea, and there establish a builder's yard. Prior to purchasing the premises they wrote to the borough engineer and surveyor in these terms:

"We have been looking for a builder's yard for some time, and we now have the opportunity to purchase one, at 37, Eastwood Road North, which we understand has been a builder's yard for about twenty years, until the death of the owner. Although we hope there will be no objection to our continuing this type of business, we would be very pleased if you could let us know if this can still be used for a builder's yard. We are enclosing a rough site plan for your information."

Six days later, on Feb. 12, 1959, they received a reply, headed: "County Borough of Southend-on-Sea", from the Borough Engineer and Surveyor's Office, Southend-on-Sea, in these terms:

"Dear Sirs, Proposed builder's yard, 37, Eastwood Road North, Leigh-on-Sea. In reply to your letter dated Feb. 6, the land you have shown on the plan accompanying your letter has an existing user right as a builder's yard, and no planning permission is therefore necessary."

Thereupon, as the justices find, the respondents purchased the land, moved a quantity of builder's equipment and materials on to the land and used the same as a builder's yard. The justices further find that the respondents would not have bought the land if as a consequence of the letter they had not thought that no further planning permission was required. Nevertheless, on July 17, 1959, the town clerk wrote on behalf of the local planning authority to the respondents, a letter the relevant passage of which is in these terms:

"I am also given to understand that you have had correspondence with the borough engineer in which it was suggested that the land had an existing use as a builder's yard. However, the Southend-on-Sea Corporation has received many complaints about the use of this land, as a result of which a considerable amount of evidence has been presented to the corporation showing that the land has not been used as a builder's yard and has no existing use as such. I am writing, therefore, to inform you that the corporation has decided that the land cannot be used as a builder's yard without planning permission and, furthermore, that such use does not appear to them to be in keeping with the surrounding development."

In due course, on Apr. 20, 1960, the appellants served on the respondents an enforcement notice dated Apr. 19 calling on the respondents to cease that user of the land. The respondents then, as they were entitled to do under s. 23 (4) of the Act, appealed to the justices by way of complaint and, the justices having

heard the complaint, found that planning permission was not required and accordingly, quashed the notice. A

I confess that I have strained throughout to support the decision of the justices in this case which clearly sounds common sense, particularly when these respondents have only acted as they have done as the result of the letter which I have read from the borough engineer. It is said, nevertheless, that the action taken by the local planning authority here is justified in law and that no estoppel can be raised against them based on the letter written by the borough engineer. B

The broad submission made by counsel on behalf of the appellants takes this form: estoppel cannot operate to prevent or hinder the performance of a statutory duty or the exercise of a statutory discretion which is intended to be performed or exercised for the benefit of the public or a section of the public. It is further said that the discretion of the local planning authority to serve an enforcement notice under s. 23 in respect of development in fact carried out without permission is a statutory discretion of a public character. It is, I think, perfectly clear that that proposition is sound, at any rate to this extent, that estoppel cannot operate to prevent or hinder the performance of a positive statutory duty. That, indeed, is admitted by counsel on behalf of the respondents, but he maintains that it is limited to that and that it does not extend to an estoppel which might prevent or hinder the exercise of a statutory discretion. D
For my part, I can see no logical distinction between the two. In *Maritime Electric Co., Ltd. v. General Dairies, Ltd.* (1), the appellants, who were a public utility company, were under the relevant statute (2) to be under this duty:

“No public utility shall charge, demand, collect or receive a greater or less compensation for any service than is prescribed in such schedules as are at the time established, or demand, collect, or receive any rates, tolls, or charges not specified in such schedules.” E

Over a considerable period sums less than the statutory charges were obtained from the respondents on representations that only so much electricity had been consumed. In fact the meter that was read only recorded one-tenth of the charge, and by mistake in rendering their accounts the appellants had failed to multiply the amount shown on the meter by ten. An estoppel was sought to be raised against them, and LORD MAUGHAM said this (3): F

“In such a case—and their Lordships do not propose to express any opinion as to statutes which are not within this category—where, as here, the statute imposes a duty of a positive kind, not avoidable by the performance of any formality for the doing of the very act which the plaintiff seeks to do, it is not open to the defendant to set up an estoppel to prevent it. This conclusion must follow from the circumstance that an estoppel is only a rule of evidence which, in certain special circumstances can be invoked by a party to an action; it cannot, therefore, avail in such a case, to release the plaintiff from an obligation to obey such a statute, nor can it enable the defendant to escape from a statutory obligation of such a kind on his part. It is immaterial whether the obligation is onerous or otherwise to the party suing. The duty of each party is to obey the law.” G H

As I have said, I can see no logical distinction between a case, such as that, of an estoppel being sought to be raised to prevent the performance of a statutory duty and one where it is sought to be raised to hinder the exercise of a statutory discretion. After all, in a case of discretion there is a duty under the statute to exercise a free and unhindered discretion. There is a long line of cases (4) to I

(1) [1937] 1 All E.R. 748; [1937] A.C. 610.

(2) The Public Utilities Act of New Brunswick (c. 127 of the Revised Statutes, 1927), s. 16.

(3) [1937] 1 All E.R. at p. 753; [1937] A.C. at p. 620.

(4) See, e.g., *Ayr Harbour Trustees v. Oswald* ((1883), 8 App. Cas. 623, 634), and 9 HALSBURY'S LAWS (3rd Edn.) 65, para. 132, text and note (f).

A which we have not been specifically referred which lay down that a public authority cannot by contract fetter the exercise of its discretion. Similarly, as it seems to me, an estoppel cannot be raised to prevent or hinder the exercise of the discretion.

B Having said that, it seems to me that this matter comes down to a very narrow point on the construction of the letters to which I have referred. Based on that principle, it is conceded that in so far as the letter from the borough engineer was saying that no permission was necessary, that could not be raised as an estoppel. What is said, however, is that that letter contains a representation of a fact which can operate as an estoppel against these appellants just as it could between private parties, namely, the representation that the land has an existing user right as a builder's yard. It is said that that is a pure representation of fact which does not prevent or hinder the exercise of the discretion which the local planning authority has under s. 23 in regard to enforcing breaches of planning. For my part, I am by no means certain that that letter read as a whole can be looked on as a pure representation of fact, but assuming that it can be read in that sense, the question arises whether it does not even so limit or hinder the free exercise by the planning authority of their discretion under s. 23.

D Section 23 of the Town and Country Planning Act, 1947, so far as it is material, by sub-s. (1) provides:

E "If it appears to the local planning authority that any development of land has been carried out after the appointed day without the grant of permission required in that behalf . . . the local planning authority may within four years of such development being carried out, if they consider it expedient so to do having regard to the provisions of the development plan and to any other material considerations, serve on the owner and occupier of the land a notice under this section",

F that is, an enforcement notice.

G It seems to me, therefore, that if the appellants are not allowed in this case to give evidence what the true position was in regard to existing user they must be prevented from exercising their free discretion under the section. It is true that it can be said, as in this case, that they have exercised their discretion. They have said that it appears to them that the development of the land has been carried out without permission, and therefore to that extent the exercise of the discretion has not been hampered; but it seems to me quite idle to say that a local authority has in fact been able to exercise its discretion and issue an enforcement notice if by reason of estoppel it is prevented from proving and showing that it is a valid enforcement notice in that amongst other things planning permission was required. I have reluctantly come to the conclusion, accordingly, that the argument for the appellants is right, and that this appeal should succeed.

H I would add only this, that apparently a point was taken before the justices that the two letters of Feb. 6 and Feb. 12, which I have read, were respectively an application under s. 17 of the Act to determine whether planning permission was necessary, and a determination by the local planning authority that no permission was necessary. Before this court, however, that point, though not actually abandoned, has not been argued, and, for my part I am quite satisfied that on the reading of those letters it cannot be said either that there was a proper valid application under s. 17 or a proper determination thereunder.

WINN, J.: I agree.

WIDGERY, J.: I also agree.



Appeal allowed: order of the justices quashing the notice quashed, case remitted to the justices to hear the evidence which the appellants were prevented from calling and to hear such further evidence by the respondents as they wish to tender. A

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Town clerk*, Southend-on-Sea (for the appellants); *Drysdale, Lamb & Jackson* (for the respondents).

[Reported by HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*] B

CLAPHAM v. NATIONAL ASSISTANCE BOARD.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Winn and Widgery, JJ.), March 1, 1961.] C

Affiliation—Application for order—Right of National Assistance Board to apply after order obtained by mother set aside on appeal—Board's right separate and independent from mother's right—National Assistance Act, 1948 (11 & 12 Geo. 6 c. 29), s. 44 (3).

A woman who had given birth to an illegitimate child made a complaint against the appellant under s. 1 of the Affiliation Proceedings Act, 1957*, at the hearing of which the justices adjudged the appellant to be the putative father and ordered him to pay a weekly sum to the mother. The appellant appealed to the appeal committee of quarter sessions where the appeal was allowed on the merits and the affiliation order was set aside. The National Assistance Board made a complaint under s. 44 of the National Assistance Act, 1948†, having paid national assistance by reference to the requirements of the child over a certain period, at the hearing of which the board called further evidence than the mother had called previously and destroyed the alibi which the appellant had successfully pleaded before the appeal committee; and the justices, holding that the mother's evidence was corroborated, made an affiliation order. On appeal by the appellant against this order on the ground that the board had in effect stepped into the shoes of the mother and that accordingly the issue was settled between the appellant and the board and the justices had not had jurisdiction to make the order, D

Held: the National Assistance Board had, under s. 44 of the National Assistance Act, 1948 (of which sub-s. (3)‡ was a purely procedural enactment) an independent and separable right, not only to apply for a summons but also to obtain an affiliation order, and at no stage did the board step into the shoes of the mother (see p. 54, letter F, post); accordingly the justices had jurisdiction and had rightly made the affiliation order. E

National Assistance Board v. Mitchell ([1955] 3 All E.R. 291) and *National Assistance Board v. Tugby* ([1957] 1 All E.R. 509) applied. F

(ii) the words of s. 44 (3) should be interpreted as if they read as follows—
“In any proceedings arising out of an application for a summons . . . the court shall . . . proceed as on a complaint arising out of an application made by the mother . . .” (see p. 54, letter G, post). G

Appeal dismissed. H

[As to jurisdiction in affiliation proceedings, see 3 HALSBURY'S LAWS (3rd Edn.) 112, para. 173; and for cases on the subject, see 3 DIGEST (Repl.) 441-445, 333-359. I

As to recovery of expenses in affiliation proceedings by the National Assistance Board, see 27 HALSBURY'S LAWS (3rd Edn.) 489, para. 969; and for cases on the subject, see DIGEST SUPPLEMENTS.

* See p. 52, letter F, post.

† The relevant provisions of s. 44 are set out at pp. 52, 53, post.

‡ See p. 54, letter D, post.

A For the Affiliation Proceedings Act, 1957, s. 1, s. 2, s. 4, see 37 HALSBURY'S STATUTES (2nd Edn.) 37, 38, 40.

For the National Assistance Act, 1948, s. 44, see 16 HALSBURY'S STATUTES (2nd Edn.) 970.

B For the Bastardy Laws Amendment Act, 1872, s. 4, s. 8, and for the Bastardy Laws Amendment Act, 1873, s. 5, see 2 HALSBURY'S STATUTES (2nd Edn.) 480, 483, 484.

For the Children Act, 1948, s. 26, see 12 HALSBURY'S STATUTES (2nd Edn.) 1122.]

Cases referred to:

National Assistance Board v. Mitchell, [1955] 3 All E.R. 291; [1956] 1 Q.B. 53; 119 J.P. 572; [1955] 3 W.L.R. 591; 3rd Digest Supp.

C *National Assistance Board v. Tugby*, [1957] 1 All E.R. 509; [1957] 1 Q.B. 506; 121 J.P. 149; [1957] 2 W.L.R. 316; 3rd Digest Supp.

Case Stated.

D This was an appeal by James Willie Clapham by way of Case Stated by the justices for the West Riding of the county of York sitting at Ossett from an order made by the justices on Oct. 12, 1960, whereby they found that the appellant was the putative father of an infant born on Dec. 28, 1958, to Mrs. Joyce Land and ordered him to pay the sum of £1 10s. per week to her for the maintenance and education of the child until he should attain the age of sixteen years, or if he should die under that age, until the date of his death. A complaint had been laid by the respondents, the National Assistance Board, on Aug. 3, 1960, against the appellant, that Mrs. Joyce Land alleged that the appellant was the father of the child and that assistance had been given under Part 2 of the National Assistance Act, 1948, on July 25, 1960, and divers other days by reference to the child, and the board applied under s. 44 (2) of the Act for a summons to be served on the appellant under s. 1 of the Affiliation Proceedings Act, 1957.

F The justices heard the complaint on Oct. 12, 1960, and the following facts were found. Mrs. Joyce Land, a widow, gave birth to an illegitimate child on Dec. 28, 1958; her husband had been killed in an accident in 1953 leaving her with four children of the marriage to support. National assistance was first paid by reference to the requirements of the children under Part 2 of the National Assistance Act, 1948, on Jan. 12, 1959, and thereafter had been paid weekly. G The total assistance paid for the child amounted to £66 8s. 6d., the present weekly rate of assistance in payment was 16s. On Feb. 18, 1959, the justices heard a complaint made by the mother against the appellant under the provisions of s. 1 of the Affiliation Proceedings Act, 1957. Evidence was given by the mother and a statement was made to the court by the appellant but no other evidence was given. The justices adjudged the appellant to be the putative father of the child and made an affiliation order. The appellant appealed to quarter sessions against the determination and order and his appeal was heard by the Appeal Committee of the Quarter Sessions of the Peace for the West Riding of the county of York on Mar. 16, 1959. Evidence was given by the mother and on her behalf by her mother and two other witnesses. The appellant gave evidence and evidence was given by another witness in support of his defence, which was in substance an alibi. The appeal was allowed on the merits and the affiliation order was set aside. On the hearing of the board's complaint the board tendered evidence which corroborated the mother's evidence and destroyed the appellant's alibi, and the justices found that he was the father of the child and had ample means to remove the need of his child from national assistance. H

I It was contended by the appellant that the decision of quarter sessions was final where the appeal was upheld or dismissed on its merits, that the matter was res judicata and no further magisterial proceedings could be brought.

Section 44 of the National Assistance Act, 1948, was designed to protect the board where national assistance had been given to a person who failed to take proceedings before the justices and found herself out of time. The Act was not designed to create fresh causes of action or to enable the board to bring proceedings on behalf of a person who had already exercised her rights. It was contended by the board that their right of action under the National Assistance Act, 1948, was separate and distinct from the mother's right under s. 1 of the Affiliation Proceedings Act, 1957. Section 44 of the National Assistance Act, 1948, was a financial section giving the board the right to recover expenses. The fact that the mother had already obtained an affiliation order which had been set aside at quarter sessions did not fetter the respondent's right of action under s. 44. The board had been in a position to tender material evidence which had not been tendered by the mother to the appeal committee at quarter sessions.

The justices made the order previously stated (see p. 51, letter D, ante). The question for the opinion of the court was whether the justices had jurisdiction to hear the complaint.

M. E. Bathurst for the appellant.

J. R. Cumming-Bruce for the respondents, the National Assistance Board.

LORD PARKER, C.J., after stating the facts, continued: Counsel who appeared for the appellant admits that there was plainly evidence before the justices on which they were entitled to make the order, always on the assumption that they had jurisdiction. What is said, quite shortly, is this: that as between the parties to the original complaint, namely, Mrs. Land and the appellant, the decision of quarter sessions is final; it was a decision on the merits, and as between those two parties the position is settled. The argument in the present case is that the National Assistance Board in effect stepped into the shoes of the mother and that, accordingly, the issue is settled as between the appellant and the National Assistance Board, and the justices ought not to have proceeded further.

The relevant provisions are to be found in the Affiliation Proceedings Act, 1957, and the National Assistance Act, 1948. Turning first to the Affiliation Proceedings Act, 1957, it is provided by s. 1:

"A single woman who is with child, or who has been delivered of an illegitimate child, may apply by complaint to a justice of the peace for a summons to be served on the man alleged by her to be the father of the child."

Section 2 deals with the time within which such an application can be made, and by s. 4 it is provided, first, that the justices must hear the evidence of the mother and such other evidence as she may produce and shall also hear any evidence tendered by or on behalf of the appellant. Section 4 (2) deals with corroboration, and provides:

"If the evidence of the mother is corroborated in some material particular by other evidence to the court's satisfaction, the court may adjudge the defendant to be the putative father of the child and may also, if it thinks fit in all the circumstances of the case, proceed to make against him an order (referred to in this Act as 'an affiliation order') for the payment by him of . . ."

certain expenses and sums by way of maintenance.

The National Assistance Act, 1948, by s. 44, gives the National Assistance Board certain rights as against a putative father. By sub-s. (1) it is provided:

"The following provisions of this section shall have effect where—
(a) assistance is given under Part 2 of this Act by reference to the requirements of an illegitimate child . . ."

Subsection (2) provides as follows:

"If no affiliation order is in force, the board or local authority may within three years from the time when the assistance was given or accommodation provided make application to a court of summary jurisdiction having jurisdiction in the place where the mother of the child resides for a summons to be served under . . ."

s. 1 of the Affiliation Proceedings Act, 1957.

Section 44 (3) of the Act of 1948, which is the important provision for the purposes of this case, as modified by the Act of 1957, provides:

"In any proceedings on an application under the last foregoing subsection the court shall hear such evidence as the board or local authority may produce, in addition to the evidence required to be heard by [s. 4 of the Affiliation Proceedings Act, 1957], and shall in all other respects, but subject to the provisions of the next following subsection, proceed as on an application made by the mother under the said [s. 1]."

—that is, s. 1 of the Affiliation Proceedings Act, 1957.

I think that this much is clear and laid down by authority, that s. 44 gives to the National Assistance Board a wholly independent and separable right from that of the mother. Thus, in *National Assistance Board v. Mitchell* (1) it was held that the board's right to apply for an order under the Act of 1948 was entirely separate from the mother's right under the Bastardy Laws Amendment Act, 1872; and, provided that the board applied within three years of the date on which they last gave assistance, they were entitled to apply for an order on proving that the children were bastards in respect of whom an order could have been made under the Act of 1872, which was in force until the Affiliation Proceedings Act, 1957, was passed.

The same also appears from *National Assistance Board v. Tugby* (2), where again it was held by LYNSKEY, J. (3):

"The effect of s. 44 is to give to the board a right independent of and separable from any right given to the mother by the Bastardy Acts, and even though she herself, by effluxion of time or by marriage, has lost her right to apply."

The argument raised on behalf of the appellant stresses the fact that in both those cases the independent and separable right which was held to exist in the National Assistance Board was merely a right to apply for a summons. The argument goes on that once the justices come to hear the complaint then, except that they shall hear such evidence as the National Assistance Board may produce, they shall, in the words of s. 44 (3),

"in all other respects . . . proceed as on an application made by the mother under the said s. [1]."

Accordingly, if I may summarise the argument of counsel for the appellant, he says: true, s. 44 gives the board three separate rights. It gives them a right to apply for a summons even if the mother could not, either because she is too late or because she is no longer a single woman. Secondly, the board have a right to tender evidence themselves. Thirdly, they have a right to get an affiliation order in their favour. But again, to quote the words of sub-s. (3), "in all other respects" they have no separate rights but they step into the shoes of the mother, and stepping into the shoes of the mother they have, so the argument runs, no better right than she would have if she had made the application.

In the present case quarter sessions decided against the mother on the merits, and she is bound by that decision. Accordingly, so it is said, the board is also

(1) [1955] 3 All E.R. 291; [1956] 1 Q.B. 53.

(2) [1957] 1 All E.R. 509; [1957] 1 Q.B. 506.

(3) [1957] 1 All E.R. at p. 511; [1957] 1 Q.B. at p. 512.

bound by that decision and the justices had no right to hear and determine the case as they did. For my part, I am quite unable to accept that argument. It seems to me perfectly clear, as I have said, that s. 44 is giving a new, independent substantive right to the National Assistance Board, and I am quite unable to accept the argument that that separate independent right is limited to applying for a summons. It is a right, as it seems to me, to get an affiliation order made in their favour, independently of what right the mother would have had. True, in *National Assistance Board v. Mitchell* (4) and *National Assistance Board v. Tugby* (5) the wording in the judgments is limited to an independent and separable right to apply for a summons, but in both those cases that was the question before the court. The court was not considering and did not have to consider whether the board had the further independent right to get an affiliation order in their own favour. It seems to me to be in a high degree artificial to say that while there is a wholly separable and independent right to apply for a summons, yet when the complaint is heard, that separate and independent right is limited in the way suggested. Full effect can be given to the words of s. 44 (3) by treating the subsection as a purely procedural section. Indeed, that is how it was referred to by LORD GODDARD, C.J., in *National Assistance Board v. Mitchell* (6), where, having referred to sub-s. (2) and sub-s. (3), he said: "That seems to me to be a procedural enactment". I agree that sub-s. (3) is purely procedural and, as it seems to me, the words

"and shall in all other respects, but subject to the provisions of the next following subsection, proceed as on an application made by the mother under the said s. [1]"

are clearly necessary to ensure that the justices, inter alia, should apply the principle that corroboration in some material particular is required and, indeed, to deal with the payment of expenses and maintenance save in so far as those provisions are altered by s. 44 (4).

Accordingly, the National Assistance Board have a quite independent and separable right from the mother, not merely to apply for a summons, but to obtain an affiliation order. At no stage do they step into the shoes of the mother and the issue as between them and the putative father has not been determined, it having been long recognised that an affiliation order is not a proceeding in rem.

I would add only one further matter. Section 44 (3) is not, in my judgment, very happily worded. It commences by saying: "In any proceedings on an application under the last foregoing subsection..." The application is therefore an application for a summons, and it seems to me that sub-s. (3) must be interpreted as meaning: "In any proceedings arising out of an application for a summons". Again, in the last two lines of that subsection the words "proceed as on an application made by the mother under the said s. [1]" must mean that the court shall "proceed as on a complaint arising out of an application made by the mother."

For the reasons I have endeavoured to state I have come to the conclusion that the justices were perfectly right and that the appeal should be dismissed.

WINN, J.: I agree. I desire to add only two short observations. The first refers to the topic LORD PARKER, C.J., has discussed of the wording of s. 44 (3) of the National Assistance Act, 1948, and I pause only to observe that a somewhat similar anomaly is to be detected in the Affiliation Proceedings Act, 1957, because by s. 1 the right is given to a woman to complain by summons, and s. 4 deals with the hearing of a complaint under s. 1, whereas the substance of the matter is that the hearing referred to in s. 4 must be the hearing pursuant to the summons being issued. We have not investigated the matter, but it may

(4) [1955] 3 All E.R. 291; [1956] 1 Q.B. 53.

(5) [1957] 1 All E.R. 509; [1957] 1 Q.B. 506.

(6) [1955] 3 All E.R. at p. 293; [1956] 1 Q.B. at p. 56.

conceivably be that originally such proceedings as these took the dual form of a finding as to paternity, an adjudgment whether or not the man named in the woman's complaint was the father, followed by a complaint requiring that he show cause why he should not pay.

The other observation is this: lest it might still seem odd to anyone that the National Assistance Board should be given a right to an order wholly independent of that of the mother of the illegitimate child—a similar right being incidentally given by s. 26 of the Children Act, 1948, to local authorities—I would refer to the historical fact which emerges clearly in the judgment of LYNSEY, J., in *National Assistance Board v. Tugby* (7), that the National Assistance Act, 1948, repealed the provisions of s. 5 of the Bastardy Laws Amendment Act, 1873, an Act which itself modified the provisions of s. 8 of the Act of 1872. Thereby in effect the Act of 1948 constituted the National Assistance Board the successors to the Poor Law Guardians who, under the Act of 1873, always had an independent right to apply for a summons against a man in respect of a child which had become chargeable to the union or parish. They were entitled on proof being given as provided in the section to obtain from the justices an order that the man was the putative father and an order against him for payment of a contribution towards the maintenance of the child.

For these reasons I agree that the appeal should be dismissed.

WIDGERY, J.: I also agree.

Appeal dismissed.

Solicitors: *J. H. Milner & Son*, agents for *Green, Williamson & Way*, Wakefield (for the appellant); *Solicitor, National Assistance Board* (for the respondents).

[Reported by JENIFER SANDELL, Barrister-at-Law.]

PRACTICE DIRECTION.

CHANCERY DIVISION.

Ward of Court—Practice—Order—Order made on motion declaring infant to be ward of court—Delivery of originating summons to registrar—Law Reform (Miscellaneous Provisions) Act, 1949 (12, 13 & 14 Geo. 6 c. 100), s. 9—R.S.C., Ord. 54p.

When, on the hearing of a motion in wardship proceedings before an appointment has been obtained under R.S.C., Ord. 54p, r. 3, an order is made by a judge declaring the infant to be a ward of court, the applicant's solicitor shall thereupon hand the originating summons to the registrar for transmission by him to the judge's chambers.

By direction of RUSSELL, J.

W. F. S. HAWKINS,
Chief Master, Chancery Division.

Mar. 13, 1961.

W. v. W. (BARCLAYS BANK, LTD., Garnishee).

[COURT OF APPEAL (Holroyd Pearce, Harman and Davies, L.J.J.), February 23, 24, 1961.]

Divorce—Maintenance—Wife—Enforcement of order against husband—Garnishee proceedings—Jurisdiction of Divorce Court—R.S.C., Ord. 45—Matrimonial Causes Rules, 1957 (S.I. 1957 No. 619), r. 82.

The Divorce Division has jurisdiction to make garnishee orders, and R.S.C., Ord. 45, applies.

The Supreme Court of Judicature Act, 1873, by s. 5* and s. 16*, conferred on the judges of the Court for Divorce and Matrimonial Causes all the powers previously enjoyed by the superior courts of common law, which included the power to make garnishee orders, and, under the Supreme Court of Judicature (Consolidation) Act, 1925, which repealed and re-enacted the provisions of the Act of 1873, the Divorce Division retains jurisdiction to make such orders; r. 64 and r. 82† of the Matrimonial Causes Rules, 1957, do not exclude R.S.C., Ord. 45.

Reasoning in *Re Woolgar, Woolgar v. Hopkins* ([1942] 1 All E.R. 583) not approved.

Decision of PHILLIMORE, J. ([1961] 1 All E.R. 751) affirmed.

[As to garnishee proceedings in the Divorce Court, see 12 HALSBURY'S LAWS (3rd Edn.) 475, paras. 1062, 1063, and 16 HALSBURY'S LAWS (3rd Edn.) 79, footnote (c); and for cases on the subject, see 27 DIGEST (Repl.) 681, 6497-6499.

For the Common Law Procedure Act, 1854, s. 60-s. 67, and the Common Law Procedure Act, 1860, s. 29, s. 30, see 18 HALSBURY'S STATUTES (2nd Edn.) 444, 445, and 464.

For the Matrimonial Causes Rules, 1957, r. 64 and r. 82, see 10 HALSBURY'S STATUTORY INSTRUMENTS (First Re-issue) 250, 262.

For R.S.C., Ord. 45, see the ANNUAL PRACTICE, 1961, p. 1091.]

Cases referred to:

Edmunds v. Edmunds, [1904] P. 362; 73 L.J.P. 97; 91 L.T. 568; 27 Digest (Repl.) 681, 6499.

Giles v. Giles, [1900] P. 17; 69 L.J.P. 26; 81 L.T. 823; 27 Digest (Repl.) 268, 2148.

Patrick, In the Goods of, (1889), 14 P.D. 42; 58 L.J.P. 36; 60 L.T. 343; 23 Digest (Repl.) 294, 3605.

Whittaker v. Whittaker, (1881), 7 P.D. 15; 51 L.J.P. 80; 47 L.T. 131; 27 Digest (Repl.) 681, 6497.

Woolgar, Re, Woolgar v. Hopkins, [1942] 1 All E.R. 583; [1942] Ch. 318; 111 L.J.Ch. 209; 167 L.T. 60; 27 Digest (Repl.) 674, 6422.

Worboys v. Worboys, [1953] 1 All E.R. 857; [1953] P. 192; [1953] 2 W.L.R. 901; 3rd Digest Supp.

Interlocutory Appeal.

This was an appeal by the husband (pursuant to leave granted by the learned judge) from a judgment of PHILLIMORE, J., dated Nov. 30, 1960, and reported [1961] 1 All E.R. 751, sub nom. *W. v. W.*, whereby it was held that a garnishee order nisi made by Mr. Registrar COMPTON MILLER on Sept. 28, 1960, be made absolute. The garnishee order was in respect of arrears of maintenance payable by the husband to the wife under an order of STEVENSON, J., dated Nov. 20, 1959. The ground of appeal was that there was no jurisdiction to make the garnishee order.

Joseph Jackson for the husband, the judgment debtor.

R. J. S. Harvey for the wife, the judgment creditor.

* The relevant terms of s. 5 and s. 16 are printed at p. 57, letter F, to p. 58, letter B, post.

† The terms of r. 82 are printed at p. 58, letter H, post.

HOLROYD PEARCE, L.J.: This is an appeal from a garnishee order made by PHILLIMORE, J., against the husband in respect of arrears of maintenance. The question is whether the Divorce Court has jurisdiction to make such an order. Undoubtedly it has been making such orders for the past eighty years, but it is argued that it should not have done so. When a useful practice has been in force for so long, the court is naturally loth to hold that it is invalid on technical grounds. If there is such a defect, it can easily be set right by alteration of a rule. In 1881 SIR JAMES HANNEN, P., made such an order in *Whittaker v. Whittaker* (1). It is interesting to find in OAKLEY ON DIVORCE PRACTICE (3rd Edn.) (1889), by T. W. H. OAKLEY, chief clerk of the Divorce Registry, five pages (p. 171 to p. 176) dealing with garnishee as a method of procedure in the Divorce Division. In CABABÉ ON INTERPLEADER AND ATTACHMENT OF DEBTS (1881), at p. 147, the learned author deals with the development of garnishee proceedings from the Common Law Procedure Act, 1854, and says, at p. 148:

“Now, however, under Ord. 45 of the Rules of the Supreme Court of 1875, the practice of attachment [viz., garnishee attachment] applies to all Divisions of the High Court . . .”

In 1904, in *Edmunds v. Edmunds* (2) GORELL BARNES, J., made such an order after examining the principles involved in garnishee proceedings arising out of decrees and orders in matrimonial suits. In that case it was not argued that the court had no jurisdiction to make such an order.

The Matrimonial Causes Act, 1857, conferred no such jurisdiction on the Divorce Court. The power to make garnishee orders originated under the Common Law Procedure Act, 1854 (3), and it was amplified by the Common Law Procedure Act, 1860. That jurisdiction was only enjoyed originally by the superior courts of common law sitting at Westminster. In 1873, however, the Supreme Court of Judicature Act, 1873 (4), set up a Supreme Court consisting of two Divisions, Her Majesty's High Court of Justice, and Her Majesty's Court of Appeal. Section 5 included in the former the judges of the Court of Probate and of the Court for Divorce and Matrimonial Causes and enacted that:

“All the judges of the said court shall have in all respects, save as in this Act is otherwise expressly provided, equal power, authority, and jurisdiction . . .”

Section 16 provided:

“The High Court of Justice shall be a superior court of record, and, subject as in this Act mentioned, there shall be transferred to and vested in the said High Court of Justice the jurisdiction which, at the commencement of this Act, was vested in, or capable of being exercised by, all or any of the courts following . . .”

The Court for Divorce and Matrimonial Causes is one of those mentioned. The section continues:

“The jurisdiction by this Act transferred to the High Court of Justice shall include (subject to the exceptions hereinafter contained) the jurisdiction which, at the commencement of this Act, was vested in, or capable of being

(1) (1881), 7 P.D. 15.

(2) [1904] P. 362.

(3) The relevant sections of the Common Law Procedure Act, 1854 (s. 60-s. 67), and of the Common Law Procedure Act, 1860 (s. 29 and s. 30) were repealed by the Statute Law Revision and Civil Procedure Act, 1883, but, by s. 5 of the Act of 1883, and s. 1 of the Statute Law Revision Act, 1898, the jurisdiction thereby conferred was saved.

(4) The whole of this Act, except s. 25 (2) (which was repealed by the Limitation Act, 1939), s. 46, s. 64 and s. 66, was repealed by the Supreme Court of Judicature (Consolidation) Act, 1925; but most of the relevant provisions are replaced by the Act of 1925; see, in particular, s. 1, s. 2 (1) and (3), and s. 18 of the Act of 1925 (5 HALSBURY'S STATUTES (2nd Edn.) 340, 341, 347).

exercised by, all or any one or more of the judges of the said courts, respectively, sitting in court or chambers, or elsewhere, when acting as judges or a judge, in pursuance of any statute, law or custom, and all powers given to any such court, or to any such judges or judge, by any statute; and also all ministerial powers, duties, and authorities, incident to any and every part of the jurisdictions so transferred.”

Those terms (5) are as wide as they can be, and it seems to me inescapable that those sections conferred on the judges of the Court for Divorce and Matrimonial Causes all the powers hitherto held by the superior courts of common law, which included the power to make garnishee orders.

Section 23, which provided for the making of rules, said:

“... and where no special provision is contained in this Act or in any such rules or orders of court with reference thereto, it shall be exercised as nearly as may be in the same manner as the same might have been exercised by the respective courts from which such jurisdiction shall have been transferred, or by any of such courts.”

As no rules relating to garnishee proceedings were in force in 1881 when SIR JAMES HANNEN, P., made his garnishee order in *Whittaker v. Whittaker* (6), the presumption is that he was acting in a way as nearly as might be to the way in which the jurisdiction had been previously exercised by the superior courts of common law. The learned judge in the present case rightly observed (7):

“No court can abrogate a jurisdiction conferred by Parliament either by rule or by failure to make a rule...”

He deduced that, when the Act of 1873 came into force in 1874, the Court for Divorce and Matrimonial Causes had jurisdiction to make garnishee orders.

In 1875 the Supreme Court of Judicature Act, 1875, was passed amending the Act of 1873. It provided for Rules of Court being made and altered. Section 17 contained provision for the making of rules. That section applied to the Court for Divorce and Matrimonial Causes. Schedule 1 to the Act contained Rules of Court which were to be in force until altered by the rule-making authorities. Among the Rules of Court, in Sch. 1, was Ord. 45, which differed very little from the procedure for garnishee proceedings that had been laid down originally in the Common Law Procedure Acts, 1854 and 1860. The Supreme Court of Judicature (Consolidation) Act, 1925, repealed and re-enacted the provisions of the Act of 1873 and the Act of 1875. In my view, nothing contained in the Act of 1925 alters the position in any material respect, and the learned judge was right in saying that under that Act jurisdiction remained in the Divorce Court to make garnishee orders.

In 1924 there was first introduced into the Matrimonial Causes Rules a rule which adopted the Rules of the Supreme Court in certain respects. In the Matrimonial Causes Rules, 1924, and the Matrimonial Causes Rules, 1937, it was r. 97 and r. 81, respectively, and in the present rules, the Matrimonial Causes Rules, 1957, it is r. 82. Rule 82 says:

“Subject to the provisions of these rules and of any enactment, the Rules of the Supreme Court shall, notwithstanding the provisions of Ord. 68 thereof, apply with the necessary modifications to the practice and procedure in any cause or matter to which these rules apply.”

I read that rule as meaning this: Where the Matrimonial Causes Rules do not otherwise provide, and where a statute does not otherwise order, the Rules of the Supreme Court shall apply with necessary modifications to the practice and procedure in any cause or matter to which the Matrimonial Causes Rules apply. It is argued that that is not the right way of reading r. 82, and that it does not

(5) These provisions now appear in s. 18 (3) of the Act of 1925.

(6) (1881), 7 P.D. 15.

(7) [1961] 1 All E.R. at p. 758.

import R.S.C., Ord. 45, into a matrimonial cause because r. 64 of the Rules of 1957, which deals with enforcement of orders, makes no mention of garnishee proceedings. It is said that, by construing r. 82 and r. 64 together, their effect is that the Rules of the Supreme Court shall not apply to any matter dealt with at all by the Matrimonial Causes Rules, 1957.

Reliance is placed on a decision of SIMONDS, J., in *Re Woolgar, Woolgar v. Hopkins* (8), where he declined to apply R.S.C., Ord. 42, r. 24, to arrears of maintenance. Rule 62 of the Rules of 1937, which was similar to the present r. 64, dealt with enforcement of orders but made no reference to R.S.C., Ord. 42. Therefore SIMONDS, J., held that by implication it excluded R.S.C., Ord. 42. He said (9):

"... it is said that the result of r. 81 is to introduce the provisions of R.S.C., Ord. 42, r. 24. That rule is as follows: 'Every order of the court or a judge in any cause or matter may be enforced against all persons bound thereby in the same manner as a judgment to the same effect.' It is said that here there is an order for alimony made by the Divorce Court, and that that order can be enforced as if it were a judgment to the same effect. A judgment, of course, can be enforced by way of proof in the administration of the estate. Therefore, it is said, under this rule, the order of the Divorce Court can be enforced in this way. However, r. 81 begins with these words: 'Subject to the provisions of these rules...' I turn, therefore, to r. 62 which is the rule which deals with the enforcement of orders, and that rule prescribes the way (and, as I think, the only way) in which an order of the Divorce Court may be enforced... That rule would be wholly unnecessary if the result of r. 81 was to substitute, as a means of enforcing the orders of the Divorce Court, the provisions of R.S.C., Ord. 42, r. 24."

With all respect to the learned judge, I cannot so view this matter. The Judicature Acts were not referred to in argument, and it may be that he might have taken the contrary view if they had been. PHILLIMORE, J., in the court below in the present case, found himself unable to follow that reasoning, and observed that it was impossible, merely by an omission of the rule, to take away a jurisdiction which the court already had. Moreover, in *Giles v. Giles* (10), GORELL BARNES, J., pointed out that the Divorce Court rules are not exhaustive. Again, in this court in *In the Goods of Patrick* (11), the court applied the Rules of the Supreme Court by analogy to Divorce Court procedure where the Divorce Court procedure had not made provision for the matter. LINDLEY, L.J., there said (12):

"I think, therefore, that, by analogy, the rule to be adopted is r. 21, applicable to the masters, and not the rules applicable to chief clerks in the Chancery Division."

I cannot accept the careful argument of counsel for the husband that, since r. 64 of the Rules of 1957 refers to methods of enforcement, but is silent as to garnishee orders, it has the effect, on a proper construction of r. 82, of excluding any garnishee proceedings. Nor can I accept his argument that the jurisdiction which has been transferred to the Divorce Division by the Judicature Acts is limited to relief to be given, and excludes matters of practice and procedure. A view similar to that which I am now expressing was put forward by DAVIES, J., in *Worboys v. Worboys* (13), where he took from the Rules of the Supreme Court certain provisions for substituted service which were not embodied in the Matrimonial Causes Rules. I agree with the very careful and exhaustive

(8) [1942] 1 All E.R. 583; [1942] Ch. 318.

(9) [1942] 1 All E.R. at p. 585; [1942] Ch. at p. 320.

(10) [1900] P. at p. 18.

(11) (1889), 14 P.D. 42.

(12) (1889), 14 P.D. at p. 44.

(13) [1953] 1 All E.R. 857; [1953] P. 192.

judgment of the learned judge, PHILLIMORE, J., and in my opinion this appeal should be dismissed. A

HARMAN, L.J.: The ingenuity of counsel for the husband constitutes the only possible meritorious element in an appeal entirely without merit in other respects. It has no substance in that it would not produce any result if it succeeded; and it will make no tremor on the face of the law if it fails, as I hold that it does. B

DAVIES, L.J.: I agree.

Appeal dismissed.

Solicitors: *Michael Fox & Co.* (for the husband); *Wright & Bull* (for the wife).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*] C

ASKEW v. ASKEW.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Marshall, J.), February 10, 1961.] D

Divorce—Maintenance—Wife—Death of divorced husband—Reasonable provision for her maintenance after his death—Commencing date of payments—Whether national assistance taken into account—Matrimonial Causes (Property and Maintenance) Act, 1958 (6 & 7 Eliz. 2 c. 35), s. 3.

In August, 1944, the former wife obtained a decree absolute and in November, 1944, she obtained an order for maintenance in her favour. On Apr. 2, 1959, the former husband died leaving estate to the value of approximately £28,000. The husband disposed of his estate by a will in which he made no provision for the former wife. On Aug. 26, 1959, probate of the will was granted to the personal representatives and on Oct. 21, 1959, the former wife made an application under the Matrimonial Causes (Property and Maintenance) Act, 1958, s. 3, for "reasonable provision for her maintenance" out of the former husband's estate. The wife and the personal representatives agreed the weekly sum to be payable to the former wife out of the estate but were unable to agree the date when the payments should begin. Since the date of the former husband's death the former wife had been in receipt of national assistance. E

Held: the court would, in the exercise of its discretion under s. 3* of the Act of 1958, order the payments to begin from the date of the former husband's death, the fact that the former wife had been receiving national assistance affording no ground for postponing the date of commencement. F

[**Editorial Note.** Where a husband is living, national assistance received by the wife may be taken into account in awarding alimony pendente lite (*Sterne v. Sterne*, [1957] 1 All E.R. 792), but in such case the National Assistance Board might be entitled to be reimbursed by the husband, if, when the suit were heard, he were found, e.g., to be in desertion. The position after the husband's death is not equally clear, since s. 43 (1) of the National Assistance Act, 1948, gives only a right of complaint "against any other person . . . liable to maintain the person assisted", and the husband is dead. The matter may well also be compared with the position under the family provision legislation; see *Re Watkins* ([1949] 1 All E.R. 695) and the decisions noted in 16 HALSBURY'S LAWS (3rd Edn.) 461, 462, para. 921, note (o). G

For the Matrimonial Causes (Property and Maintenance) Act, 1958, s. 3, see 38 HALSBURY'S STATUTES (2nd Edn.) 445.] H

* By s. 3 (2) the court "may" order that "such reasonable provision for her maintenance as the court thinks fit" shall be made out of the net estate of the deceased. I

Summons adjourned into open court.

This was an application by the former wife for an order under the Matrimonial Causes (Property and Maintenance) Act, 1958, s. 3, for financial provision out of the estate of her deceased former husband.

The decree dissolving the marriage was made absolute on Aug. 30, 1944, and on Nov. 30, 1944, the former wife obtained an order for maintenance at the rate, ultimately, of £377 per annum less tax. The husband re-married in 1945 and had no children by his second wife. On Apr. 2, 1959, the husband died. By his will the husband left his estate to his widow for life with remainder to a nephew and three nieces. No provision was made for the former wife. The estate was worth approximately £28,000 on which duty of approximately £5,000 was payable. On Aug. 26, 1959, a grant of probate of the will was obtained by the personal representatives and on Oct. 21, 1959, the former wife issued a summons for the hearing of the present application. The parties agreed that the former wife should receive payment of £5 10s. per week out of the estate but were unable to agree the date when the payments should begin.

Joseph Jackson for the former wife.

J. F. Ingham for the personal representatives.

MARSHALL, J.: Section 3 (1) of the Matrimonial Causes (Property and Maintenance) Act, 1958, is in the following terms:

“Where after the commencement of this Act a person dies domiciled in England and is survived by a former wife of his who has not re-married, the former wife may apply to the High Court for an order under this section on the ground that the deceased has not made reasonable provision for her maintenance after his death: Provided that an application under this section shall not be made except—(a) before the end of the period of six months beginning with the date on which representation in regard to the estate of the deceased is first taken out, or (b) with the permission of the court, after the end of that period but before the administration and distribution of the estate have been completed.”

[His LORDSHIP stated the facts and continued:] It falls to the court to consider whether in the section itself there is any indication or guide to the proper date from which payments should be made out of the estate. The right which the former wife has established is described in s. 3 (1) as a right of “reasonable provision for her maintenance after his death”, and I have no doubt whatever that a court in its discretion would, if the circumstances of any particular case warrant it, make an order from the date of death. I do not, however, consider that there is a right arising immediately after death in all circumstances. In my judgment this section gives the court a discretion, and it would be incumbent on the court to consider all the factors in the case before deciding on any date from which the first payments under this section should be made. Counsel have suggested that there might be three dates: the first, the date of death; the second, the date of the application; and the third, the date when judgment is given.

The former wife, who has no financial resources, has been in receipt of national assistance, and the only matter that would be proper for me to consider is whether or not the fact that she has received by way of national assistance weekly payments is a matter which should in any way modify the date on which payments should begin. In my judgment in the present case if I took into consideration the question of payment of national assistance the effect would be that the estate might well benefit from the fact that the payments have been made. The payments that were made by way of national assistance are less than the payments that she would have been entitled to receive, had the former husband continued to live, under the order for maintenance made in her favour. I have considered carefully in the present case whether, because national assistance payments have been made, I should delay the commencement of my order

to a date later than the date of death. I do not, however, think that I should be justified in making any order later than the date of death. A

Accordingly, considering all the facts of this case, I have come to the conclusion that an order should now be made for the agreed figure of £5 10s. per week commencing from Apr. 2, 1959 (1). I have considered in making that order the very real possibility that the former wife may, in the light of the order that I now make, have to make some repayment to the national assistance authorities B (2). By agreement also I make an order for the payment of the costs of this application to be met out of the estate.

Order accordingly.

Solicitors: *Oswald Hickson, Collier & Co.*, agents for *Ray & Vials*, Northampton (for the former wife); *Joynson-Hicks & Co.*, agents for *Phipps & Troup*, Northampton (for the personal representatives). C

[*Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.*]

DUNN v. BLACKDOWN PROPERTIES, LTD.

 D

[CHANCERY DIVISION (Cross, J.), February 21, March 3, 1961.]

Easement—Drainage—Perpetuity—Easement commencing at uncertain future date—Right to use sewers and drains then passing or thereafter to pass under private road owned by adjacent landowners—No sewers or drains in existence at date of grant—Validity of grant—Law of Property Act, 1925 (15 & 16 Geo. 5 c. 20), s. 162 (1) (d) (iv). E

Two conveyances, dated in 1926 and 1938, of adjoining plots of land, one of which fronted on the west on a private road ("P" road), and the other of which fronted both on the P. road on the west and on another private road ("N" road) on the south, expressly purported to grant to predecessors in title of the plaintiff certain rights of way and of drainage along and under these roads, which belonged to the defendants. Each of these grants was, so far as relevant, of full right and liberty for the plaintiff's predecessor in title, his heirs and assignees in common with others having the like right and liberty, to use the sewers and drains then passing or thereafter to pass under the roads or any part thereof. Neither in 1926 nor in 1938 were there any sewers or drains passing under either road. Subsequently the defendants constructed (a) a surface water sewer along P. road and (b) a soil sewer which ran southwards along P. road for some distance past part of the northern of the plaintiff's plots, and then turned westwards on to other land of the defendants. The plaintiff claimed that she had the right to connect the drains from any house which she might build on either of her plots with any sewers belonging to the defendants or their successors in title which might then be in P. road, and in particular with the soil sewer already in existence. F

Held: (i) the purported grants of easements of drainage in the conveyances of 1926 and 1938 were void as infringing the rule against perpetuities because, as it was for the owners of the soil of the roads to decide whether a sewer should pass under the roads in future, the grants were of easements to arise at an uncertain future date. G

South Eastern Ry. Co. v. Associated Portland Cement Manufacturers (1900), Ltd. ([1910] 1 Ch. 12) and *Sharpe v. Durrant* ((1911), 55 Sol. Jo. 423) considered. H

(ii) the grants were not validated by the Law of Property Act, 1925, s. 162 (1) (d). I

(1) The former husband died on Apr. 2, 1959.

(2) As regards the recovery of national assistance expenses by the National Assistance Board, see 27 HALSBURY'S LAWS (3rd Edn.) 485.

(iii) on the true construction of the grants the right of each grantee would have been (if the grants had been valid) to use the sewers under P. road notwithstanding that the sewers passed under land of the defendants other than the soil of P. road.

[As to interests subject to the rule against perpetuities, see 29 HALSBURY'S LAWS (3rd Edn.) 290, para. 581; and for cases on the subject, see 37 DIGEST 90, 273, 274.

For s. 162 of the Law of Property Act, 1925, see 20 HALSBURY'S STATUTES (2nd Edn.) 769.]

Cases referred to:

Sharpe v. Durrant, (1911), 55 Sol. Jo. 423; *affd.*, [1911] W.N. 158; 37 Digest 90, 273.

South Eastern Ry. Co. v. Associated Portland Cement Manufacturers (1900), Ltd., [1910] 1 Ch. 12; 79 L.J.Ch. 150; 101 L.T. 865; 74 J.P. 21; 37 Digest 80, 200.

Tulk v. Moxhay, (1848), as reported in 1 H. & Tw. 105; 18 L.J.Ch. 83; 13 L.T.O.S. 21; 47 E.R. 1345; 30 Digest (Repl.) 424, 669.

Action.

The plaintiff, Patience Louise Dunn, the owner in fee simple of two pieces of land shown and coloured pink and blue on the plan annexed to the writ which fronted on to land owned in fee simple by the defendants, Blackdown Properties, Ltd., and coloured hatched brown in the said plan being a private road known as Pine Tree Hill, claimed (i) a declaration that the plaintiff was entitled to a right of way from the pink land and the blue land (and every part thereof) over and along Pine Tree Hill for herself and her successors in title and all persons authorised by her or them at all times by day or night and for all purposes with or without horses or other animals, carts, carriages, wagons and other vehicles; (ii) a consequential injunction to restrain the defendants from interfering with the reasonable enjoyment of that right; (iii) a declaration that the plaintiff was entitled to the right for herself and her successors in title and all persons authorised by her or them (in common with others having the like right) to use the sewers and drains then passing or thereafter to pass under Pine Tree Hill or any part thereof in connexion with the pink land and the blue land.

The plaintiff became owner of the fee simple of the pink land and the blue land by conveyance dated Sept. 20, 1945.

As regards the measure of access to Pine Tree Hill claimed by the plaintiff, the parties agreed that the plaintiff was entitled to such access from the pink land and blue land as was reasonable having regard to the state of her property from time to time and that the access at present available, consisting of two gateways marked on the plan, was reasonable as things were at present. The issue, accordingly, only arose as to claim (iii).

The facts appear in the judgment.

Sir Lynn Ungood-Thomas, Q.C., and *F. B. Alcock* for the plaintiff.

Nigel Warren, Q.C., and *A. J. Balcombe* for the defendants.

Cur. adv. vult.

Mar. 3. CROSS, J., read the following judgment: The plaintiff, Patience Louise Dunn, is the owner of the fee simple in two plots of land at Pyrford, between Woking and Byfleet, which are coloured pink and blue on the plan annexed to the writ. Both plots have a frontage on the west to a private road called Pine Tree Hill, which belongs to the defendants, Blackdown Properties, Ltd. After running southwards past the pink land and then past the blue land, Pine Tree Hill joins another private road called Norfolk Farm Road, which runs eastwards from the point of its junction with Pine Tree Hill, along the southern frontage of the blue land, into a public road called the Old Woking Road.

The conveyances of the pink land and the blue land to the plaintiff's predecessors in title contain certain rights over Pine Tree Hill and Norfolk Farm Road to which the plaintiff is now entitled and to which I must refer in detail. By a conveyance made on Dec. 17, 1926, a Mr. Sugden conveyed to a Mr. Freemantle, who was a predecessor in title of the plaintiff, first, the pink land and, secondly, full right and liberty for Mr. Freemantle, his heirs and assigns and all persons authorised by him or them in common with others having the like right and liberty at all times thereafter by day or by night and for all purposes with or without horses or other animals, carts, carriages, wagons and other vehicles to go, return, pass and repass along, over and on the roads coloured brown on the plan to the conveyance, and also full right and liberty for Mr. Freemantle and such persons as aforesaid, in common with others having the like right and liberty, to use the sewers and drains then passing or thereafter to pass under the said roads or any part thereof. The roads coloured brown on the plan to that conveyance were: (a) the part of Pine Tree Hill which abuts on the pink land; (b) a further part of Pine Tree Hill running southwards past the blue land to Norfolk Farm Road; and (c) the part of Norfolk Farm Road which runs eastward from the junction with Pine Tree Hill to the Old Woking Road.

By a conveyance made on Jan. 11, 1938, a Mr. Maides and a Mr. Taylor conveyed to a Mr. Downes, who was a predecessor in title of the plaintiff, the blue land together with full right and liberty for Mr. Downes and his successors in title and all persons authorised by him at all times thereafter by day or by night and for all purposes with or without horses or other animals, carts, carriages, wagons or other vehicles to go, return, pass and repass over and along so much of the roads known as Norfolk Farm Road and Pine Tree Hill as were coloured brown on the plan thereon and also full right and liberty for Mr. Downes and such persons as aforesaid in common with others having the like right and liberty to use the sewers and drains then passing or thereafter to pass under the said roads or any part thereof. The roads which were coloured brown on the plan to that conveyance were: (a) the part of Pine Tree Hill running past the blue land, and (b) the part of Norfolk Farm Road running eastwards from its junction with Pine Tree Hill to the Old Woking Road. The defendants are the owners of the soil of Pine Tree Hill.

The pleadings raise two issues between the parties. The first is as to the measure of access to Pine Tree Hill to which the plaintiff is entitled, and the second is as to her rights of drainage, but when the case came on it appeared that there was really no dispute between the parties on the first point. Counsel on both sides agreed that the plaintiff was entitled to such access from the pink and blue land to Pine Tree Hill as was reasonable, having regard to the state of her property from time to time, and that the access at present available, which is through two gateways marked on an agreed plan, is reasonable as things are at present.

The facts with regard to the drainage are as follows. Neither on Dec. 17, 1926, nor on Jan. 11, 1938, were there any sewers or drains passing under the lands coloured brown on the respective conveyances or any part of such lands through which the respective vendors had any right to discharge drainage. At some date (1) after Jan. 11, 1938, the defendants or their predecessors in title constructed: (a) a surface water sewer along Pine Tree Hill, which is coloured blue on the agreed plan, and (b) a soil sewer coloured red on the agreed plan which passes from the defendants' land lying immediately to the north of the pink land into Pine Tree Hill, runs southward along Pine Tree Hill for some distance past part of the pink land, and then turns westwards on to other land of the defendants lying on the farther side of the road. From that point it runs on downhill to join a sewer in another road considerably further to the west. The plaintiff does not at present need any drainage facilities over Pine Tree Hill, but she claims that she has the right to connect the drains from any houses which she may hereafter

(1) About November or December, 1958.

build on this pink or blue land with any sewers belonging to the defendants or their successors in title which may then be in Pine Tree Hill, and in particular with the sewer coloured red on the agreed plan.

In answer to that claim the defendants plead: (i) that in so far as the conveyances dated Dec. 17, 1926, and Jan. 11, 1938, purported to grant to the predecessors in title of the plaintiff the right to use sewers and drains thereafter to pass under the roads therein mentioned as opposed to rights to use any sewers and drains then in existence, the respective grants were void as infringing the rule against perpetuities; and, alternatively (ii) that the plaintiff is not entitled to use any part of the sewers or drains under the said roads if by doing so she will thereby necessarily use the sewers and drains passing under other parts of the defendants' land in respect of which the plaintiff has no right of drainage. The defendants, that is to say, contend that, if the grants are not void for perpetuity, the only sewer through which the plaintiff would be entitled to pass her sewage would be one running along Pine Tree Hill to the junction of Norfolk Farm Road and then down Norfolk Farm Road into a public sewer in the Old Woking Road. She would, they say, have no right to use a sewer such as that coloured red on the agreed plan, which leaves Pine Tree Hill and passes over other land of the defendants on its way to a public sewer.

Subject to the operation of s. 162 of the Law of Property Act, 1925, with which I will deal later, there is no doubt that the rule against perpetuities applies to grants of easements. It follows that, where the grant is not immediate but is of an easement to arise in the future, it will be void unless it is limited to take effect only within the perpetuity period. It is not, however, always easy to decide whether the grant in question is of an immediate right or of a right to arise in the future. The difficulty may be illustrated by comparing *South Eastern Ry. Co. v. Associated Portland Cement Manufacturers (1900), Ltd.* (2), with *Sharpe v. Durrant* (3). The facts in the former case were that, by a conveyance made on Dec. 31, 1847, one John Hales Calcraft conveyed to the South Eastern Railway Company a strip of land to be used by them as a railway line reserving to himself, his heirs, appointees and assigns inter alia the right to construct at his or their expense a tunnel or archway under the proposed railway where it passed or was intended to pass through or over the land thereby conveyed. In 1907 the defendants, who were assignees of the benefit of this reservation wished to construct a tunnel under the railway line, but the railway company claimed, among other things, that the reservation was void for uncertainty and for perpetuity. SWINFEN EADY, J., held that the reservation was not void for uncertainty, since it was for Mr. Calcraft or his assigns to decide where the tunnel was to be built when he or they wished to build it. He dealt with the objection of perpetuity in two ways. First, he held that the right reserved was an immediate easement and not an easement to arise in the future whenever Mr. Calcraft or his assigns decided to build the tunnel. Secondly, he pointed out that, as the plaintiff railway company was one of the original contracting parties, the agreement could be enforced against it by the assignee of the benefit of it without regard to the rule against perpetuities. The case went to the Court of Appeal (4) which affirmed the judgment on this latter ground without expressing any view on the question whether the reservation was of an immediate or a future easement.

The facts in *Sharpe v. Durrant* (3) were that in 1889 a vendor conveyed to a purchaser a strip of land for a tramway, reserving the right to cross the line at two points to be selected by him, and the purchaser covenanted to provide crossings at those points. In 1892 the vendor selected one crossing point and notified his selection to the purchaser, but no crossing was made. The purchaser subsequently sold the strip to the defendant. WARRINGTON, J., held that the reservation was void for perpetuity on the ground that, until the selection was made, no easement was created. He went on, however, to hold that the covenant

(2) [1910] 1 Ch. 12.

(3) (1911), 55 Sol. Jo. 423.

(4) [1910] 1 Ch. 27.

to provide crossings implied a negative undertaking not to interfere with the crossing which bound the land in the hands of the defendant under the doctrine of *Tulk v. Moxhay* (5). This judgment in *Sharpe v. Durrant* (6) was affirmed by the Court of Appeal (7), but there is no report showing whether or not that court accepted the judge's view that the reservation was void for perpetuity.

I do not find the views expressed by SWINFEN EADY, J., and WARRINGTON, J., as to the effect, from the point of view of perpetuity, of a right given to the grantee to select the site of an easement at all easy to reconcile. I do not think, however, that I am compelled to choose between them in this case. If there had been a sewer under Pine Tree Hill at the dates of the grants to her predecessors in title the plaintiff could have claimed, on authority of the *Associated Portland Cement* case (8), that the owners of the pink and blue land had from the first a right exercisable at any time to make connexions with and use that sewer or any sewer substituted for it, but, as there was no sewer under the road, the plaintiff must rely on the words "or hereafter to pass". It is not for the owners of the pink or blue land to decide whether or not a sewer will or will not pass under the road in the future. That is for the owners of the road to decide, and I do not see how this part of the right granted can be treated as anything but the grant of an easement to arise at an uncertain date in the future.

Counsel for the plaintiff submitted that in the *Associated Portland Cement* case (8) the right to construct the tunnel only arose if the railway company decided to build the railway and that SWINFEN EADY, J., must have thought that this fact did not make the reservation bad for perpetuity. I do not so read the facts or the judgment. It is to my mind reasonably clear that the reservation in question was of an immediate right to build a tunnel exercisable as from the date of the conveyance to the railway company, whether or not a railway was built. Counsel for the plaintiff next argued that, assuming that the grants would have been void at common law, they were saved by s. 162 (1) of the Law of Property Act, 1925. Subsection (1) starts with these words:

"For removing doubts, it is hereby declared that the rule of law relating to perpetuities does not apply and shall be deemed never to have applied . . ."

There follow three sub-heads (a), (b) and (c), which deal with rights, powers or rentcharges given by way of indemnity against payment of a rent. Then sub-head (d), which is the material sub-clause for present purposes, is in the following terms:

"To any grant, exception, or reservation of any right of entry on, or user of, the surface of land or of any easements, rights, or privileges over or under land for the purpose of—(i) winning, working, inspecting, measuring, converting, manufacturing, carrying away, and disposing of mines and minerals; (ii) inspecting, grubbing up, felling and carrying away timber and other trees, and the tops and lops thereof; (iii) executing repairs, alterations, or additions to any adjoining land, or the buildings and erections thereon; (iv) constructing, laying down, altering, repairing, renewing, cleansing, and maintaining sewers, watercourses, cesspools, gutters, drains, water-pipes, gas-pipes, electric wires or cables or other like works."

It is to be observed that sub-heads (i) and (ii) merely deal with rights of entry or easements which are ancillary to grants of other property. They pre-suppose grants of minerals or timber which are not themselves void for perpetuity and are directed to making it clear that the fact that the rights of entry or easements given to enable the grantee to get the minerals or timber may not be exercised for many years after the original grants is not to make the ancillary rights void for perpetuity. Similarly sub-head (iii) pre-supposes that the grantee has an interest in the adjoining land which is itself not void for perpetuity. He is given a right of entry or easement over the servient land for the purpose of doing the work referred to on this adjoining land, and the fact that these rights may be

(5) (1848), 1 H. & Tw. 105.

(7) [1911] W.N. 158.

(6) (1911), 55 Sol. Jo. 423.

(8) [1910] 1 Ch. 12.

exercisable from time to time in the indefinite future is not to be treated as making the grant of them void for perpetuity. Having regard to the context in which it appears, I doubt very much whether sub-head (iv) was intended to do more than make it clear that, if A had a right of drainage or some similar right over the land of B itself which was not itself void for perpetuity, ancillary rights of constructing and repairing works to make the basic right effective were not to be treated as void for perpetuity because they might be exercised outside the perpetuity period. To construe this sub-head as validating grants of rights of drainage or similar rights to arise at some uncertain date in the future would lead to very odd results. Suppose, for example, a grant to landowner A that, if at any time landowner B or his successors in title should construct a road from point X on the border of A's land to point Y on the other side of B's land, A and his successors in title should be entitled to use the road and to construct and use a drain from their land running to it, then if this sub-head means what counsel for the plaintiff says it means the grant of the right of drainage would be good although the grant of the right of way was bad.

Counsel for the plaintiff, however, urges that, whatever the draftsman of the Act may have meant, the words "any easements . . . for the purpose of . . . constructing . . . sewers" naturally include the grant of a right of drainage, and I am prepared to assume for the purpose of this judgment that this is so. Even on that footing, however, I cannot see how the plaintiff can succeed. She is not simply claiming a right to construct and use a drain running under Pine Tree Hill. She is claiming a right to construct a drain from her land to join a sewer already constructed by the owners of the soil of Pine Tree Hill and to use that sewer. I cannot see how the right to user of this sewer, if void for perpetuity apart from s. 162, can be validated by that section. Counsel for the plaintiff urged that the only right which his client needed to claim was a right to construct a drain to join the defendants' sewer. She would not, he said, be concerned with what happened to her sewage after it reached the defendants' sewer. I cannot accept this submission. The right to construct a drain to join the defendants' sewer would be useless to the plaintiff without the further right to use the defendants' sewer.

Having regard to the view which I have formed on the perpetuity point, it is not strictly necessary for me to say anything on the other point, but, in case the case goes further, it is perhaps right that I should deal with it. In the ordinary case which the forms in the books of precedents have in mind one has a row of houses adjoining a street and a sewer running under the whole length of the street. The words used here are not designed to meet a case such as this where, having regard to the lie of the land, the sewer turns away from the street and runs across country under adjoining land of the servient owner. The question is whether in these circumstances the words "passing under" should be construed as "exclusively passing under". On the whole I think not. In cases of doubt a grant should be construed against the grantor and I see no sufficient reason why, had the sewer coloured red been in existence at the date of the grant, the plaintiff should not have been entitled to join up with it and use it, even though it passes in part under the land of the defendants' other than Pine Tree Hill. I would add that in saying this I assume: (a) that the sewer in question passed exclusively over the land of the defendants on its way to the defendants' sewer and not also over the land of third parties; and (b) that the plaintiff did not propose to put a quantity of sewage into the sewer which was greater than it could reasonably bear having regard to its other commitments at the time. I say nothing about what the position would be if these assumptions were not correct.

In the result I hold that the action fails on this question.

Order accordingly.

Solicitors: *Griffinhoofe & Co.* (for the plaintiff); *Herbert Baron & Co.* (for the defendants).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

TOWERS & CO., LTD. v. GRAY.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Winn and Widgery, JJ.), March 1, 2, 1961.]

Trade Mark—False trade description—"Possession"—Goods of appellant company deposited in cold store of cold storage company—Weight of goods wrongly stated by producer on wrapped goods—Whether goods were in the possession of the appellant company while in the cold store—Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), s. 2 (2), as amended by Merchandise Marks Act, 1953 (1 & 2 Eliz. 2 c. 48), s. 4.

The appellant company carried on the business of wholesale butchers and from time to time deposited perishable goods in the adjacent cold store of a cold storage company on terms that the cold storage company had a lien for its charges but the appellant company could remove them within certain hours on production of a voucher. A producer supplied the appellant company with frozen chickens wrapped in bags and packed into cartons, the net weight of each chicken being marked inside the bags. The producer had marked incorrect weights, and these amounted to a false trade description. On delivery to the appellant company the chickens were signed for and directed to the cold store where they were deposited. The appellant company was convicted by justices of having in its possession for the purpose of trade prepacked frozen chickens to which a false trade description was applied contrary to s. 2 (2) of the Merchandise Marks Act, 1887*, as substituted by s. 4 of the Merchandise Marks Act, 1953. The appellant company appealed on the ground that the chickens were not in its possession while deposited in the cold store.

Held: the meaning of the word "possession" depended on the context in which it was used and both in the commercial world and in the criminal law the word could cover cases where a man's goods were in the custody of a bailee from whom he had a right to recover the goods on demand; in the present case the goods, while deposited in the cold store, were in the possession of the appellant company for the purposes of s. 2 (2) of the Merchandise Marks Act, 1887, as substituted, and the appellant company had been rightly convicted.

Dictum of BRANSON, J., in *City Fur Manufacturing Co., Ltd. v. Fureenbond (Brokers) London, Ltd.* ([1937] 1 All E.R. at p. 802), and *R. v. Sleep* ((1861), 8 Cox, C.C. 472) applied.

Dicta of VISCOUNT READING, C.J., in *Webb v. Baker* ([1916] 2 K.B. at p. 758) and of VISCOUNT CALDECOTE, C.J., in *Oliver v. Goodger* ([1944] 2 All E.R. at p. 482) applied.

Appeal dismissed.

[As to sale under false trade descriptions, see 10 HALSBURY'S LAWS (3rd Edn.) 686, para. 1315; and for cases on the subject, see 43 DIGEST 241, 242, 852-861.]

As to the meaning of possession, see 29 HALSBURY'S LAWS (3rd Edn.) 363, 364, para. 720; and for cases on the subject, see 37 DIGEST 157, 158, 27-30.

For the Merchandise Marks Act, 1887, s. 2 (2), see 25 HALSBURY'S STATUTES (2nd Edn.) 1114.

For the Merchandise Marks Act, 1953, s. 4, see 33 HALSBURY'S STATUTES (2nd Edn.) 920.]

Cases referred to:

Ancona v. Rogers, (1876), 1 Ex.D. 285; 46 L.J.Q.B. 121; 35 L.T. 115; 7 Digest 113, 666.

City Fur Manufacturing Co., Ltd. v. Fureenbond (Brokers) London, Ltd., [1937] 1 All E.R. 799; Digest Supp.

*The relevant terms of s. 2 (2) as substituted by s. 4 of the Merchandise Marks Act, 1953, are set out at p. 71, letter C, post.

Oliver v. Goodger, [1944] 2 All E.R. 481; 109 J.P. 48; 2nd Digest Supp.

R. v. Sleep, (1861), Le. & Ca. 44; 30 L.J.M.C. 170; 4 L.T. 525; 25 J.P. 532; 8 Cox, C.C. 472; 15 Digest (Repl.) 863, 8295.

R. v. Sunley, (1859), Bell, C.C. 145; 33 L.T.O.S. 154; 23 J.P. 310; 8 Cox, C.C. 179; 15 Digest (Repl.) 863, 8292.

Slatcher v. George Mence Smith, Ltd., [1951] 2 All E.R. 388; [1951] 2 K.B. 631; 115 J.P. 438; 2nd Digest Supp.

United States of America & Republic of France v. Dollfus Mieg et Compagnie S.A. & Bank of England, [1952] 1 All E.R. 572; [1952] A.C. 582; 3rd Digest Supp.

Webb v. Baker, [1916] 2 K.B. 753; 86 L.J.K.B. 36; 115 L.T. 630; 80 J.P. 449; 25 Digest 110, 346.

Case Stated.

This was an appeal by Towers & Co., Ltd., by way of Case Stated by the justices for the City of Leicester before whom an information had been preferred by the respondent William Gray, the chief inspector of the City of Leicester weights and measures department, on July 6, 1960, against the appellant company. The information charged that the appellant company on June 10, 1960, did have in its possession for the purpose of trade certain goods, namely, thirty-nine prepacked frozen chickens to which a false trade description was then applied, namely, each of the wrappings within which was a frozen chicken was marked with the net weight of the chicken within the wrapper whereas in fact the minimum net weight of each chicken was less than that marked, contrary to s. 2 (2) of the Merchandise Marks Act, 1887, as amended by s. 4 of the Merchandise Marks Act, 1953.

The justices heard the information on Oct. 4, 1960, and found the following facts. The appellant company leased premises for the purpose of its business as wholesale butchers from the Leicester Pure Ice & Cold Storage Co., Ltd. The leased premises were adjacent to but separate from premises used as a public cold store or refrigeration plant operated by the cold storage company, the leased premises and the cold store being part of the same property. The conditions on which goods were accepted by the cold storage company for deposit were that all goods were received at the owner's risk and were received subject to a general lien for all charges accrued or accruing against the owner or storer or for other moneys due. The appellant company had the right to remove goods to other cold stores or to change the charges for storage. It had the right to remove goods found to be offensive and transfers were allowed subject to a general lien on the goods transferred, for all sums due from the owner. Production of a voucher would be deemed sufficient evidence of ownership to authorise delivery of the goods to the bearer thereof. Certain hours were fixed for deposit and removal of goods from the store.

The appellant company from time to time in the course of its business used the cold store for the purpose of depositing therein perishable goods bought and to be sold by the appellant company in the course of its business but leased no specific space therein. On May 26, 1960, a consignment of frozen chickens was received into the cold store from an independent carrier for the appellant company. The consignment consisted of sixty cartons of which twenty were identified by the code number 184/25. Each carton contained eight chickens and each chicken was packed on a tray and wrapped in cellophane. Receipts signed by employees of the cold storage company were given to the carrier and the appellant company. The chickens were consigned by the head office of the appellant company to its branch at Leicester and receipt thereof at Leicester was duly signed for by the branch manager. Thereafter the chickens were immediately placed in the cold store and signed for in the manner set out above. The producer who supplied the appellant company with the chickens identified by the code number 184/25 had marked the net weight of each chicken on its

container. The producer's scales were inaccurate. In order to take away goods from the cold store an indent system was used whereby the owner of goods gave an indent to the cold storage company specifying the goods to be collected. The cold storage company kept the indent and gave the owner a delivery note on to which the contents of the indent had been copied. On May 27 and 28, 1960, the appellant company notified the Leicester manager of reported shortages of weight of chickens, and advised him to weigh all his deliveries and to make a note of any shortages discovered so that a claim from the supplier could be made. The appellant company's Leicester manager gave instructions that each carton of chickens or any smaller quantity ordered be weighed in bulk before sale, and that customers be warned to weigh individually and mark the correct weight on each container before retail sale. The appellant company's London manager gave instructions for random check-weighing of chickens but at no stage in the handling of poultry by the appellant company was provision made for each chicken to be weighed individually before sale. The appellant company distributed about two thousand cases of frozen poultry each week. On June 10, 1960, an inspector of weights and measures visited the premises of the appellant company at Leicester and asked to check-weigh frozen chickens. The appellant company's manager made arrangements with the cold storage company for chickens to be produced for the inspector for check-weighing. These arrangements were made orally and no indents were made out. The inspector check-weighed six cartons out of those identified by the code number 184/25; of these forty-eight chickens so weighed, thirty-nine were of less weight than that marked on them, the others being correct or overweight. The weighing took place in the ante room to the cold store which was part of the premises of the cold storage company. From the time the chickens were removed from the deep freeze until they were returned after the weighing, an employee of the appellant company was present and no employee of the cold storage company was present all the time (although one such was present at intervals).

It was contended on behalf of the appellant company that there was no evidence that it had the chickens in its possession on the material date and the submission that there was no case to answer should have been upheld; that the evidence showed that at the material date the chickens were in the possession of the cold storage company under a contract of bailment giving not only custody and control but legal possession and a possessory lien; that, even if the chickens had been in its possession, they were not so for the purpose of trade, and that the appellant company only intended to sell them after removing them from the cold store, weighing and delivering them with an invoice showing the true weight with an oral caution that they should be weighed individually and the labels altered before retail sale.

It was contended on behalf of the respondent that on the facts even if the chickens were bailed to the cold storage company the appellant company had the right to their possession, which was exercised when the inspector asked the manager if he could weigh the chickens; and that on the facts the appellant company could not rely on s. 2 (2) (b) of the Merchandise Marks Act, 1887.

The justices were of opinion that the chickens were immediately available on demand by the appellant company which used the cold store not only as a place in which to preserve the goods but as a warehouse in which to store them, and that they were in its constructive possession for the purpose of its trade. The contract between the cold storage company and the appellant company, in excluding all risks incident to bailment in normal warehousing, contemplated only the holding of the goods for refrigeration subject to their return to the owner in normal business hours. At the time of weighing, the chickens were in the actual possession of the appellant company for the purpose of trade. The words in the information "at their branch depot at East Street, Leicester" were surplusage and it was immaterial whereabouts the appellant company was in possession of the goods for the purpose of trade. The defence in s. 2 (2) (b) of the Act of

1887 was not satisfied in accordance with *Slatcher v. George Mence Smith, Ltd.** The justices therefore convicted and fined the appellant company.

The question for the opinion of the court was whether the justices came to a correct determination of the law.

Joseph Dean for the appellant company.

Paul Wrightson for the respondent.

LORD PARKER, C.J., having stated the facts, continued: The real point in this case concerns the question whether the chickens while in the refrigerators belonging to the cold storage company were in the possession of the appellant company. Section 4 of the Merchandise Marks Act, 1953, inserted a new s. 2 (2) into the Merchandise Marks Act, 1887, and the relevant words for this purpose are as follows:

“(2) Every person who sells, or exposes for, or has in his possession for, sale, or any purpose of trade or manufacture, any goods or things to which any forged trade mark or false trade description is applied, or to which any trade mark or mark so nearly resembling a trade mark as to be calculated to deceive is falsely applied, as the case may be, shall [unless he can substantiate one of two defences there set out] be guilty of an offence against this Act.”

The term “possession” is always giving rise to trouble. As **VISCOUNT JOWITT** said in *United States of America & Republic of France v. Dollfus Mieg et Compagnie, S.A. & Bank of England* (1):

“The person having the right to immediate possession is, however, frequently referred to in English law as being the ‘possessor’—in truth, the English law has never worked out a completely logical and exhaustive definition of ‘possession’.”

For my part I approach this case on the basis that the meaning of “possession” depends on the context in which it is used. Thus its meaning was dealt with in connexion with the Bills of Sale Act, 1854, in *Ancona v. Rogers* (2). Again, in *United States of America & Republic of France v. Dollfus Mieg et Compagnie, S.A. & Bank of England* (3), to which I have referred, the meaning of “possession” was dealt with in connexion with the law of foreign sovereign immunity. In each case the meaning must depend, in my judgment, on the context in which the word is used. In some contexts, no doubt, a bailment for reward subject to a lien, where, perhaps, some period of notice has to be given before the goods can be removed, could be of such a nature that the only possession that there could be said to be, would be possession in the bailee. In other cases it may well be that the nature of the bailment is such that the owner of the goods who has parted with the physical possession of them can truly be said still to be in possession.

In the present case we are dealing with a penal statute which deals with the sellers of goods, and it is to be observed that possession in the eyes of the commercial community, at any rate, is a word perfectly apt to cover an owner of goods who has those goods warehoused or in the hands of some third person. That appears from the judgment of **BRANSON, J.**, in *City Fur Manufacturing Co., Ltd. v. Furenbond (Brokers) London, Ltd.* (4). The facts of the case do not matter. The question was what was meant by “possession” in the Sale of Goods Act, 1893, s. 25. **BRANSON, J.**, in that case refers to the fact that the Factors Act, 1889, s. 1 (2), had defined “possession” as including possession by another person on behalf of the person whose possession was material. He took the view that in dealing with the Sale of Goods Act, 1893, (5), there was no

* [1951] 2 All E.R. 388; [1951] 2 K.B. 631.

(1) [1952] 1 All E.R. at p. 581; [1952] A.C. at p. 605. (2) (1876), 1 Ex.D. 285.

(3) [1952] 1 All E.R. 572; [1952] A.C. 582. (4) [1937] 1 All E.R. 799.

(5) For s. 25, see 22 **HALSBURY'S STATUTES** (2nd Edn.) 1002.

reason why the same meaning should not be given to the word "possession". A He said this (6):

"Possession by an agent, possession by a warehouseman or mercantile agent, is a perfectly well-known form of possession in the business world, and I can see no reason for confining the meaning of it to personal possession or actual possession of the person who has sold the goods."

There one has a meaning put on the word "possession" that is common in the commercial world.

Dealing with the criminal aspect of the matter, we have been referred to *R. v. Sleep* (7). In that case the prisoner was charged with being in possession of naval stores marked with the broad arrow. He was an ironmonger and brazier of Plymouth, and he delivered on the quay for the captain of a coasting vessel a cask containing copper to be carried from Plymouth to Helston in Cornwall. In order to prove the offence it was necessary to prove, first, that he was in possession of the contents, which were copper bolts, and second, that he knew that the copper was marked with the broad arrow. The matter was put in the form of separate questions to the jury. The jury found that he was in possession, but they said that they had not sufficient evidence to show that he knew the copper had the broad arrow on it. The case was reserved for the opinion of the court consisting of COCKBURN, C.J., POLLOCK, C.B., MARTIN, B., CROMPTON, J., and WILLES, J. It is to be noted that COCKBURN, C.J. (8), began his judgment by saying that he felt bound to say that on the evidence

"the jury might well and reasonably have been called upon to conclude, that the prisoner knew that the copper bolts were marked with the broad arrow while in his possession."

He then goes on to say that the jury, however, had not so found and that on the findings of the jury the prisoner ought not to have been convicted. POLLOCK, C.B., was of the same opinion, but when MARTIN, B., came to deliver judgment, he went further; he said (9):

"I think that [the verdict] was wrong in two particulars. First, I think the goods were not found in the prisoner's possession at all. In my judgment 9 & 10 Will. 3 c. 41, s. 2, means that the goods must be found in the possession of the individual on his trial. If he has parted with possession of them, and they are found, as in this case, in the custody of the captain of a vessel, I do not think he could be found guilty upon this enactment."

CROMPTON, J. (9), referred to that point which had been taken by MARTIN, B., and he clearly doubted the validity of the point. However, he found it unnecessary to give any opinion whether "the possession of a bailee, like a ship's captain, is the possession of the prisoner". WILLES, J. (10), went further and said that in his view

"'Possession' means not merely manual possession, but a property in the thing, though in the custody of another person."

There having been that division of opinion, COCKBURN, C.J., added to his judgment by saying (10):

"I certainly understood that the question whether the possession was sufficiently proved to be in the prisoner in this case was not part of the matter submitted or to be adjudicated upon by us. Lest I should be considered as sharing in the opinion of my brother MARTIN, I must say that I hold a diametrically opposed opinion upon it, and I do so because the point has been already expressly decided by this court in the case of *R. v. Sunley* (11), which was precisely similar to this in all its circumstances, and in which

(6) [1937] 1 All E.R. at p. 802.

(8) (1861), 8 Cox, C.C. at p. 478.

(10) (1861), 8 Cox, C.C. at p. 480.

(7) (1861), 8 Cox, C.C. 472.

(9) (1861), 8 Cox, C.C. at p. 479.

(11) (1859), 8 Cox, C.C. 179.

it was held by this court that where the stores were in the possession of a railway company to which they had been sent by the prisoner for the purpose of being conveyed to another place, the possession of the railway company was the possession of the prisoner, and that he was rightly convicted under this statute."

I have referred to those two cases because it seems to me that both in the commercial world and in connexion with the criminal law, "possession" has been given a broad interpretation covering something more than actual physical possession, covering cases where, at any rate, a man has the right on demand to recover goods from a bailee.

We have been referred to other cases, in particular to two decisions of this court. In *Webb v. Baker* (12), this court had to consider the position of a seller of goods which had been rejected by the buyer and remained on the buyer's premises. The goods in question were rabbits, and the sellers were charged with having in their possession food which was diseased or unsound. The question was whether the sellers on rejection while under an obligation to remove the rabbits were in possession of them, and VISCOUNT READING, C.J., in giving the judgment of the court, said this (13):

"Upon the second point we have come to the conclusion that there was no evidence to justify the finding that the rabbits were at the material time in the possession of the appellant. There is no doubt considerable force in the contention, based upon a strict and somewhat narrow construction of the word 'possession', that there was sufficient evidence to support the justices' finding; but in our view the word 'possession' in s. 117 [of the Public Health Act, 1875] should be given a popular, and not a narrow, construction, and, giving the word that construction, we cannot say that the rabbits were in the possession of the appellant within s. 117 during the period that they remained, under cl. 4 of the conditions of the contract, with the guardians after their rejection, with merely an obligation on the appellant to remove them within that period."

That, clearly, is quite a different case, but it is to be observed that VISCOUNT READING, C.J., says that the word should be given its popular construction. Its popular construction, no doubt, for the purposes of that case would involve that a man who was miles away and who delivered goods to a purchaser was not in possession of those goods when they were rejected. It is an authority, for what it is worth, for saying that you should give to the word its popular and common-sense meaning in the particular context.

We were also referred to one of the milk cases, *Oliver v. Goodger* (14). The question in that case was whether a farmer was in possession of a churn of milk which, pursuant to arrangements made with the Milk Marketing Board, he had taken off his farm and put at a point beside a road where it was to be collected. It is true that that case was based to some extent on the fact that the farmer no longer had actual possession of the milk; but again it is to be observed that VISCOUNT CALDECOTE, C.J. (15), said that "possession" was not a term of art and that it should be given a popular construction. In that case the farmer had done all that he had to do under the contract. He had taken the milk off his farm and had, as it were, done all he could to divest himself of possession of the milk. In a popular sense he no longer had possession.

It seems to me that in the present case in the context in which it appears looked at both from the point of view of the criminal law and from the point of view of the commercial community, "possession" in its popular sense would cover a case such as this where the goods are held to the order of the seller on terms on which he can get them back at once.

(12) [1916] 2 K.B. 753.

(14) [1944] 2 All E.R. 481.

(13) [1916] 2 K.B. at p. 758.

(15) [1944] 2 All E.R. at p. 482.

Accordingly, it becomes unnecessary, in my judgment, to deal with the second point raised by the justices, that at any rate the appellant company had possession when the inspector of weights and measures came to weigh the chickens. Counsel for the appellant company, for whose argument the court is indebted, has taken other points of a minor character with which I can deal very briefly. He says, in the first place, that the information was bad in that the possession was laid as being at the branch depot at East Street, Leicester, whereas, I suppose, he would say it ought to have been laid that possession was in the cold store of the cold storage company. In my judgment, there is nothing in that objection, and the matter is covered by s. 100 of the Magistrates' Courts Act, 1952. He then says that the information was laid on the basis that they had these goods in their possession for the purpose of trade, whereas he says that if they did have them in their possession, they had them in their possession for the purposes of sale, and again he says that the charge was wrongly laid. For my part, I have found it a little difficult to see what exactly is meant by having goods in one's possession for the purposes of trade as opposed to having them in one's possession for the purposes of sale or of manufacture. It may be that it was designed to cover some such case as samples which, though not themselves for sale, would be used for the purposes of trade, but, in my judgment, the words "having goods in possession for sale or for purposes of trade" are not mutually exclusive, and I could not say that this charge was wrongly laid.

Finally, counsel maintains that the appellant company were entitled to a defence under the section, the particular defence being that "otherwise they had acted innocently". Those words have come before this court on many occasions. I find it unnecessary to go through the cases, of which the latest is *Slatcher v. George Mence Smith, Ltd.* (16). It is sufficient, in my judgment, to say that I am satisfied that the appellant company could not avail themselves of that defence.

Lastly, I would like to say that I have every respect for the manner in which the justices dealt with this case. It was not an easy one to decide, in particular because it is not a case where any moral blame could conceivably be attached to the appellant company. We are not told what they were fined, but I hope it was very little.

In my judgment this appeal should be dismissed.

WINN, J.: I agree.

WIDGERY, J.: I also agree.

Appeal dismissed.

Solicitors: *Linklaters & Paines* (for the appellant company); *Field, Roscoe & Co.*, agents for *Town clerk*, Leicester (for the respondent).

[Reported by JENIFER SANDELL, Barrister-at-Law.]

Re THE CEMENT MAKERS' FEDERATION'S AGREEMENT.

[RESTRICTIVE PRACTICES COURT (Diplock, J., Mr. W. L. Heywood, Mr. W. G. Campbell and Sir Gilbert Flemming), January 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, 30, 31, February 1, 2, 3, March 16, 1961.]

Restrictive Trade Practices—Reference—Cement—Price fixing scheme—Merchants' margins—Rebates to user-purchasers and merchant-purchasers—Special rebates to cement asbestos manufacturers—Delivery of cement to be on a day-to-day basis of price—Quotations and contracts for supply of cement other than for specific job not to be made for period exceeding twelve months—Undertaking by merchants to re-sell at prices and on standard conditions as notified—Whether removal of main price fixing restriction would deny public substantial benefit—Whether other restrictions validated by validity of main restriction—Restrictive Trade Practices Act, 1956 (4 & 5 Eliz. 2 c. 68), s. 21 (1) (b).

Restrictive Trade Practices—Court—Contempt of court—Restrictive Practices Court.

Restrictive Trade Practices—Court—Practice—Evidence—Answers to questionnaire sent out by trade association—Discretion of court to admit as evidence.

The Cement Makers' Federation, whose membership consisted of four groups of companies and five single companies, produced all but a negligible proportion of the total annual output of Portland cement manufactured in the United Kingdom. The objects of the Federation included the arranging of reasonable prices and terms for the sale of cement manufactured by members. The Federation had, since 1934, passed resolutions establishing common price and marketing arrangements, the current arrangements being contained in the "White Book" and any member being at liberty to withdraw from participation by giving notice. It was expressly provided that these arrangements imposed no legal obligation and carried no penalties for failure to comply with any of them. By cl. 5 of the White Book: "Each member of the Federation will individually specify as the current prices for its cement the prices contained in the current price schedules issued by the Federation, allowing the rebates and/or margins provided by these arrangements to those buyers of cement who become entitled to them in accordance with the conditions upon which such rebates and/or margins are declared to be payable. In respect of cement supplied for re-sale, each member will individually enforce such specified prices by means of any lawful remedy available to it either under s. 25 of the Restrictive Trade Practices Act, 1956, or otherwise". This was the main price fixing restriction.

Cement was a heavy substance and transport costs represented on the whole some eighteen per cent. of the total cost of the delivered product. The price structure was founded on "basing points" and "distance zones". Each cement works or group of adjacent works was treated as a "basing point", and a "base price" was fixed for cement delivered within a five-mile radius of the basing point. Concentric circles of radii increasing by successive five miles were drawn delimiting zones within which the delivered price increased by specified amounts, and these concentric circles from each basing point continued until one intersected a corresponding circle bounding a similar zone price from another basing point. As a result of the report (in 1947) of the Forde Committee, who were appointed by the Minister of Works to examine the price structure of the industry, the Federation appointed an independent costs committee consisting of the independent chairman of the Federation and the independent accountant, neither of whom had any financial interest in the cement industry. The general premise accepted by the independent costs committee and by the Federation was that it was the function of the industry to provide the whole country with cement whenever it was required at prices at places of delivery which bore a reasonable relationship to one another and which provided a reasonable profit to members taken as a whole. The independent costs

committee kept under regular review the costs and profits of the industry, receiving each quarter from each member particulars of that member's production and net proceeds of sale and his costs of manufacture and delivery analysed under a number of heads. After consideration, weighted average costs and results for the whole industry were circulated. If the independent costs committee, or any member of the Federation, considered that, in order to maintain the over-all profits of the industry at a reasonable figure, a change of prices, whether up or down, was called for, a meeting of the council of the Federation under the chairmanship of the independent chairman and attended by the independent accountant was held. At this the independent chairman and accountant took part, but had no vote on any resolution. The independent costs committee did not make specific recommendation as to prices. The committee was also concerned with the fixing of a "base price" and distance zones for any new works which came into operation, and from time to time initiated at its discretion a general review of base prices and distance zone increments throughout the country. As a consequence of the price structure the price included an element of transport subsidy, for it did not rise to the full extent of the additional transport cost for distant deliveries, and the price ex-works to a purchaser taking delivery into his own transport contained some measure of the transport subsidy; nevertheless, the general effect of the price structure was to make it unattractive to a cement manufacturer to deliver cement beyond the area in which the distance zones were based on the works from which delivery was made. Associated with the main price-fixing restrictions were provisions relating to (a) merchants' margins and (b) rebates to be allowed to (i) user-purchasers and (ii) merchant-purchasers. Merchants' margins allowed a reduced price on sales made to merchants to cover their remuneration in respect of cement sold to them for re-sale to users and, in order to qualify, a merchant had to satisfy certain minimum qualifications. The rebates to user-purchasers and merchant-purchasers were based on the aggregate quantities of cement purchased by the user or merchant from all members of the Federation during the course of the year. In addition to these general rebates, there were special rebates in respect of cement supplied to cement asbestos manufacturers which were fixed by separate negotiations with individual manufacturers. In the standard contracts, there was a requirement that deliveries would be made on a day-to-day basis of price, i.e., at the inclusive prices for cement and packages operating on the date of despatch and this condition was to override all other conditions as to prices in the contract. Quotations and contracts for the supply of cement other than for a specific job were not to be made for periods exceeding twelve months. In contracts for the sale of cement to merchants, the merchant was required to undertake that he would re-sell the cement at the prices and on the standard conditions as notified to him, and operating on the day of despatch to his customer.

On a reference by the Registrar of Restrictive Trading Agreements under s. 20 (1) and s. 20 (2) (a) of the Restrictive Trade Practices Act, 1956*,

* Section 20, so far as relevant, provides: "(1) The court shall have jurisdiction, on application made in accordance with this section in respect of any agreement of which particulars are for the time being registered under this Part of this Act, to declare whether or not any restrictions by virtue of which this Part of this Act applies to the agreement (other than restrictions in respect of matters described in paras. (b) to (d) of s. 8 (8) of this Act) are contrary to the public interest.

"(2) An application to the court under the foregoing subsection may be made—(a) in any case, by the registrar . . .

"(3) Where any such restrictions are found by the court to be contrary to the public interest, the agreement shall be void in respect of those restrictions; and . . . the court may . . . make such order as appears to the court to be proper for restraining all or any of the persons party to the agreement . . . (a) from giving effect to . . . the agreement in respect of those restrictions; . . ."

the Federation sought to support the restrictions under s. 21 (1) (b) of the Act*.

Held: (i) the main price fixing restriction was valid, not being deemed by s. 21 (1) of the Act of 1956 to be contrary to the public interest because the court was satisfied of circumstances within s. 21 (1) (b) and was further satisfied (for the purposes of the balancing provision at the end of s. 21 (1)), as follows—

(a) that, taking the home trade in cement as a whole, the prices on balance would be substantially higher in the absence of the common price agreement, if it were conducted in future as it had been in the past (see p. 86, letter D, and p. 90, letter F, post); and

(b) that, having regard to the evidence and to an assurance offered by the Federation (viz., to supply the registrar at his request with information to enable him to decide in future whether an application should be made under s. 22 of the Act of 1956 for variation or discharge of the present declarations), the common price agreement would in fact be so conducted in the future as it had been in the past (see p. 93, letter G, post); and

(c) that the fact that some purchasers of cement might benefit by lower prices if the main price fixing restriction were removed (because of the element of transport subsidy in the price to buyers near to the works), which was a matter to be taken into consideration under the balancing provisions at the end of s. 21 (1), did not outweigh the benefit to all purchasers, looked at as a collective whole, from the continuance of the common price agreement (see p. 92, letter B, post).

Re Black Bolt and Nut Asscn. of Great Britain's Agreement ([1960] 3 All E.R. at pp. 137, 138) followed on the meaning of "public as purchasers" in s. 21 (1) (b).

(ii) of the provisions associated with the main price fixing restriction the merchants' margins and the special rebates for cement supplied to cement asbestos manufacturers had economic justification, were reasonable and, like the main price fixing restriction itself, were not contrary to the public interest (see p. 94, letter B, and p. 95, letter A, post), but the general rebates to large purchasers and merchants (at any rate as theretofore conducted) had no economic justification and would be declared to be contrary to the public interest (see p. 94, letter I, and p. 95, letter B, post).

(iii) as the main price fixing restriction was valid, ancillary restrictions relating to standard contracts for the sale of cement would also be valid, if they were reasonably required for purposes connected with the maintenance of the main price fixing restriction (see p. 95, letter D, post); of those ancillary restrictions that fixing prices according to the dates of deliveries and that fixing the re-sale price by merchants were so requisite (see p. 95, letter I, and p. 96, letter C, post), but the minor restriction prohibiting contracts for the supply of cement for periods exceeding twelve months was not so requisite and would be declared to be contrary to the public interest (see p. 96, letters A and D, post).

Per CURIAM: the Restrictive Practices Court is by statute a superior court of record, and possesses in relation to all matters incidental to its jurisdiction the like powers, rights, privileges and authority in England and Wales as the High Court; the publication of any matter tending to interfere with the due course of justice in proceedings before the court is

* Section 21 (1), so far as relevant, provides: "For the purposes of any proceedings before the court under the last foregoing section, a restriction accepted in pursuance of any agreement shall be deemed to be contrary to the public interest unless the court is satisfied of any one or more of the following circumstances, that is to say— . . . (b) that the removal of the restriction would deny to the public as purchasers, consumers or users of any goods other specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them as such, whether by virtue of the restriction itself or of any arrangements or operations resulting therefrom; . . ."

subject to the ordinary sanctions as respects contempt of court (see p. 96, letter F, post). A

Answers to questionnaire submitted to customers admitted as a matter of discretion (see p. 79, letter E, post).

[For the Restrictive Trade Practices Act, 1956, s. 21, see 36 HALSBURY'S STATUTES (2nd Edn.) 954.] B

Case referred to:

Black Bolt and Nut Asscn. of Great Britain's Agreement, Re, [1960] 3 All E.R. 122; L.R. 2 R.P. 50; [1960] 1 W.L.R. 884.

Reference.

Pursuant to the Restrictive Trade Practices Act, 1956, s. 20 (2) (a), the Registrar of Restrictive Trading Agreements referred to the Restrictive Practices Court an agreement made between the members of the Cement Makers' Federation (hereinafter called "the Federation"), and contained in the Federation's constitution stated to be effective on Jan. 1, 1953, and the declarations and undertakings of members to be bound by and to observe the constitution, a document entitled "Common Price and Marketing Arrangements" and known as the "White Book", a document entitled "Statement of Prices" setting out regradings and other price revisions for operation from July 1, 1957, the schedule of Merchants' Terms number 12 and Price Schedules numbered 1 to 11, resolutions of the council of the Federation, and in two sets of maps of the London District, England and Wales and of Northern Ireland, showing the basis of the price structure and prices operative from July 1, 1956 and 1957, respectively. By cl. 3 of the constitution C
D
E

"(1) The objects of the Federation are to regulate the relations between member and member of the Federation and to promote, encourage, foster, develop and protect, having proper regard to the interests of consumers, the manufacture, distribution and sale of cement in the United Kingdom, and to develop the stability and confidence needed to enable cement manufacturers to plan ahead in order to fulfil demands, for cement with maximum efficiency and economy. F

"(2) Without prejudice to the generality of and for the purpose of achieving the said objects, the Federation may—(a) consult with other organisations in regard to the various British Standard specifications for cement and cement products; (b) arrange reasonable prices and terms for the sale of cement manufactured by members; (c) arrange and promote the adoption of quotation and contract forms and other documents relevant to the sale of cement; (d) collect, compile and distribute among members and the public information on matters relating to cement or to the cement industry; (e) institute, promote, support or oppose legislative or other measures or proceedings; (f) negotiate on matters of concern to the cement industry and enter into, procure or promote agreements on such matters; (g) establish or support institutions, associations, professorships, lectureships, scholarships, funds or trusts for education, research, or advancement of knowledge (whether solely connected with the manufacture and use of cement or not) which may be considered to advance or promote the interests of manufacturers or users of cement; (h) establish or support a benevolent fund or funds for the benefit of those engaged in or connected with the cement industry; (i) contribute or subscribe to institutions or associations whether charitable or otherwise as may be deemed desirable; (j) raise and administer any fund or funds as may be necessary for any of the objects of the Federation; (k) invest in any manner any moneys raised but not immediately required for the purposes of the Federation; (l) lend money upon security or otherwise and borrow money for the purposes of the Federation upon such terms and conditions as may be determined." G
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I

By cl. 8, a member might resign from the Federation by three months' notice in writing addressed to the secretary to expire on the last day of any month in any year; in the event of any such notice being given, each other member was to be forthwith informed of the fact, and each member of the same class as the member resigning (there being two classes of membership, ordinary members and associate members) was to be entitled to give notice in writing of his resignation to take effect at the same date as that of the resigning member. A resigning member was to be amenable to the constitution up to the date when the resignation became effective.

On Jan. 18, during the course of the hearing, counsel for the Federation sought to put in evidence under r. 54 or r. 55 of the Restrictive Practices Court Rules, 1957*, the replies submitted by some four thousand customers to a questionnaire sent out by the Federation, containing the following questions: "Have you been approached by the office of the Registrar of Restrictive Practices?" "Have supplies generally been promptly available in the last few years?" "Are you satisfied with the quality of cement supplied?" "Are you satisfied with the service provided by makers?" "Do you consider that the prices of cement over the last few years have been reasonable?" and "Would you like to see the present fixed price system for cement abolished and traders free to charge what prices they please?" He said that the court, in *Re Black Bolt and Nut Assn. of Great Britain's Agreement*†, had attached very great importance to the question whether or not the persons who constituted the body of purchasers for the purpose of the Act approved or disapproved of the system. It was only for that purpose that the Federation sought to put in the answers to the questionnaire. Counsel for the Registrar said that it seemed to be opening the door to an extraordinarily undesirable practice of having polls of public opinion through industries, and the framework of the questions was so undesirable that it was not a case in which the court ought to exercise its discretion. DIPLOCK, J., after the court had conferred, said that this was a matter for the court's discretion and that this was a case where they should allow the answers to the questionnaire to be put in. The court thought, however, that the first question was very undesirable, because, when it came from a very tight ring of suppliers in a sellers' market, it might be thought to contain the suggestion that they should not give evidence on the other side, and it was a matter on which the court took a very strong view indeed.

The facts are set out in the judgment of the court.

H. A. P. Fisher, Q.C., R. J. Parker and R. C. Southwell for the Cement Makers' Federation.

Sir Milner Holland, Q.C., and Arthur Bagnall for the Registrar.

Cur. adv. vult.

Mar. 16. DIPLOCK, J., read the following judgment of the court: The respondents are members of the Cement Makers' Federation. Between them, they produce all but a negligible proportion of the total annual output of some thirteen million tons of Portland cement manufactured in the United Kingdom. Of this total, about twelve million tons are sold in the United Kingdom at a net delivered price which in 1959 averaged 107s. per ton. Imported cement, although occasionally used to satisfy local shortages, does not compete in price

* S.I. 1957 No. 603. Rule 54, so far as relevant, provides: "... the court may order that evidence of any particular fact shall be given at the final hearing in such manner as may be specified in the order ..."

Rule 55, so far as relevant, provides: "Where it appears to the court ... at the final hearing, that the court would be assisted in determining any issue in the proceedings by the admission of evidence (whether oral or documentary) which would not otherwise be admissible under the law relating to evidence, the court may make an order allowing the admission of such evidence."

† See [1960] 3 All E.R. at pp. 137, 138; L.R. 2 R.P. at p. 94.

with home-produced cement. Thus, between them, the respondents effectively control the home market in this product. A

The restrictions with which this reference is concerned, which are in essence a scheme fixing prices at points of delivery, relate to three types of cement, namely: ordinary, rapid hardening, and low heat Portland cement. The great bulk of the output is of ordinary Portland cement, and the prices and statistics referred to in the course of the hearing related in the main to this product. Rapid hardening cement is more expensive to manufacture and sells at a delivered price of 10s. 6d. per ton more than ordinary cement, but, save for this difference in price, is subject to the same restrictions as ordinary cement. Low heat cement is only manufactured in small quantities, and no specific attention has been drawn to it by either the Registrar or the Federation. B

There are certain special features of the cement industry of which mention should be made at the outset. The raw materials from which Portland cement is manufactured are calcium carbonate, which occurs naturally as chalk or limestone, and clay or shale. These materials, mixed in appropriate proportions, are fired in a kiln by pulverised coal or, more recently, atomised oil, to form a fused product known as cement clinker. The clinker, mixed with a small quantity of gypsum, is then ground in a ball mill to a fine powder which is Portland cement. Cement clinker can be stored without rapid deterioration, but cement itself is not a good keeper, and must be used within a short period after being made. Some cement is made as a by-product in the chemical industry, but this accounts for only some five per cent. of the total production. Cement is delivered either in hundredweight paper bags or in bulk in special pressurised vehicles. The use of the latter method has expanded considerably in recent years, and now accounts for some forty per cent. of deliveries. Cement is a heavy material, and transport costs on the average represent about eighteen per cent. of the total cost of the delivered product. C

The nature of the raw materials dictates the siting of cement works, since they must be close to an adequate supply not only of chalk or limestone of high calcium carbonate content not covered by an excessive over-burden, but also of suitable clay or shale. These geological requirements are fulfilled in a limited number of regions in the United Kingdom which are not always those where the demand for cement is greatest. There are, indeed, large areas, particularly in the north and west of England and in Scotland, where suitable raw materials are completely lacking. It was these geological requirements which caused the industry to be originally established in the Thames and Medway areas. There, to the presence of suitable chalk and clay, was added the advantage of cheaply conveyed sea-borne coal from Durham. The area was close to the London and Home Counties market in which twenty-five per cent. of the total national consumption is used, and before the development of road transport also benefited from cheap sea-borne freights for cement to various ports in other parts of the United Kingdom. While the Thames and Medway area still possesses the same geological advantages, the benefits of cheap coal and sea-borne freights to United Kingdom ports have now largely disappeared with the consequence that progressively during the present century the tendency has been to construct new works in other areas (which we hereafter call "inland works"), and the proportion of the United Kingdom consumption derived from the Thames and Medway area has fallen from some eighty per cent. in 1900 to thirty-two per cent. today, of which rather more than two-thirds is delivered to the London and Home Counties area. D E F G H I

The capital cost of erecting a modern works has increased nearly sixfold since before the war. Today, the lowest economical size for a new works is for an output of two hundred thousand tons a year, of which the capital cost today would be some £15 to £20 a ton, involving a capital expenditure of at least £3 million. It is somewhat cheaper to extend the capacity of existing works, the estimated cost being from £10 to £12 per ton, or a capital expenditure of upwards

of £2 million for expansion of capacity of two hundred thousand tons per annum. The life of a works, or extension, is about thirty years, by the end of which time the plant will have required complete renewal. Cement making is a continuous process and, since the fixed charges in modern works are relatively high, there is considerable economy in working to capacity. While only a broad estimate is possible, the available calculations suggest that to work at ninety per cent. capacity at a modern works would increase the cost per ton of cement by a figure of the order of three to $3\frac{1}{2}$ per cent., and at 1959 costs and prices, would reduce the annual profit earned by the works by some twenty to twenty-five per cent.

Cement is not an end product. Its principal use is as a constituent of concrete and mortar used in building and constructional work, and, to a lesser extent, as a constituent of asbestos cement and concrete products which, in their turn, are also mainly used in building and construction. Rather more than one-third of the total home consumption of cement is used for housing; rather more than a quarter for industrial construction, including fuel and power, and another one-fifth on public works, including government buildings, schools, roads, sewers, etc. The demand is accordingly a derived demand, dependent on the general level of constructional activity in the country. In nearly all the purposes for which it is used cement is essential, but its cost represents only a small proportion of the total cost of the building and constructional works for which it is required. While it is not possible to obtain precise figures, it would seem that, taking an average of all buildings and structures, the cement cost represents something under three per cent. of the total cost, though this will vary with the nature of the building or structure. Even in the case of roads, the cement cost seems to be no more than six per cent. of the total cost. This has the consequence that the demand for cement is not responsive to price changes, and the witnesses were unanimous that an alteration of the order of five to ten per cent. up or down in the price of cement would have no appreciable effect on the demand even for those uses for which there are possible substitute materials. Punctuality and regularity of delivery may have a much greater effect on the final cost of the work in which cement is used, than any minor variations in the cost of cement itself. This does not mean that the price of cement is unimportant, but it does mean that a reduction in price of the order of five to ten per cent., that is at present prices of 5s. 6d. to 11s. per ton, would not lead to any appreciable increase in over-all demand, nor would a comparable increase in price lead to a reduction in over-all demand.

The demand for cement has increased continuously during the post-war years at an average rate of about four per cent. per annum. This has been subject to fluctuations, at times dependent on the volume of constructional work being undertaken throughout the country which is largely influenced by government policy, but it is common ground that the expansion will continue. In general, in the post-war years, capacity has expanded to keep pace with the home demand. The expansion of the home demand has, however, been accompanied by a falling off in exports due to the construction of new cement works in countries, mainly those of the Commonwealth, to which cement was exported from the United Kingdom. Between 1948 and 1953, some quantities of cement were imported to meet temporary local shortages, though these imports were small and in some years negligible compared with the export of home produced cement. Between 1954 and 1959 inclusive, no cement was imported, but for a short period in the summer of 1960 a total of rather less than two hundred and fifty thousand tons was imported from Belgium to make up temporary shortages principally in the north-east region.

The Cement Makers' Federation was formed in 1918, but it was not until 1934 that it was in a position effectively to control the price of cement. The intervening period was one of intense price competition which terminated with the acquisition by the Associated Portland Cement Manufacturers, Ltd., of the

assets of a rival group which had become insolvent. The present membership consists of seventeen companies, but since, under the constitution of the Federation, associated companies are treated for voting purposes as a single entity, the effective membership is nine, namely four groups of companies and five single companies. Of these, by far the largest is the Associated Portland Cement Manufacturers group (hereinafter called A.P.C.M.), which operates through its subsidiary companies twenty-nine separate works, of which twelve are in the Thames and Medway area, and produces sixty-two per cent. of the total quantity of cement delivered in the United Kingdom, and the bulk of the export trade. The second largest group, the Tunnel group, operating three works of which one is in the Thames and Medway area, produces about twelve per cent., and the other two groups, the Rugby group and Eastwoods, operating two and three separate works respectively of which one is in the Thames and Medway area, produce $6\frac{1}{2}$ and $4\frac{1}{2}$ per cent. of the total home deliveries. The remainder of the home deliveries are produced by the other five companies operating single inland works, one of which is owned in equal shares by the Tunnel group and one of the individual member companies. One of the individual companies—I.C.I.—produces cement as a by-product of other manufacturing processes. Its output is only three per cent. of the total and its costings are different from those of ordinary cement manufacturers. They have, accordingly, by agreement between the parties been excluded from the general statistical particulars put before us. Two other chemical manufacturers make cement or cement clinker as a by-product; they are not members of the Federation but sell the whole of their output to A.P.C.M. In addition, there are two companies operating in Scotland who are associate members. Under the rules of the Federation, they have no vote, their output is very small, mainly of blast-furnace cement, and the figures relating to them have also been excluded. Effectively, therefore, the cement industry is concentrated in the hands of no more than eight different groups or companies, one of which produces nearly two-thirds of the total output used in the United Kingdom.

The expressed objects of the Federation include the arranging of reasonable prices and terms for the sale of cement manufactured by members. The Federation acts by resolution of its members, whose voting power is calculated on a system based on, but not directly proportionate to, their annual deliveries for use in the United Kingdom. The voting rights are so calculated as to reduce the voting power of A.P.C.M. to thirty-six per cent. Furthermore, no resolution can be passed unless four members vote in favour. Thus, A.P.C.M., despite its preponderant position, cannot control the policy of the Federation so far as positive resolutions are concerned, nor can it, of itself, exercise a veto on resolutions, although in combination with the Tunnel group it can do so. Pursuant to its above-mentioned objects, the Federation has passed resolutions establishing common price and marketing arrangements which have been effective since 1934 and which constitute "Restrictions" for the purposes of the Restrictive Trade Practices Act, 1956. The current arrangements are contained in a volume known as the "White Book". The arrangements are expressed to continue for an indefinite period, but with liberty to any member to withdraw from participation by giving notice to the Federation. It is expressly provided that the arrangements impose no legal obligation and carry no penalties for failure to comply with any of them.

The main restriction is in the following terms:

"Each member of the Federation will individually specify as the current prices for its cement the prices contained in the current price schedules issued by the Federation, allowing the rebates and/or margins provided by these arrangements to those buyers of cement who become entitled to them in accordance with the conditions upon which such rebates and/or margins are declared to be payable. In respect of cement supplied for re-sale, each member will individually enforce such specified prices by means of any lawful

A remedy available to it either under s. 25 of the Restrictive Trade Practices Act, 1956, or otherwise."

B Subsequent provisions of the White Book contain details of merchants' margins and a deferred rebate scheme for large users and merchants, and for standard terms of contracts which include a price variation clause, providing that deliveries shall be on a day-to-day basis of price, that is, at the price current at the actual date of delivery. There are eleven price schedules, nine for different districts in England and Wales, one for Scotland, and one for Northern Ireland. These schedules specify the delivered prices of Portland cement to current British Standard specification at the different places in the district.

C There is no written document which sets out the basis on which, or the method by which, prices are to be fixed by the Federation. In practice, in England and Wales each cement works or group of adjacent works is treated as a "basing point", and a "base price" is fixed for cement delivered within a five-mile radius of the basing point. The "ex-works price" for cement collected at works by customers in their own vehicles is less than the base price by 2s. per ton in the case of bagged cement, and by 3s. per ton in the case of bulk cement. Concentric circles of radii increasing by successive five miles are drawn delimiting zones within which the delivered price increases by specified amounts. The current increase for the five to ten mile zone is 2s. 6d. per ton; for the ten to fifteen mile zone 2s. per ton; for the next three five-mile zones up to thirty miles from the basing point the price rises by successive increases of 1s. 6d. per ton, and for every five-mile zone after thirty miles from the basing point by 1s. per ton. The concentric circles from each basing point continue until one intersects a corresponding circle bounding a similar zone price from another basing point. The whole country is thus covered by price zones in which the price increases with their distance from the nearest cement works.

F If all base prices were equal, this would have the result that the highest price in the country would be charged in places which were most distant from any cement works. In fact, however, for various reasons, the base price at some inland works is higher than normal with correspondingly higher prices in the concentric zones round that basing point, so that prices are not in all cases highest at the farthest point from any cement works. Cornwall and North Devon are another exception, in that prices in those districts are based on prices in the nearest port and distance by road from port.

G This type of price structure founded on basing points and distance zones has been in operation since 1934. In the early years, when coast-wise freights from the Thames and Medway area were cheap, there were a number of port basing points which have since been eliminated except in Cornwall and North Devon. Six new inland works and two new works producing cement or cement clinker as a by-product have been erected since 1934 and each has, in turn, become a new basing point. The original base prices adopted in 1934 appear to have been fixed at the general level of price at a normal works immediately at the end of the period of price competition, and the distance zone "increments" appear to have been intended to approximate to the actual cost of transport at that time. Between 1934 and 1947, there were a number of increases in prices applied uniformly to all basing points and distance zones. These were determined by resolution of the Federation, although from 1939 onwards, while a system of government control of prices was in operation, the increases required and received the consent of the appropriate Minister. In 1947, the fforde Committee, which had been appointed by the Minister of Works to examine the price structure of the industry, reported that, in their view, the prices fixed up to that date had not been unreasonable, but recommended improvements in the method of fixing prices. As a result of these recommendations, the Federation appointed an independent costs committee consisting of the independent chairman of the Federation who was then Lord Selborne, and the independent accountant, Mr. Slimmings. This committee worked with a representative of the Minister of

Works until government control was withdrawn in 1951. Since that date, it has consisted of Sir Malcolm Eve, who succeeded Lord Selborne as independent chairman at the end of 1951, and Mr. Slimmings. Neither of these gentlemen has any financial interest in the cement industry. A

The general premise accepted by the independent costs committee and by the Federation is that it is the function of the industry to provide the whole country with cement whenever it is required at prices at places of delivery which bear a reasonable relationship one to another, and which provide a reasonable profit to members of the Federation not as owners of individual works or groups of works but taken as a whole. The independent costs committee inherited and have continued to approve a price structure built up on basing points and distance zones. It keeps under regular review the costs and profits of the industry, receiving each quarter from each member particulars of that member's production and net proceeds of sale and his costs of manufacture and delivery analysed under a number of heads. In the case of groups operating a number of works, the costs and proceeds of individual works are not in general supplied, only the aggregate results of all the works operated by the group; although the Eastwoods group does in fact supply the results of its individual works which are owned by separate subsidiary companies. From these returns are prepared statements of the results per ton of the individual members. These statements are then considered by Sir Malcolm Eve and Mr. Slimmings in order to decide whether the costs can properly be averaged to form an estimate of the results of the industry for the quarter, or whether they include some abnormal results which, if included in the weighted average, would give a picture of the state of the industry which would form an unsound basis for action as regards future prices. The independent costs committee have authority, which they have in practice rarely found it necessary to exercise, either to exclude from the determination of the weighted average results of the industry the returns of any member which, after hearing his explanation, they regard as untypical, or to decide that the circumstances of the industry as a whole in a particular quarter are so abnormal as to make the weighted average results misleading as a basis for future action. B C D E F

The weighted average costs and results for the whole industry (but not those of any individual manufacturer) for the quarter and for the preceding twelve months are then circulated to all members. If the independent costs committee, or any member of the Federation, considers that, in order to maintain the over-all profits of the industry at a reasonable figure, a change of prices, whether up or down, is called for, a meeting of the council of the Federation under the chairmanship of the independent chairman and attended by the independent accountant is held to consider the matter. The independent chairman and accountant take an active part in the discussion but have no vote on any resolution. At such meetings, Sir Malcolm Eve and Mr. Slimmings do not regard it as their function themselves to recommend any specific figure by which prices should be changed. They indicate their views as to present and future trends of costs and demand, but leave the final decision to the members. There is, in their view, always a certain margin or bracket within which a price may be reasonable, and Sir Malcolm Eve has told us that, in his nine years' experience, the members have on every occasion but one resolved on a price which in his view fell within that margin. On the one occasion on which they exceeded by about 1s. per ton or one per cent. the figure which he and Mr. Slimmings thought was reasonable, the matter was corrected to his satisfaction at the next subsequent price review. It must be borne in mind that the powers of the independent costs committee are limited to persuasion. How they can best exert their influence must be a matter for their own judgment, and we see no reason to suppose that the practice at present adopted by them has not been effective to ensure that prices are kept at a level of which they, as independent advisers, can approve. G H I

In addition to the quarterly reviews which result in a decision either to leave prices unchanged or to raise or lower all prices by a fixed amount (which in

practice is always a multiple of 6d. a ton), the independent costs committee is concerned with the fixing of a "base price" and distance zones for any new works which comes into operation. As already stated, the base prices are not, and never have been, entirely uniform. In general, an attempt is made to fix a base price which will show a reasonable return on the capital invested in the new works. Not only does this involve estimating the costs of production, which are influenced by a number of factors not dependent on the efficiency with which the plant is managed, such as the character and location of raw materials, the delivered cost of fuel and power (which accounts for as much as forty per cent. of the total cost of manufacture) and, in the case of post-war works in particular, the high provision required for depreciation; it also entails forming a judgment as to the areas in which the cement produced at the new works will find a market, and the extent to which it will be delivered into distance zones based on some other "basing point". It is subject to the overriding principle, adopted as a matter of policy, that the base price of a new works must not exceed the current price, based on a "distance zone" from some existing works, at the place where the new works is erected.

Finally, the independent costs committee from time to time initiates at its discretion a general review of base prices and distance zone increments throughout the country. Such reviews took place in 1949, 1951 and 1957, the two first-mentioned being during the period of government control. In the view of Sir Malcolm Eve, the time would have been ripe for another general review in 1960, but this was postponed owing to the pendency of the present reference. If the common price scheme is permitted by this court to continue, a general review will be initiated during the current year. At each of these general reviews, the essential features of a price structure founded on basing points and distance zones have been preserved. Changes in costs of delivery, however, have not always been accompanied by corresponding increases in the distance zone increments or in the difference between the ex-works price and base price, that is, the delivered price in the first five-mile circle round that works. Consequently, not only does the present ex-works price itself contain a transport subsidy but each successive distance zone increment is less than the corresponding increase in the cost of transport from the works to that zone, so that the farther a buyer is from the works the more he benefits from the transport subsidy. The amount of the transport subsidy included in the ex-works price is not, in our view, susceptible of accurate estimation nor, a fortiori, is it possible to assess the relative extent to which buyers of cement delivered to the various distance zones benefit from it.

It is claimed by the Federation that this type of price structure, including a transport subsidy, has the effect of reducing the uneconomical use of transport and of encouraging the siting of new works as near as possible to areas where the demand is greatest. The general effect of the price structure is to make it unattractive to a cement manufacturer to deliver cement beyond the area in which the distance zones are based on the works from which delivery is made, since, although the distance from his works is greater, the price which he can obtain grows less as the point of delivery approaches another works. But the existence of the transport subsidy creates an economic inducement to him not merely to restrict his deliveries of cement to the distance zones based on his works, but to deliver as much as he can as near to his own works as possible. For the geological and historical reasons already indicated, the capacity of inland works is in most cases insufficient to fulfil the total demand for cement within the whole area covered by distance zones based on those works, and the balance has to be supplied from more distant works and, in particular, from the production of the Thames and Medway area which is surplus to the requirements of the London and Home Counties market. By making it more profitable to owners of inland works to satisfy the demand in the areas nearest to their works, the need for cement from the Thames and Medway area in low-priced zones is reduced. Thus, supplementary supplies tend to go to places somewhat farther from the inland

works basing point. This does not necessarily involve a longer or dearer haul for cement from the Thames and Medway area than to lower price zones based on the same inland works, and the Federation claim that the over-all cost of delivering cement to zones based on inland works is kept to a minimum. It is also claimed that cross-haulage (that is, the carriage of cement from distant works to areas close to works which are themselves sending cement to other producing areas) has been virtually eliminated. We were told that this was an expensive and not uncommon practice before distance circles were introduced. The evidence adduced as to the areas in which cement has in fact been delivered from the various works supports the Federation's claim that the Federation's price structure has, in general, these effects. A
B

The Federation's main contention is that the existence and method of operation of their common price agreement results in cement being sold and delivered at prices which, taking purchases throughout the country as a whole, are lower than they would be in the absence of the agreement. They claim that this brings the case within para. (b) of s. 21 (1) of the Restrictive Trade Practices Act, 1956, since the removal of the restrictions contained in the common price agreement would deny to the public as purchasers of cement the specific and substantial advantage of the lower prices for cement which they enjoy and are likely to continue to enjoy by virtue of the restrictions themselves or arrangements resulting therefrom. It is no part of the Federation's case that prices in some areas or to some particular classes of purchasers might not be lower if the agreement came to an end. What they claim is that, taking home trade in cement as a whole, the prices on balance would be substantially higher in the absence of the common price agreement. C
D

We accept that, if the Federation succeed in establishing the correctness of their main contention, they will have shown a substantial and specific benefit enjoyed by the public as purchasers. As was stated in *Re Black Bolt and Nut Asscn. of Great Britain's Agreement* (1) this expression "connotes collectively all persons who purchase the goods", and E

"What must be shown, to satisfy the requirements of para. (b), is that, looking at all purchasers as a collective whole, they can properly be regarded as being denied specific and substantial benefits or advantages if the restriction were removed." F

The fact that some purchasers of cement, ex hypothesi a minority, would have the benefit of lower prices if the restriction were removed falls to be taken into consideration under the balancing clause at the end of the subsection as a detriment to G

"persons not parties to the agreement (being purchasers . . . of goods produced or sold by such parties . . .) resulting or likely to result from the operation of the restriction";

it does not, of itself, prevent the case from falling within para. (b). H

The Federation's main contention, like any other claim based on para. (b), requires the court to reach a conclusion as to what is likely to happen in the future on two hypotheses: namely, on the one hand that the restrictions are allowed to continue and on the other hand that they are removed. The history of how the restrictions have operated in the past is relevant only for the light which it throws on the way in which they are likely to be operated in the future, but for this purpose it is of cardinal importance. I

It has not been suggested on behalf of the Registrar that the prices in fact fixed under the common price scheme have resulted in a profit to the industry as a whole which is unreasonable. Some individual makers, whose output is less than ten per cent. of the whole and who in the main supply local demands with low transport costs, have made consistently good profits, but the weighted average profits of the industry have shown no more than a modest return on the

capital employed. Most of the makers engage in other profit-earning activities, and their published accounts do not reflect accurately their rates of profit on the sale of the kinds of cement to which the restrictions relate. It has been necessary to estimate these for the purposes of this reference. A number of calculations have been submitted on different bases of estimating capital employed and of computing depreciation, namely: (i) based on companies' own accounts (that is, balance sheet values and actual depreciation charged) without adjustment for capital works in progress and surplus cash, (ii) based on historic costs of fixed assets and Inland Revenue methods of depreciation after adjustment for capital works in progress and surplus cash, and (iii) based on depreciated replacement value of fixed assets and Inland Revenue methods of depreciation after a similar adjustment, and an attempt has been made to compare these figures with the weighted average yields for manufacturing industries and for all industries prepared by "The Economist" from published accounts of public companies. Any such comparison must be accepted with caution; figures, such as those of "The Economist", based on companies' own accounts are substantially affected by the extent to which assets have been revalued particularly since 1948. The strong indications, however, are that, over the last eight years, the prices have been so fixed under the Federation's price fixing scheme that, despite the existence of a seller's market, the cement industry has operated at an average rate of profit on capital employed appreciably lower than that achieved by manufacturing industries in general in the United Kingdom.

But modest profit margins for manufacturers do not ensure a low price level to purchasers of cement unless the industry is operating with efficiency, which, in the case of an industry supplying a nation-wide demand, raises questions as to the proper location of works and the provision of adequate capacity to satisfy the demand. Much evidence and argument have been directed to these matters. Bearing in mind the considerable economies in costs of production which flow from working to capacity, we do not think that the evidence justifies any criticism of the Federation on the ground that, during the past nine years, since government control ended, they have failed to expand the over-all capacity of the industry in proper relationship to demand. Indeed, we think that a higher rate of expansion might well have led to increased costs of production. As regards the geographical areas at which expansion has in fact taken place, we see no reason for supposing that this has not been at sites where it was best justified from the economic point of view. Independent confirmation of this came from two witnesses, one called by the Registrar himself, who had actually considered the feasibility of erecting new works at two different sites which were suggested by the Registrar to be the most promising, but had come to the conclusion that, at the then current prices of cement, it could not be produced at these sites at a cost which would show a reasonable return on the capital expenditure involved. Furthermore, the evidence satisfies us that, taken as a whole, the industry does operate with a high degree of efficiency so far as costs of production of cement are concerned. As must be expected in a manufacturing process in which physical and geological factors have a substantial effect on costs, there is considerable variation in the costs of production of individual works; but there is no evidence which supports the suggestion canvassed in argument that the common price scheme has resulted in the maintenance in operation of old works with high costs of production which could have been economically replaced by new works in some other locality. As we have already indicated, the effect of the transport subsidy element in the price structure has been to reduce the uneconomical use of transport and it is, we think, significant that, in the eight years since 1952, the weighted average cost of delivery of cement has remained practically constant despite the general fall in the value of money. In the result, we are satisfied that, under the Federation's common price scheme, the cement industry as a whole has operated efficiently both as respects costs of production and costs of delivery and that the prices over-all have in fact been reasonable.

This view we have been able to form as a result of a good deal of information A
which was obtained for the purposes of this case and which is not normally
available to the independent costs committee when advising the Federation
on prices. It is fair to say that an examination of this new information has
not brought to light any facts which, in the view of Sir Malcolm Eve and Mr.
Slimmings, would, had they known them at the time, have materially affected B
any particular price change which they in the event approved. But this is not,
in our view, the test, and we consider that the independent costs committee
would have been in a better position to give their advice to the Federation
if more information had been made available. The particular points to which
criticism has, we think justifiably, been directed are the following: (i) The
independent costs committee is not supplied with the costs of individual works
operated by multiple makers. It was the practice at one time during government C
control of prices for these figures to be supplied, but the committee as then
constituted, of which Mr. Slimmings was a member, came to the conclusion, with
which Sir Malcolm Eve in his evidence concurred, that the individual works costs
of a multiple maker only become of importance for their investigation if his
average works costs are out of line with those of other makers who include a
number of makers who operate only one works. Since one of the functions of the D
independent costs committee is to exclude from the weighted average costs of
the industry works where the results are abnormal, an eventuality which is not
necessarily more unlikely to occur with a multiple maker than with a single
works maker, we think that information of individual works costs should be
made available to the independent costs committee not necessarily every
quarter, but at intervals of not more than once a year. There is a further reason E
for this: namely, that such returns, particularly of individual inland works, may
contain indications which justify a consideration of some alteration in base
prices. (ii) The bases of depreciation adopted by the various companies were not
disclosed to the committee which has acted on the principle that this is "essen-
tially a matter on which the makers should make up their own minds." Since
depreciation is an important element in the costs of production, particularly at F
modern works, we consider that the committee should be accurately informed
of the basis on which each maker has calculated his depreciation. (iii) The com-
mittee do not make any investigation into the capital employed in the industry
either as a whole or as sub-divided into loan, preference and equity capital.
Such an investigation has been made for the purposes of this case, and has shown
that the return on capital employed has, in fact, been reasonable. But for G
consideration of the earnings of any industry it seems to us that estimates of the
extent of the sub-divisions should be available to the independent costs com-
mittee, together with rates of interest payable on fixed-interest capital. (iv) The
consideration of returns by the committee has always been confined to those
relating to the home trade in ordinary and rapid-hardening Portland cement.
There are, however, other activities which cannot be entirely severed from the H
basic production of the industry, of which the export trade and the manufacture
of special cements are the most important. At one time, a considerable premium
was earned on exported cement, but today the realised export prices approximate
to the home price so that only normal profits are earned. No information of the
profitability of special cements which stems from the basic production of ordinary
cement has been given. We consider that these aspects should not have been I
entirely eliminated from the committee's appraisals of the situation of the industry.

In drawing attention to what we consider are weaknesses in the procedure
which has been adopted by the independent costs committee, we are not criticis-
ing the manner in which they have in fact carried out their duties. Within the
limits of the information available to them, we are satisfied that they have
performed their functions independently, carefully and fairly and that their
influence, while not mandatory, has been effective in exercising a wise control
over prices which, in the event, would probably have been no different, although

it would have been better informed if the material to which we have alluded had been available to them.

Turning now from the history of the past to a forecast of what is likely to happen in the future, the Federation rely on certain special features of the cement industry which are not really disputed. These are that: (a) taking one year with another the over-all demand for cement will continue to expand at about the same rate as it has done in the past, namely some $3\frac{1}{2}$ per cent. to four per cent. per annum; (b) the over-all demand for cement would not be materially affected by rises or falls in the price level of the order of five per cent. to ten per cent.; and (c) the industry is now working at full capacity and any increase in demand can only be met by the creation of new capacity.

They base their main contention, namely, that the over-all price of cement delivered in the United Kingdom would in the future be lower if the common price agreement continued than it would be if the agreement were abrogated, on three broad propositions: (i) that, in an expanding industry, in the long term the price level under free competition will be at or around the level at which there is sufficient return on cement produced at new works (after providing sufficient depreciation) to attract the investment of capital in a new works; (ii) that in the future supply will keep in step with demand except for short periods at particular times and places; and (iii) that the minimum return which will attract investment in a new works is higher under free competition than under the common price agreement, because the risk is greater. Each of these broad propositions was accepted as correct by the expert witnesses on both sides, and we also accept them. The next steps in the argument, however, are the crucial ones, namely to satisfy the court that: (iv) members of the Federation would in fact exercise their power of fixing prices under the common price agreement at a level lower than that which would be required to attract investment of capital in new works under free competition; and (v) the difference in price level would be sufficient to constitute a "substantial" benefit to the public as purchasers of cement.

Several of the expert witnesses gave their personal opinions of the return which a new entrant into the industry, thinking in terms of the industry in free competition would expect on his equity capital before embarking on the costly venture of erecting new cement works. The individual estimates differed to some extent, but all, including that of the Registrar's accountant, fell within the range of fifteen per cent. to twenty per cent., and we accept that the return required on new capital invested in the cement industry under free competition would be in the range of fifteen per cent. to twenty per cent. What effect would a return within this range have on the price level of cement? Mr. Slimmings has made two assessments, taking the cost of construction of new works at 1959 figures at the minimum figure of £15 per ton and working capital at £1 10s. per ton, and adopting "straight line" depreciation of fixed assets at $3\frac{1}{3}$ per cent. (that is, a thirty years' average life). In the first assessment, he has assumed the costs of manufacture (excluding depreciation) to be the same as those of the lowest cost maker; in the second assessment, he has taken them to be the same as those of the newest works in the industry.

To obtain a return of fifteen per cent. on capital invested would, under the first assessment, require a net realised selling price of 133s. 1d. or, under the second assessment, of 137s., while to obtain a return of twenty per cent. these prices would have to rise to 149s. 7d. and 153s. 6d. respectively. The average net realised price for the industry in 1959 was 107s. 1d., and the average net realised price obtained for cement from the newest works was 112s. 8d. To obtain the postulated return of fifteen per cent. would, therefore, require either an increase in price or reduction in costs or a combination of the two of the order of 25s. per ton, and to obtain a return of twenty per cent., a similar increase in price or reduction in costs of the order of 40s. per ton. There is no evidence which suggests that economies in costs either of manufacture or delivery of anything like the

order of 25s. could be attained at any new works, and we reach the conclusion A that the postulated return could only be achieved by an increase in the price of cement which could properly be described as "substantial". As a comparison with these assessments, the Federation rely on the returns which were in fact obtained on the capital invested in the two most recently constructed works. The first was a works erected in 1949. Over the eight years from 1952 to 1959, after allowing for depreciation at a rate sufficient to cover the 1949 costs of B construction of about £9 per ton of capacity in twenty-one years, the rate of return on capital costs of construction and a working capital adequate to the size of the works was nine per cent. The period of twenty-one years is less than the estimated life of twenty-seven to thirty years, but the cost of construction of new works has increased by more than fifty per cent. since that date. The second was a works completed in 1957 at a cost of about £16 per ton of C capacity. This showed a return in 1959, after allowing for depreciation on the basis of a twenty-nine year life, and for working capital, of 7.1 per cent. The cost of construction was greater by some three per cent. to five per cent. by reason of provision for future expansion, but, even allowing for this, the rate of return is no more than of the order of $7\frac{1}{2}$ per cent.

The evidence satisfies us that the members of the Federation, following the D advice of the independent costs committee, have been content in the past eight years to fix the price of cement at a level which shows a return of under ten per cent. on capital invested in new works despite the fact that, collectively, they have had a monopoly of the trade in what has been almost continuously a sellers' market. We accept also that they have felt able to do this because of the added security of their investment afforded by the common price agreement E and that, without that security, they would have required and could have obtained a higher return of the order of fifteen per cent. To obtain each additional one per cent. return on capital invested in new works at present-day costs of construction requires an addition of 3s. 3.4d. to the price of cement, and to increase the return from ten per cent. to fifteen per cent. requires an increase F in price of 16s. 6d. per ton. The common price agreement, has, we think, been so operated as to keep down the over-all price of cement to a level substantially lower than it would have been under free competition. If, therefore, we can be satisfied that, if the common price agreement is allowed to continue in operation, the Federation are likely to fix the prices of cement in the same way and in accordance with the same principles as they have adopted in the past, the Federation will have succeeded in establishing the existence of the circumstances G specified in para. (b) of s. 21 (1) of the Act.

Before deciding whether we can be so satisfied, we turn to consider the detriments to the public or to persons not parties to the agreement (being purchasers of goods sold by such parties) which it is alleged result or are likely to result from the operation of the common price agreement. We have already dealt with and rejected the contention by the Registrar that the agreement has prevented H adequate expansion of the industry by the erection of new works in the most suitable geographical areas. All except two of the members are currently engaged in expanding their capacity in inland works, and A.P.C.M. is in addition undertaking the construction of two new works, one in Scotland and one at Westbury. There is no evidence that a larger or more rapid expansion could have been planned without risk of increasing costs, or that there are more suitable areas in which I expansion could take place more economically. It has also been strongly urged that the price structure under the common price agreement is detrimental to buyers of cement for delivery close to cement works, since the transport subsidy element in the ex-works prices and base prices involves their paying more for their cement in comparison with buyers of cement for delivery farther from the works than they would if the common price agreement were abrogated.

This contention involves two assumptions, first, that, if the common price agreement were abrogated, cement would be sold throughout the country at

prices which corresponded more closely to the ex-works price plus actual costs of delivery and, secondly, that such prices would, in the case of deliveries close to cement works, be lower than the prices for such deliveries under the common price agreement.

We do not think that the first assumption is necessarily correct. Buyers of cement, as well as manufacturers, have been conditioned to a price structure based on distant circles for a quarter of a century, and habits in industry are hard to break. The industry is dominated by A.P.C.M., which supplies a high proportion of the cement delivered in areas most distant from other cement works. It is the natural price leader in the industry, and would be unlikely to abandon some system of freight averaging involving a transport subsidy. It would be in a strong position in any price war with one of the other companies. Inland works belonging to the other companies are either in areas in which the demand in the market nearest to them is greater than their capacity to satisfy or in areas in which there is a competing works owned by A.P.C.M. There seems no reason why the former, in what will continue to be a sellers' market, should reduce their prices to any purchasers. They would, indeed, be in a strong position to increase them, thus enabling A.P.C.M. to follow suit in respect of the balance of the demand. The works in areas where there is a competing works owned by A.P.C.M. could reduce prices to nearby customers only at the risk of a price war with A.P.C.M. It is difficult, indeed, to forecast what alterations in comparative prices in different areas would follow on the abrogation of the common price structure, and none of the witnesses was prepared to state a confident opinion. No doubt, in times of temporary surplus, it would be possible to buy cheap lots of cement in areas close to works, but we do not think it possible to say that, under the type of competition which would exist in a compact industry dominated by one large producer, the price of cement delivered in areas near to cement works would in general bear a proportional relationship to the price of cement delivered to more distant works different from that which exists today under the common price agreement.

As regards the second assumption, it must be borne in mind that, under the common price agreement, the system of freight averaging does not affect the over-all price charged for cement to purchasers as a whole. It reduces the price to more distant purchasers to the same extent as it increases the price to the nearer purchasers. If the over-all price level is less as a result of the common price agreement than it would be under free competition, no detriment is suffered by the nearer purchaser unless the reduction in price as a result of the abolition or modification of the transport subsidy embodied in the common price scheme is greater than the general increase in the "ex-works" price which would be required to attract new investment into the industry under conditions of free competition. If we accept ten per cent. as the return on new capital with which the industry is content under the common price scheme and fifteen per cent. as the return which would be required under free competition, the general increase in price level would be of the order of 16s. 6d. per ton. The highest estimate of the transport subsidy included in the ex-works price under the common price scheme was a figure of 7s. 8d., arrived at by the Registrar's economist. We think that this figure errs on the high side, but it is sufficient to indicate that prospects of purchasers of cement for delivery in areas near to cement works paying a lower price under conditions of free competition are not rosy.

It has also been argued, though but faintly, that any freight averaging scheme involving a transport subsidy is detrimental to the public. Whatever may be the theoretical arguments in favour of this view in the case of goods used in manufacturing processes, we do not think that it applies to cement which is mainly used for capital works of building and civil engineering. While it may be in the public interest to provide an economic inducement to site factories near sources of raw material required for their manufacturing processes, there seems no obvious public interest in providing an economic inducement to build houses,

factories or motor-roads near a cement works in, say, Rutlandshire or Flintshire. A
It is true that about nineteen per cent. of the total home deliveries of cement
are used in a manufacturing process either in making asbestos cement products
or concrete products; but these products in turn are used primarily in building
and civil engineering work. Here, again, there is no clear public interest in
providing an economic inducement to site such factories near cement works B
if economies in the transport of cement to the factories are counterbalanced by
the greater use of transport in moving the end product from the factories to
the buildings or civil engineering works in which they are to be incorporated.
We do not think that the alleged detriments outweigh the specific and substantial
advantage of lower over-all prices of cement on which the Federation rely under
para. (b).

There remains, however, the difficult question whether we can be satisfied C
that the Federation is likely to continue, under the common price agreement
to fix prices in the same way and in accordance with the same principles as they
have adopted in the past, and to be content with a modest margin of profit on
capital invested which reflects the security which the industry enjoys as a
result of the fixed price arrangements. As in the *Black Bolt and Nut* case (2),
the restrictions contain no express provisions as to the basis on which prices are D
to be fixed. Sir Malcolm Eve has given reasons, which, in the case of this partic-
ular industry, we think are cogent, for not seeking to write into the agreement
a definite formula to be applied automatically. It would be difficult indeed to
devise a formula to deal with such matters as changes in individual base prices
or distance zone increments, or to take account of such relevant factors in fore-
casting costs of production or delivery as the extent to which there is likely E
to be working to a particular percentage of capacity or the areas in which demand
during a particular period is likely to arise. Sir Malcolm considers that it is
better, as has been done in the past, to leave the actual decisions to be made by
the makers, after receiving the advice of the independent costs committee given
in the light of their past experience of the industry, their knowledge of its current
costs and returns and their appreciation of future trends. We agree that, in the F
special circumstances of this industry, it would not be helpful to try to incor-
porate in the restrictions a price formula; but to leave the matter at large does
involve relying on the good judgment and moderation of those who will be
concerned in the actual decisions on price changes. Although for the past thirteen
years these decisions have been reached by the members of the Federation only
after receiving the advice of the independent costs committee, no provision for G
the existence of the committee, nor for its powers and terms of reference is to be
found in the constitution of the Federation or in any other of the restrictions.

The independent costs committee has, we think, exercised an important
restraining influence in the fixing of prices. In so saying, we imply no criticism
of the members of the Federation themselves who, we think, have acted through-
out with a sense of responsibility and moderation. But they have, quite properly, H
their shareholders' interests to consider and must have a tendency to take a
cautious view of the future prospects where this is relevant to a change in prices.
It is not without significance that, on the one occasion on which they resolved
on a price 1s. per ton higher than Sir Malcolm Eve had thought justified, the
discrepancy arose not from a difference of opinion as to the proper profit margin,
but from a difference of view as to the economies which would result from working I
more nearly to capacity as a result of an expected increase in demand. The
Federation themselves recognise this and regard the functions of the independent
costs committee as an integral part of the common price scheme. They have
through their counsel given an assurance to the court that, if the common price
agreement continues, they will take steps to amend the Federation's constitution
to make express provision for the independent costs committee. In this connexion

we draw attention to the four respects in which it seems to us that the information supplied to the independent costs committee by the members ought to be supplemented. We have already acknowledged that, had the additional information referred to been available to the committee in the past, it is not likely that their advice as to any particular price change would have been different, but this might not always be so, and, looking to the future, we think it desirable that additional information on the lines we have already indicated in this judgment should be supplied.

Having had the advantage of hearing the evidence not only of Sir Malcolm Eve and Mr. Slimmings, but also of responsible representatives of each of the makers, we feel justified in thinking that they will continue to operate the price agreement with the same sense of responsibility and restraint as they have done up to now. But the way in which a price fixing scheme of this kind in fact operates must in the final analysis depend on the qualifications and character of the persons on whom the responsibility of deciding on the prices lies. However confident we may feel that Sir Malcolm Eve and Mr. Slimmings will carry out their duties wisely and responsibly and that the present members of the council of the Federation will give heed to their advice, we cannot overlook the fact that the composition of the independent costs committee and of the council may alter, and that the policy of either or both in relation to prices may change. As the court pointed out in the *Black Bolt and Nut* case (3), where the court bases its finding on the way in which restrictions have been operated in the past, any change in policy in the fixing of prices which involved a departure from the principles on which prices had been fixed in the past either in relation to method or in relation to the profit margin allowed would be a material change in relevant circumstances entitling the Registrar to apply to the court under s. 22 of the Act (4); but this power provides an inadequate safeguard unless the Registrar is in a position to place before the court evidence that there has been such a change. Recognising this, the Federation have offered an assurance to the court that, if the Registrar at any time represents to the Federation that he has reason to suppose that there may have been a material change in the relevant circumstances, the Federation will supply to the Registrar such information relative to prices and costs as is in the possession of the independent costs committee for the purpose of enabling him to decide whether he should make an application under s. 22. If, having seen such information, the Registrar considers it to be his duty to make an application under that section, the Federation is willing that the information so supplied should be placed before the court for the purpose of such application.

In the light of the evidence as to the way in which the common price agreement has in fact operated in the past, and of our confidence that the independent costs committee and the council of the Federation as at present constituted will continue so to operate it in the future, and in the light of the assurances we have received, we are satisfied that the main price fixing restriction is not contrary to the public interest.

Associated with the main price-fixing restrictions are provisions relating (a) to merchants' margins and (b) to rebates to be allowed to (i) user-purchasers and (ii) merchant-purchasers. So far as merchants' margins are concerned, it is not disputed that, if the main price-fixing restriction is valid, provisions are necessary for allowing a reduced price on sales made to merchants to cover their remuneration in respect of cement sold to them for re-sale to users. The current merchants' margin in England and Wales is 7s. per ton in respect of cement delivered to and

(3) [1960] 3 All E.R. at p. 142; L.R. 2 R.P. at p. 102.

(4) Section 22, so far as relevant, provides: "(1) The court may, upon application made in accordance with this section, discharge any previous declaration of the court in respect of any restriction and any order made by the court in pursuance thereof and substitute such other declaration, and make such order in pursuance thereof, as appears to the court to be proper at the time of the hearing of the application . . .

"(3) An application under this section may be made by the registrar . . ."

unloaded at the merchant's store, and 4s. per ton in respect of cement ordered by a merchant for delivery direct to the user's site. It has not been suggested by the Registrar that these margins are excessive. The merchant witnesses have expressed the view that they are inadequate, but this view was instinctive rather than justified by any facts or figures. We have no reason to suppose that the margin is other than reasonable. The merchant performs a useful function in connexion with the sale and distribution of cement, and a provision for margins of this kind is a necessary part of a price-fixing scheme of the kind operated by the Federation. In order to qualify for the merchants' margins, a merchant has to satisfy certain minimum qualifications which, in our view, are not unreasonable in principle, and there is no evidence that they have operated unfairly in practice. We are satisfied that the restrictions relating to merchants' margins are not contrary to the public interest.

The rebates to user-purchasers and merchant-purchasers are based on the aggregate quantities of cement purchased by the user or merchant from all members of the Federation during the course of the year. Any user who purchases more than one thousand tons per annum is entitled to 1s. a ton on the quantity in excess of one thousand tons up to ten thousand tons and 2s. per ton on any additional quantity purchased in excess of ten thousand tons. Any merchant who purchases cement in excess of twenty-five thousand tons per annum is entitled to a rebate of 1s. 6d. per ton on such excess. It has not been seriously argued by the Federation that there is any economic justification for a rebate calculated on the total tonnage purchased by an individual purchaser or merchant from all manufacturers. There may well be economic justification for charging a lower price for large orders from a single manufacturer, and in an industry such as the cement industry where considerable economies in cost may be obtained by working to capacity there may also be economic justification for charging a lower price to a purchaser who places large orders for cement from a single works during the course of the year, but the effect of a rebate granted irrespective of whether orders are placed for cement with one works or forty-nine different works is to create a privileged class of purchaser, and, under the method of fixing prices adopted by the Federation and based on the overall profits of the industry, any reduction in price to this privileged class must be at the expense of the majority of purchasers who are not entitled to the rebate.

It was suggested that the rebates were the consequence of, and justified by, the strong bargaining position of large purchasers and merchants vis-à-vis the Federation. This suggestion does not, in our view, bear examination. No doubt before the Federation's price fixing scheme became effective in 1934, large purchasers and merchants were in a strong bargaining position vis-à-vis the individual makers, but for the past twenty-five years the Federation has had a monopoly of the sale of cement, and the continuance of these rebates is, in our view, merely an historical survival which illustrates the fact that practices in an industry survive long after the reason for their existence has disappeared. Apart from the absence of any economic justification for these rebates they have the positive disadvantage of discouraging purchasers from buying cement from non-members of the Federation, thus making it more difficult for a member to resign from the Federation or for a new manufacturer to enter the industry without joining the Federation. Accordingly, we are not satisfied that these general rebates to large users and large merchants are in the public interest. We accordingly declare them void. The consequence of this declaration should be that the general price of cement to purchasers other than large purchasers and large merchants will be correspondingly reduced.

In addition to these general rebates there are, however, special rebates in respect of cement supplied to cement asbestos manufacturers. These are fixed by separate negotiations with individual manufacturers. Supplies of cement to cement asbestos works are required regularly throughout the year and are not subject to seasonal variations like the ordinary demand for cement; all

the supplies to a particular asbestos works are in practice obtained from a single cement works. Contracts for supplies of this kind involve savings in selling costs and assist the cement manufacturer to plan his production so as to work more closely to capacity. These rebates thus differ from the general rebates allowed to large purchasers and large merchants in that there is an economic justification for them and they do not have the effect, under the price-fixing scheme, of increasing the price to other purchasers. We are satisfied that these rebates are not contrary to the public interest.

In declaring the general rebates to large purchasers and large merchants contrary to the public interest, we do not exclude the possibility of the Federation's instituting in future rebate schemes for purchasers other than cement asbestos manufacturers, but such rebates can, in our view, only be justified to the extent that the reduction in price corresponds broadly to savings in cost of production, delivery, or sale due to the size, regularity, or nature of the order.

In addition to the provisions relating to merchants' margins and rebates, there are a number of ancillary restrictions of a kind usual in price-fixing schemes relating to such matters as the standard terms and conditions on which cement may be sold by members of the Federation. Restrictions of these kinds are necessarily ancillary to a price-fixing scheme in order to prevent a member from selling cement at a price which is, in effect, different from the agreed price by giving to the purchaser unusual services or advantages in respect of the sale or delivery of the cement sold. As we are satisfied that the main price-fixing restriction is not contrary to the public interest, restrictions of this kind can be justified in so far as they are reasonably required for purposes connected with the maintenance of the main price-fixing restriction.

Only three of these ancillary restrictions call for special mention. The first is the requirement contained in the standard contract that:

"deliveries will be made on a day-to-day basis of price, i.e., at the inclusive prices for cement and packages operating on the date of despatch, and this condition overrides all other provisions as to prices in this contract."

The effect of this restriction is to prevent any member of the Federation from quoting a fixed price for cement delivered throughout the period of a long-term contract. Witnesses engaged in the building and civil engineering and contracting trades have expressed the view that this is disadvantageous to them since they themselves are now, and have since 1957 progressively been, required to enter into contracts requiring up to two years completion at fixed prices. We recognise the force of this argument. It is, however, only right to point out that the policy of the Federation has been to avoid as far as possible frequent changes in prices. In August, 1955, they were the first industry to announce a standstill in prices for at least twelve months. At the expiration of that period the Federation raised its prices by 3s. and announced another twelve months' standstill on that level; a further increase of 7s. 6d. per ton was made in July, 1957; thereafter prices remained unchanged until February, 1960, when they were reduced by 2s. per ton. In January, 1961, during the actual hearing of this case, prices were increased by 2s. a ton, thus restoring them to the same level as they had been from July, 1957, to February, 1960. Apart from a lack of a sense of security, purchasers of cement have not suffered on balance any serious financial disadvantage from inability to enter into long-term contracts for the supply of cement at fixed prices. If the Federation's price fixing scheme were amended by the deletion of this standard condition, it would be a simple matter for individual members by entering into long-term contracts at a fixed price to evade and so nullify the effects of a price agreement based on the current costs of the industry plus a reasonable margin of profit. We are, therefore, forced to the conclusion that this restriction is reasonably required for the maintenance of the main restriction which we have held to be not contrary to the public interest on the grounds specified in para. (b) of s. 21.

There is, however, a minor restriction providing that quotations and contracts for the supply of cement other than for a specific job shall not be made for periods exceeding twelve months. This restriction would appear to be a survival from the days when the Federation's price-fixing scheme was accompanied by quota provisions for the individual members. The Federation have not sought to justify this restriction as necessary under present conditions, and we accordingly declare it to be contrary to the public interest. A

Finally, there is a standard condition in contracts for the sale of cement to merchants, under which the merchant is required to undertake that he will re-sell the cement at the prices and on the standard conditions as notified to him, and operating on the dates of despatch to his customers. Such a condition is, in our view, reasonably necessary for the purposes of a scheme which provides for fixed prices of sale to the ultimate consumer. This condition is likely to have the effect of keeping down the price to the ultimate purchaser in what will probably continue to be a sellers' market and is, we think, reasonably necessary for the purposes of the main restriction. B

In the result, therefore, the Federation have satisfied us that the main price-fixing conditions, other than those providing for general rebates to large users and large merchants, are not contrary to the public interest, and that the ancillary restrictions, other than that relating to the prohibition on the quotations and contracts for the supply of cement for periods exceeding twelve months, are also not contrary to the public interest. The restrictions relating to rebates to large users and large purchasers and the minor ancillary restriction just mentioned are contrary to the public interest and, accordingly, void. C

There is one matter of general application about which it is desirable to say something. During the course of the hearing, our attention was drawn to a weekly periodical which had published a comment ridiculing the argument then being presented to the court on behalf of the Federation and supported by the evidence of witnesses. The comment was a passing one in an article dealing with a different topic, and it did not appear to the court that any further action was, in all circumstances, required. As, however, the suggestion has since been made that the ordinary law as respects contempt of court does not apply to proceedings before the Restrictive Practices Court, it is desirable to state publicly that this court is by statute a superior court of record, and possesses in relation to all matters incidental to its jurisdiction the like powers, rights, privileges and authority in England and Wales as the High Court (5). Proceedings before it are sub judice, and the publication of any matter tending to interfere with the due course of justice in proceedings before this court is subject to the ordinary sanctions as respects contempt of court (6). This does not mean that the mere fact that particular restrictions have been referred to the court by the Registrar rules out all public discussion of their merits. The jurisdiction of the court is peculiar and relates to matters which are properly the subject of public interest and controversy. But the publication of any matter calculated to deter or influence witnesses who may appear before the court, or to substitute trial by newspapers for trial by this court while a hearing is proceeding amounts to contempt of court and will be dealt with accordingly. We do not doubt that the good sense and a sense of justice of the Press itself will make it easy to see where the line should be drawn. D

Order accordingly. E

Solicitors: *Sydney Morse & Co.* (for the Cement Makers' Federation); *Treasury Solicitor.*

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.] F

(5) See the Restrictive Trade Practices Act, 1956, s. 2 (3), (4), Sch. para. 10; cf., in this connexion, *Practice Direction*, p. 11, ante.

(6) No person can be punished, however, for contempt of the court except by or with the consent of a judge who is a member of the court (Restrictive Trade Practices Act, 1956, s. 2 (4), Sch. para. 12). G

CAMPBELL DISCOUNT CO., LTD. v. BRIDGE.

[COURT OF APPEAL (Holroyd Pearce, Harman and Davies, L.JJ.), February 27, 28, March 1, 1961.]

Hire-Purchase—Penalty—Minimum payment clause—Termination of hiring by hirer—No breach of contract—Whether sum payable on exercising option to terminate hiring was a penalty.

In July, 1959, the defendant, as hirer, entered into a hire-purchase agreement in respect of a motor car of which the cash price was £405. The defendant gave another car in part exchange (in respect of which he was allowed £95) and paid £10 in cash. The total hire-purchase price was £482 10s., and the defendant agreed to pay off the balance of £377 10s. by thirty-six monthly instalments of £10 9s. 2d. (with a final payment of £1). The agreement provided that the hirer might terminate the hiring by giving notice of termination in writing to the owners and that thereupon the provisions of cl. 9 thereof should apply. Clause 9 provided that if the agreement were terminated the hirer should forthwith deliver up the vehicle to the owners and pay to the owners all arrears of hire rent due and unpaid (with interest) and "by way of agreed compensation for depreciation of the vehicle such further sum as may be necessary to make the rentals paid and payable hereunder equal to two-thirds of the hire-purchase price..." After paying the first instalment of £10 9s. 2d. the defendant exercised his option under cl. 6 to terminate the hiring and returned the car. The owners claimed £206 3s. 4d. under cl. 9 of the agreement.

Held: the owners were entitled to the sum claimed for the following reasons—

(i) the question whether the sum claimed was a penalty did not arise because it was claimed on the exercise of the defendant's option under the agreement and not in respect of any breach of the agreement (see p. 101, letter C, post).

Associated Distributors, Ltd. v. Hall ([1938] 1 All E.R. 511) applied.

Cooden Engineering Co., Ltd. v. Stanford ([1952] 2 All E.R. 915) considered.

(ii) no case for equitable relief was made out even if it were assumed that the figure of two-thirds in cl. 9 was so high as to be penal (see p. 102, letter C, post); moreover, if equity were to refuse to enforce the contract it would be necessary first to consider the circumstances and results and to show that the bargain was unconscionable, but there was no evidence in the present case that the plaintiffs had behaved improperly or unconscionably (see p. 103, letters A and I, post).

Appeal allowed.

[As to rights on determination of a hire-purchase agreement, see 19 HALSBURY'S LAWS (3rd Edn.) 550, para. 891; and for cases on the subject, see 26 DIGEST (Repl.) 674-676, 73-81.]

Cases referred to:

Apex Supply Co., Ltd., Re, [1941] 3 All E.R. 473; [1942] Ch. 108; 111 L.J.Ch. 89; 166 L.T. 264; 26 Digest (Repl.) 658, 2.

Associated Distributors, Ltd. v. Hall, [1938] 1 All E.R. 511; [1938] 2 K.B. 83; 107 L.J.K.B. 701; 158 L.T. 236; 26 Digest (Repl.) 667, 39.

Chester & Cole, Ltd. v. Wright, (1930), JONES AND PROUDFOOT'S NOTES ON HIRE-PURCHASE LAW (2nd Edn.), p. 124.

Cooden Engineering Co., Ltd. v. Stanford, [1952] 2 All E.R. 915; [1953] 1 Q.B. 86; 17 Digest (Repl.) 154, 523.

Elsay & Co., Ltd. v. Hyde, (1926), JONES AND PROUDFOOT'S NOTES ON HIRE-PURCHASE LAW (2nd Edn.), p. 107.

Dagenham (Thames) Dock Co., Re, Ex p. Hulse, (1873), 8 Ch. App. 1022; 43 L.J.Ch. 261; 38 J.P. 180; 10 Digest (Repl.) 1265, 8935.

- Dunlop Pneumatic Tyre Co., Ltd. v. New Garage & Motor Co., Ltd.*, [1915] A.C. 79; 83 L.J.K.B. 1574; 111 L.T. 862; 17 Digest (Repl.) 149, 491.
- Kilmer v. British Columbia Orchard Lands, Ltd.*, [1913] A.C. 319; 82 L.J.P.C. 77; 108 L.T. 306; 20 Digest 517, 2439.
- Maynard v. Moseley*, (1676), 3 Swan. 651; 36 E.R. 1009; sub nom. *Maynard's Case*, Freem. Ch. 1; 22 E.R. 1016; 40 Digest (Repl.) 382, 3060.
- Mussen v. Van Diemen's Land Co.*, [1938] 1 All E.R. 210; [1938] Ch. 253; 107 L.J.Ch. 136; 158 L.T. 40; Digest Supp.
- Steedman v. Drinkle*, [1916] 1 A.C. 275; 85 L.J.P.C. 79; 114 L.T. 248; 20 Digest 517, 2440.
- Stockloser v. Johnson*, [1954] 1 All E.R. 630; [1954] 1 Q.B. 476; [1954] 2 W.L.R. 439; 3rd Digest Supp.

Appeal.

This was an appeal by the plaintiffs from an order of His Honour JUDGE BASSETT, dated May 3, 1960, made at Ilford County Court, whereby the plaintiffs' claim for money due under a hire-purchase agreement was dismissed on the ground that the sum claimed was a penalty.

Stanley Rees, Q.C., and *A. D. Gavin* for the plaintiffs.

Neil Lawson, Q.C., and *J. G. K. Sheldon* for the defendant.

HOLROYD PEARCE, L.J.: This is an appeal from a judgment dismissing the plaintiffs' claim for £206 3s. 4d. The plaintiffs are a finance company from whom the defendant hired a motor car under a hire-purchase agreement. The defendant, having exercised his right to return the motor car, was liable under the terms of the agreement to pay a certain sum by way of agreed compensation for depreciation of the vehicle. The learned judge held that that sum was a penalty, and was not recoverable. Counsel for the plaintiffs contends that the learned judge erred in that no question whether the sum was a penalty arose since there was no breach. For by returning the car the defendant merely exercised an option at a certain price. Moreover, even if the question whether the sum was a penalty did arise and if it could be a penalty, it was not in fact a penalty, counsel for the plaintiffs argues, but was a genuine pre-estimate of damage in circumstances that are bound to contain many imponderables. Counsel for the defendant contends that the judge decided rightly. He further argues on a cross notice that even if the sum claimed is not a penalty, the court under its equitable jurisdiction should relieve the defendant of all obligations and liabilities in respect of the sum claimed, and dismiss the action. That point was never taken in the court below, nor was any evidence given as to the circumstances of the transaction.

The hire-purchase agreement is dated July 20, 1959. It sets out the cash price of the vehicle as £405 of which £105 was discharged by an initial cash payment of £10 and a credit of £95 in respect of a car taken in part exchange. The total purchase price was £482 10s. Thirty-six monthly instalments of £10 9s. 2d. were payable. The defendant paid the first instalment on the due date, Aug. 20, 1959. On Sept. 3, 1959, he wrote a letter saying:

"Owing to unforeseen personal circumstances I am very sorry but I will not be able to pay any more payments on the Bedford Dormobile. Will you please let me know when and where I will have to return the car? I am very sorry regarding this but I have no other alternative."

There was no answer to that letter. The defendant then returned the car to the dealer on Sept. 14, 1959, and in due course it came into the plaintiffs' possession.

The relevant clauses of the agreement are as follows. Clause 6 provides:

"The hirer may at any time terminate the hiring by giving notice of termination in writing to the owners, and thereupon the provisions of cl. 9 hereof shall apply."

Clause 9 provides:

"If this agreement or the hiring be terminated for any reason before the vehicle becomes, under cl. 5 hereof, the property of the hirer, then the hirer shall no longer be in possession of the vehicle with the owner's consent and the hirer shall forthwith (a) at his own cost and risk deliver up the vehicle in a proper state of repair and condition together with all necessary licences, registration books or certificates, insurance policy and other documents relative to the vehicle to the owners at such address as they may direct and (b) pay to the owners all arrears of hire rent due and unpaid at the date of termination of the hiring together with interest thereon stipulated under cl. 1 hereof and by way of agreed compensation for depreciation of the vehicle such further sum as may be necessary to make the rentals paid and payable hereunder equal to two-thirds of the hire-purchase price as specified in the schedule hereto."

Clause 7 and cl. 8 were referred to for the purposes of the argument. By cl. 7:

"If the hirer shall fail to pay any sum due hereunder or to observe any of the stipulations in cl. 4 hereof or any other stipulations on his part contained herein the owners may thereupon and without notice terminate the hiring and/or this agreement, and may . . . retake possession of the vehicle whereupon the provisions of cl. 8 hereof shall apply."

Clause 8 provides:

"Without in any way derogating from their rights under cl. 7 hereof, and without discharging or prejudicing any pre-existing liability of the hirer to the owners (including the liability of the hirer under cl. 9 hereof) this agreement and the hiring hereunder shall forthwith and for all purposes be determined absolutely and come to an end"

on certain events including death of the hirer, distress, bankruptcy, liquidation and so forth.

The hirer exercised his option under cl. 6 by giving notice. Clause 9 then applied. Under cl. 9 (a) the hirer had to return the vehicle, which he has done. Under cl. 9 (b) he has to pay such sum as will make up the rentals to two-thirds of the purchase price, viz., the sum here claimed. No breach of contract or damages are in question for the hirer is simply exercising his right to return the car with all the incidents set out under cl. 9 (a) and (b). Therefore the doctrine relating to penalties does not apply.

A similar situation was considered in *Associated Distributors, Ltd. v. Hall* (1). There the hirer had hired a tandem bicycle under a hire-purchase agreement. By cl. 5 of the agreement he was given an option of terminating the hiring at any time by returning the bicycle, but he remained liable for the rent up to the date of the return and for all other sums payable under the agreement and damages (if any) for any breach of any term of the agreement. By cl. 7 it was agreed that in the event of the hiring being determined he was to pay by way of compensation for depreciation of the goods, in addition to any other sums payable thereunder, such sums as, with the amount previously paid for rent, should make up a sum equivalent to not less than one-half of the total amount including the option purchase price payable under the agreement. This court held that there was no question as to the plaintiffs' claim under cl. 7 "being liquidated damages or in the nature of a penalty", and that therefore the owner was entitled to recover his money. SLESSER, L.J., having referred to cases in which payments were made as compensation for depreciation where the hirer's default had brought the agreement to an end, continued (2):

"In such cases the question has arisen whether the sum which the owner may claim by way of compensation for depreciation of the goods, in addition

(1) [1938] 1 All E.R. 511; [1938] 2 K.B. 83.

(2) [1938] 1 All E.R. at p. 513; [1938] 2 K.B. at p. 87.

to any other sums payable as provided in cl. 7, is liquidated damages or penalty. The cases, as I understand them—two cases in the Divisional Court and a decision in the Court of Appeal—seem to establish the view that they are to be regarded as liquidated damages, but it is not necessary in this case for us to express any opinion upon those decisions, because they have nothing to do with the case which we are here to consider. This is a case where the hirer has elected to terminate the hiring. He has exercised an option, and the terms on which he may exercise the option are those set out in cl. 7. The question, therefore, whether these payments constitute liquidated damages or penalty does not arise in the present case for determination.”

SCOTT, L.J., and CLAUSON, L.J., agreed, but the latter pointed out (3):

“... that it would save much misunderstanding, and would certainly conduce to the reputation of those who hire out bicycles upon these conditions being that of honest traders, if they were to take steps whenever this form of contract is used to make it clear, if possible, by a statement on the face of the contract, that the young person who enters into it is under the liability...”

which the court was enforcing in that case. I agree with that observation. The Hire-Purchase Acts, 1938 and 1954, have secured that result in transactions within their scope, but the transaction in the present case, being over £300 in amount, is unfortunately outside their scope.

Counsel for the defendant sought to distinguish that case in two ways. First he argued that the defendant broke the terms of the hiring agreement by not giving proper notice of termination and by returning the car not to the owners but to the dealer who was not their agent. If that be so he can argue that the sum claimed under cl. 9 is damages for his own breach. He relied on *Cooden Engineering Co., Ltd. v. Stanford* (4) as establishing that the sum could be and is a penalty on the facts of the present case. In my judgment that argument is quite untenable. The letter of Sept. 3 was a notice to terminate, and the car was quite properly returned to the dealer who accepted it. The plaintiffs gave the defendant no other address to which he was to return it. They waived their rights to have the car delivered to any other address, and accepted delivery to the dealer as the fulfilment by the hirer of his obligations under cl. 9 (a).

Counsel for the defendant's second point is that the reasoning which lay behind *Associated Distributors, Ltd. v. Hall* (5) has been disapproved by this court in the later case of *Cooden Engineering Co., Ltd. v. Stanford* (3). In the former case, he argues, SLESSER, L.J., referred to cases reported in the appendix to JONES AND PROUDFOOT'S NOTES ON HIRE-PURCHASE LAW (2nd Edn.), which were decided on reasoning that did not commend itself to this court in the *Cooden Engineering* case (3). SALTER, J., in *Elsey & Co., Ltd. v. Hyde* (6) had said that since a clause provided for payment in events not caused by a breach as well as in those caused by a breach, the payment under the clause in compensation for a breach could not be a penalty; and GREER, L.J., in *Chester & Cole, Ltd. v. Wright* (7), had said that where a hirer had to pay such a sum as is here claimed—whether on termination through his own fault or from some other cause—it was not a penalty, but a sum to become payable in a certain event, i.e., the termination of the agreement as thereby provided, and not by way of damages for breach of the agreement. SIMONDS, J., held this view binding on him in *Re Apex Supply Co., Ltd.* (8). It is argued that since that

(3) [1938] 1 All E.R. at p. 514; [1938] 2 K.B. at p. 89.

(4) [1952] 2 All E.R. 915; [1953] 1 Q.B. 86.

(5) [1938] 1 All E.R. 511; [1938] 2 K.B. 83.

(6) (1926), JONES AND PROUDFOOT'S NOTES ON HIRE-PURCHASE LAW (2nd Edn.), at p. 107.

(7) (1930), JONES AND PROUDFOOT'S NOTES ON HIRE-PURCHASE LAW (2nd Edn.), at p. 124.

(8) [1941] 3 All E.R. 473; [1942] Ch. 108.

reasoning of *SALTER, J.*, and *GREER, L.J.*, was disapproved by the majority in the *Cooden Engineering* case (9), therefore the effect of the decision in *Associated Distributors, Ltd. v. Hall* (10) has been weakened.

I cannot agree. In the *Cooden Engineering* case (9), *SOMERVELL, L.J.*, with whom *HODSON, L.J.*, agreed, disapproved of the reasoning of *SALTER, J.*, and *GREER, L.J.* But he left open the question decided in *Associated Distributors, Ltd. v. Hall* (10). The reasoning of which he disapproved is not necessary to, nor is it the basis of, the decision in *Associated Distributors, Ltd. v. Hall* (10); nor does *SOMERVELL, L.J.*, suggest that the decision was wrong. Moreover, it was the unanimous decision of this court, whereas the *Cooden Engineering* case (9) was a majority decision with a powerful dissenting judgment by *JENKINS, L.J.* Even had the *Cooden Engineering* case (9) criticised the reasoning in *Associated Distributors, Ltd. v. Hall* (10), we should in my view be bound by the decision in the earlier case. It was decided rightly as the law now stands on the ground that the sum payable was the price of the hirer's right to terminate, and could not be considered as a penalty since it was not payable in respect of any breach.

Finally, counsel for the defendant argues that it is unfair that the defendant cannot attack as being a penalty the sum payable under cl. 9, whereas he could have done so had he made default in his obligations. It is inequitable that the honest man should be in a worse position than the defaulter. The court should, he urges, regard the sum payable in this case as analogous to a penalty, and unconscionable, and it should therefore decline to enforce its payment. He has cited no case where such a course has been taken in similar circumstances. He relies on the following dicta in the *Cooden Engineering* case (9). But it must be remembered that the hire-purchase agreement in that case was extremely harsh to the hirer who was bound to pay all the instalments even if he returned the hired vehicle immediately after the hiring started. *SOMERVELL, L.J.*, said (11):

"In *Re Apex Supply Co., Ltd.* (12) the claim was based on the hiring company having gone into liquidation. Though it may well be that the conclusion would be the same, it might fall to be considered on equitable rather than on common law principles."

JENKINS, L.J., dealt more fully with the matter. He said (13):

"Although, in the view I take, the sum payable under cl. 11 is not a penalty in the sense contended for in the present appeal, it might, I suppose, conceivably have been argued that the provision in question is a penal provision in the sense that it is so oppressive and unconscionable that equity should grant relief from it on equitable terms: cf. *Re Dagenham (Thames) Dock Co., Ex p. Hulse* (14); *Kilmer v. British Columbia Orchard Lands, Ltd.* (15); and *Steedman v. Drinkle* (16), cases in which relief was successfully sought from provisions for forfeiture of instalments of purchase money in contracts for the sale of land comparable for the present purpose to the one considered by *FARWELL, J.*, in *Mussen v. Van Diemen's Land Co.* (17); and note *FARWELL, J.*'s explanation (18) in the last-mentioned case of the principle on which those cases proceeded. But if that argument were tenable here at all—and I express no opinion one way or the other about that, for no such argument has been raised in the present case—it surely could not be equitable in the circumstances to grant relief on terms which would put the owners in any worse position than they would have been in if the hirer

(9) [1952] 2 All E.R. 915; [1953] 1 Q.B. 86.

(10) [1938] 1 All E.R. 511; [1938] 2 K.B. 83.

(11) [1952] 2 All E.R. at p. 921; [1953] 1 Q.B. at p. 98.

(12) [1941] 3 All E.R. 473; [1942] Ch. 108.

(13) [1952] 2 All E.R. at p. 929; [1953] 1 Q.B. at p. 112.

(14) (1873), 8 Ch. App. 1022. (15) [1913] A.C. 319. (16) [1916] 1 A.C. 275.

(17) [1938] 1 All E.R. 210; [1938] Ch. 253.

(18) [1938] 1 All E.R. at p. 215; [1938] Ch. at p. 261.

had returned the vehicle under cl. 10 on the date on which they repossessed themselves of it under cl. 11. Be that as it may, the question does not arise in the present case, in which the owners' claim has been contested solely on the ground that the sum sued for is a penalty in what I have termed the relevant sense, and as such wholly irrecoverable."

I respectfully agree with those observations.

Clause 6 is not a penal provision. It is a right to return the car before the period of hiring had expired. Without cl. 6 the hirer could not do so. In former days there were many agreements that contained no such right. There must obviously be a provision to compensate the owners in some degree. The amount of such compensation must be a question of degree. Even assuming (without deciding) that the figure of two-thirds under cl. 9 is so high as to be penal, and that had the hirer made default, that figure would be held to be a penalty, yet in order to show that the bargain was unconscionable and unenforceable the particular facts and the resulting circumstances must be investigated. Whereas in considering whether a sum payable constitutes a penalty, the contract itself at the time of its creation and its inherent circumstances are the test (see *Dunlop Pneumatic Tyre Co., Ltd. v. New Garage & Motor Co., Ltd.* (19)), in considering whether equity should enforce an agreement, the general circumstances surrounding the agreement and also the later facts are relevant.

In *Stockloser v. Johnson* (20) where a purchaser sought unsuccessfully to recover forfeited deposits, SOMERVELL, L.J., said (21):

"As the basis of the plaintiff's right, if he has one, is the unconscionability of the defendant's retaining sums which have been paid to him as instalments, I agree that the circumstances of the particular case should be looked at and the question is not one to be decided by looking only at the contract."

DENNING, L.J., said (22):

"These illustrations convince me that in a proper case there is an equity of restitution which a party in default does not lose simply because he is not able and willing to perform the contract. Nay, that is the very reason why he needs the equity. The equity operates, not because of the plaintiff's default, but because it is, in the particular case, unconscionable for the seller to retain the money. In short, he ought not unjustly to enrich himself at the plaintiff's expense. This equity of restitution is to be tested, I think, not at the time of the contract, but by the conditions existing when it is invoked."

ROMER, L.J., on the other hand said (23):

"There is, in my judgment, nothing inequitable per se in a vendor, whose conduct is not open to criticism in other respects, insisting on his contractual right to retain instalments of purchase money already paid. In my judgment, there is no sufficient ground for interfering with the contractual rights of a vendor under forfeiture clauses of the nature which are now under consideration, while the contract is still subsisting, beyond giving a purchaser who is in default, but who is able and willing to proceed with the contract, a further opportunity of doing so; and no relief of any other nature can properly be given, in the absence of some special circumstances such as fraud, sharp practice, or other unconscionable conduct of the vendor, to a purchaser after the vendor has rescinded the contract."

In the present case there is no evidence at all establishing that the plaintiffs behaved improperly or unconscionably except in so far as it is argued that the

(19) [1915] A.C. at p. 86.

(20) [1954] 1 All E.R. 630; [1954] 1 Q.B. 476.

(21) [1954] 1 All E.R. at p. 636; [1954] 1 Q.B. at p. 488.

(22) [1954] 1 All E.R. at p. 638; [1954] 1 Q.B. at p. 492.

(23) [1954] 1 All E.R. at p. 644; [1954] 1 Q.B. at p. 501.

contract was a harsh one. The defendant has not sought leave to bring affidavit evidence. The plaintiffs have offered an affidavit which we have not admitted. But counsel for the defendant has to concede that the plaintiffs have in fact done badly out of the transaction, although he contends that he might be able to show that had they been astuter or more vigilant, they would have done very well out of it. In my judgment, therefore, no case for equitable relief is made out. Only very exceptional circumstances could possibly justify it. For any relief available in respect of hire-purchase agreements must also (it is conceded) be available in respect of all contracts. It would be a novel extension for the law to interfere on equitable grounds with ordinary contracts freely entered into by persons under no duress or mistake merely on the ground that in certain events it has turned out harshly for parties who subsequently wished or were compelled by circumstances to abandon their contracts. Parliament has rightly put certain fetters on hire-purchase contracts on social grounds prompted by considerations of the kind of persons who enter into them, and the nature of the transactions. It has, perhaps unfortunately, chosen not to put fetters on transactions of the size of that in the present case. This court cannot seek to repair that deliberate omission by creating special principles for that purpose. On general principles the evidence (or lack of it) in this case does not justify the courts' interference with the contractual rights of the parties. Not without regret, I am of opinion that the appeal must be allowed.

HARMAN, L.J.: I am of the same opinion and though I should like to emulate the laconic terms of the judgment of the learned county court judge who delivered judgment in two words (24), I feel constrained to add a word or two because of the uneasy feeling that I have that the position of the law as it stands is not satisfactory. If the judgment of the majority in *Cooden Engineering Co., Ltd. v. Stanford* (25) be right, then the position may be different according to whether there is somewhere behind the termination of the contract a breach by somebody. It has been pointed out quite rightly to us that it is unsatisfactory if the man who honestly admits to the finance company that he cannot go on may have to pay a penalty, but that if he waits for the finance company to exercise their rights and in the meanwhile breaks the contract, he may be able to escape paying it on the ground that penalty for breach of contract is not enforceable in law. I have felt myself oppressed by that consideration.

The solution may be that the minority view in the *Cooden Engineering* case (25) was in fact the right one. I do not think that the discrepancy can be healed by some rather loose conception of what are called equitable principles. Equitable principles are, I think, perhaps rather too often bandied about in common law courts as though the Chancellor still had only the length of his own foot to measure when coming to a conclusion. Since the time of LORD ELDON the system of equity for good or evil has been a very precise one, and equitable jurisdiction is exercised only on well-known principles. There are some who would have it otherwise, but as at present advised I am of opinion that, at any rate in the instant case, there is no equitable principle that can be called in aid.

Similarly I rather deprecate the attempt to urge the court on what are called equitable principles to dissolve contracts which are thought to be harsh, or which have turned out to be disadvantageous to one of the parties. The observation of LORD NOTTINGHAM, C., in *Maynard v. Moseley* (26) is still true that: "... the Chancery mends no man's bargain," and I do not therefore see my way to call in aid equity to mend what may be an unfortunate situation and one which, if it calls for remedy, calls for aid by the legislature rather than by the judiciary.

(24) The county court judge's note of his judgment read "claim dismissed".

(25) [1952] 2 All E.R. 915; [1953] 1 Q.B. 86.

(26) (1676), 3 Swan. at p. 655.

I therefore agree that this appeal should be allowed, holding as I do that we are bound by *Associated Distributors, Ltd. v. Hall* (27). A

DAVIES, L.J.: I agree with both judgments.

Appeal allowed. Leave to appeal to the House of Lords granted.

Solicitors: *Ronald Brooke & Co.*, Ilford, Essex (for the plaintiffs); *E. Edwards, Son & Noice* (for the defendant). B

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

CAMPBELL DISCOUNT CO., LTD. v. GALL. C

[COURT OF APPEAL (Holroyd Pearce, Harman and Davies, L.JJ.), March 1, 2, 1961.]

Hire-Purchase—Agreement—Agreement signed by hirer in blank—Price exceeding £300 inserted incorrectly by dealer—Deposit of £65 paid by hirer to dealer and deducted by finance company in paying balance to dealer—Whether dealer the agent of the finance company or the hirer—Whether hirer estopped from denying correctness of written agreement—Whether agreement enforceable or hirer entitled to recover the deposit. D

The defendant orally agreed with a dealer to purchase a motor car for £265 on hire-purchase terms, and paid a deposit of £65. At the same time the defendant signed in blank a form of hire-purchase contract (supplied to the dealer by a finance company, the plaintiff), leaving the dealer to complete the form. The dealer entered the price as £325, and sent the document to the plaintiff, which bona fide accepted the transaction and paid the dealer for the car (less the £65 which the dealer had received). The plaintiff sent the defendant a copy of the completed form of agreement. The defendant refused to pay the instalments. The plaintiff took possession of the car and claimed payment of four of the monthly instalments by the defendant, who counterclaimed for the return of his deposit. E

Held: (i) the claim for the payment of monthly instalments would be dismissed for the following reasons— F

(a) there had been no consensus ad idem between the defendant and the plaintiff, for the price stated in the written agreement was not agreed by the defendant (see p. 110, letter F, and p. 109, letter I, post). G

(b) the case was not one where the dealer had apparent authority from the defendant to conclude agreement on his behalf, for the plaintiff did not know that the defendant had allowed the dealer to fill in the form after the defendant had signed it (see p. 109, letter C, post). H

Eastern Distributors, Ltd. v. Goldring ([1957] 2 All E.R. 525) distinguished.

(c) the defendant was not estopped by negligence from denying the truth of the written agreement, since the defendant owed no duty to the plaintiff to take care; moreover the doctrine of estoppel by negligence applied only to negotiable instruments, and the defendant's negligence was not the proximate cause of the loss (see p. 109, letters E to I, post). I

Dictum of LORD GREENE, M.R., in *Wilson & Meeson v. Pickering* ([1946] 1 All E.R. at p. 397), and *Swan v. North British Australasian Co., Ltd.* (1863), 2 H. & C. 175 applied.

(ii) the defendant could not recover his deposit from the plaintiff because the dealer was not the agent of the plaintiff in receiving the £65 (although he would have been such if the hire-purchase agreement had become

effective); accordingly, the dealer had held the money on behalf of the defendant (see p. 108, letters F and C, and p. 110, letter D, post).

Per HOLROYD PEARCE, L.J.: evidence is admissible to show the true nature of a written transaction which appears to satisfy or exclude the Hire-Purchase Act, 1938, although that evidence varies or contradicts the document (see p. 107, letter C, post).

QUAERE: whether an agreement unenforceable under the Hire-Purchase Act, 1938, can be rendered binding by estoppel (see p. 107, letter D, and p. 109, letter I, post).

Appeal allowed.

[**Editorial Note.** On the questions of apparent authority and estoppel by negligence this decision may conveniently be considered with *Central Newbury Car Auctions, Ltd. v. Unity Finance, Ltd.* ([1956] 3 All E.R. 905).

As to the limits of the statutory control over hire-purchase agreements, see 19 HALSBURY'S LAWS (3rd Edn.) 514, para. 828; and as to the effect of non-compliance with the statutory requirements, see *ibid.*, p. 528, para. 849.

As to agency by estoppel, see 15 HALSBURY'S LAWS (3rd Edn.) 237, para. 441; and as to estoppel by negligence and proximate cause, see *ibid.*, p. 245, para. 453, and in relation to negotiable instruments, see *ibid.*, p. 246, para. 454; and for cases on the subject, see 21 DIGEST 359-365, 1391-1426 (holding out), 399-402, 1595-1618 (estoppel by negligence).

As to apparent authority as an owner, see 1 HALSBURY'S LAWS (3rd Edn.), 212, para. 485; and for cases on the subject, see 1 DIGEST 340-346, 525-570.

For the Hire-Purchase Act, 1938, s. 1, s. 2, see 22 HALSBURY'S STATUTES (2nd Edn.) 1021; for the Hire-Purchase Act, 1954, s. 1, see 34 HALSBURY'S STATUTES (2nd Edn.) 758.]

Cases referred to:

Bank of Australasia v. Palmer, [1897] A.C. 540; 66 L.J.P.C. 105; 17 Digest (Repl.) 318, 1253.

Eastern Distributors, Ltd. v. Goldring (Murphy, Third Party), [1957] 2 All E.R. 525; [1957] 2 Q.B. 600; [1957] 3 W.L.R. 237; 26 Digest (Repl.) 675, 77.

Lowe v. Lombank, Ltd., [1960] 1 All E.R. 611; [1960] 1 W.L.R. 196.

Swan v. North British Australasian Co., (1863), 2 H. & C. 175; 32 L.J.Ex. 273; 159 E.R. 73; 21 Digest 291, 1036.

Wilson & Meeson v. Pickering, [1946] 1 All E.R. 394; [1946] K.B. 422; [1947] L.J.R. 18; 175 L.T. 65; 2nd Digest Supp.

Appeal.

This was an appeal by the defendant from an order of His Honour JUDGE NICHOLAS made at Lambeth County Court on May 19, 1960. Judgment was given for the plaintiff finance company for £52 being four monthly instalments alleged to be due under a hire-purchase agreement which was terminated by the plaintiff. The defendant's counterclaim for the return of a deposit of £65 was dismissed.

D. R. M. Henry for the defendant.

O. S. Martin for the plaintiff.

HOLROYD PEARCE, L.J.: This is a defendant's appeal from a judgment of His Honour JUDGE NICHOLAS who held that he was liable to pay certain instalments under a hire-purchase agreement, and dismissed his counterclaim for the return of a deposit of £65. The defendant contends first that the learned judge erred in that no agreement was ever made between the plaintiff company and the defendant. Secondly, he argues that if such an agreement was made, it was not enforceable since there was no sufficient note or memorandum of the agreement under the Hire-Purchase Act, 1938, s. 2 (2) (a).

The case involves the question whether the loss occasioned by the fraud (or just conceivably the mistake) of a motor car dealer falls to be borne by the defendant or the plaintiff finance company. The defendant was introduced to one Boodof, the manager of a firm, Windsor Autos, that dealt in motor cars. He believed that Boodof was a dealer on his own. He agreed with Boodof to buy a second-hand Vauxhall car for £265 on hire-purchase terms. The defendant paid a deposit of £65 in cash to Boodof. Unfortunately, at Boodof's request the defendant signed one of the plaintiff's forms of hire-purchase contract leaving the blanks unfilled, for Boodof to complete. He had been told by Boodof and expected that he would have to pay a further £200 by instalments not exceeding £2 per week spread over a period of eighteen months to two years. Boodof inserted into the uncompleted hire-purchase agreement a false purchase price of £325. He also inserted into the hire-purchase agreement a provision that repayment was to be by twenty-four monthly instalments of £13 per month. He gave similar false particulars on the sales note. He sent the requisite documents to the plaintiff, who bona fide accepted the transaction, and paid Boodof for the motor car. The car was delivered to the defendant, but he never used it. Shortly thereafter the plaintiff sent him a copy of the agreement. The defendant said in evidence that he complained by letter and telephone that both the price and the instalments were too high, but the plaintiff had no record of such a letter or telephone conversation. The judge makes no finding on that point. In due course the plaintiff took possession of the car and sued the defendant for four monthly instalments. The defendant contends that he never agreed to the hire-purchase agreement now sued on, and that since the total hire-purchase price under the real agreement was less than £300, the transaction came within the Hire-Purchase Acts, (1) and is unenforceable owing to certain breaches of the statutory requirements. He counterclaims for the £65 deposit paid under the purported agreement made with Boodof. The question is whether the defendant is bound by, and also whether the plaintiff can enforce, the hire-purchase agreement which by its terms is outside the Acts since the total hire-purchase price thereunder is over £300, when in fact the true bargain that the defendant himself made was within the Acts. If the Hire-Purchase Act, 1938, is applicable there was plainly a failure to comply with s. 2 (2) (a) since the signature by the hirer of the agreement in blank does not satisfy the statutory requirement; *Eastern Distributors, Ltd. v. Goldring (Murphy, Third Party)* (2).

The position of Boodof vis-à-vis the parties is of vital importance. There are three possibilities: (i) that Boodof was either the plaintiff's agent by authority or by estoppel; (ii) that he was the defendant's agent by authority or by estoppel; and (iii) that he was not the agent of either party.

Both counsel have put their arguments very clearly and fairly. Counsel for the defendant puts forward as his main contention the proposition that Boodof was the agent of the plaintiff. If that be right, the defendant must succeed, for he made an oral agreement with the plaintiff through their agent, and that agent fraudulently (or just conceivably by mistake) filled in the form so that it purports to embody an agreement that was never in fact made. In that event, quite apart from the Hire-Purchase Act, 1938, the plaintiff cannot successfully sue on the agreement produced. The plaintiff's attempt to do so is a repudiation of the original oral agreement with the result that the deposit becomes repayable to the defendant.

Counsel for the plaintiff took the preliminary point that parol evidence is not admissible to show that the written agreement is other than it appears to be. I do not think that point is good. It was not put forward on a cross-notice, and,

(1) Viz., the Hire-Purchase Act, 1938, and the Hire-Purchase Act, 1954. The latter Act, by s. 1, extended the application of the Act of 1938 to, so far as relevant, hire-purchase agreements where the price did not exceed £300.

(2) [1957] 2 All E.R. 525; [1957] 2 Q.B. 600.

A therefore, counsel for the defendant was taken by surprise and has not had time to deal with the matter fully. Had we been against him on this point we must have granted him an adjournment. In *Bank of Australasia v. Palmer* (3), LORD MORRIS said:

B “... parol testimony cannot be received to contradict, vary, add to or subtract from the terms of a written contract, or the terms in which the parties have deliberately agreed to record any part of their contract.”

Parol evidence can be used, however, to show whether a written contract is void for mistake: see cases cited in CROSS ON EVIDENCE at p. 477: or was signed subject to a condition precedent. Moreover, in certain cases parol evidence is admissible when it is relevant for the court to find the true nature of the transaction.

C The Hire-Purchase Acts (4), like the Bills of Sale Acts, 1878 and 1882, and the Rent Acts (5), cannot in my judgment be excluded by documents which, though purporting to be outside the Acts, represent a transaction which is in truth within it. Under the two latter categories of Acts, (6) parol evidence has always been admissible to show the true nature of a written transaction which appears to satisfy or exclude the Acts although that evidence varies or contradicts the documents. Such evidence is admissible here for the purpose of showing that the true bargain was within the Hire-Purchase Act, 1938, as amended (although the written document is outside it) unless the defendant is estopped from so contending. Even if Boodof was the defendant's agent, I feel considerable doubt whether the Act can be excluded by such an estoppel. Clause 12 of the agreement on which the learned judge relied provides that the dealer is not the agent of the hire-purchase company, and that the company is not in any way responsible for, and shall not be bound by, any representations made by such vendor. If in truth this transaction comes within the Act of 1938, then the provisions of s. 5 (e) apply, and

E “Any provision in any agreement . . . (e) whereby an owner or seller is relieved from liability for the acts or defaults of any person acting on his behalf in connexion with the formation or conclusion of a hire-purchase agreement or credit-sale agreement, shall be void.”

F If, therefore, Boodof was acting for the plaintiff, cl. 12 of the hire-purchase agreement would be void. That still leaves the question intact whether he was in fact so acting.

G The following facts are said to show that Boodof was acting as agent for the plaintiff. First, it is said, he decided what the total price and what the rates of repayment were to be. In my view that was not a decision by Boodof on behalf of the plaintiff; it was merely Boodof's definition of the proposition which he proposed to put up to the plaintiff. Then it is said that the dealer receives a commission on this transaction from the plaintiff, but that in my view is no indication that he was, before the transaction became effective, the agent of the plaintiff.

H Reliance was placed on s. 2 of the Hire-Purchase Act, 1938, which provides that the owner shall state in writing what is the price of the goods to be hired; and it is argued that since the price of these goods was given to the defendant by Boodof, he must have been the plaintiff's agent for that purpose. The proviso to s. 2 shows that if the hirer has accepted the goods, and the price is shown

(3) [1897] A.C. at p. 545.

(4) See footnote (1), p. 106, ante.

(5) Viz., the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939; the Rent Act, 1957, and cf. the Housing Repairs and Rent Act, 1954, Part 2 and s. 49 (1).

(6) In deciding whether a document is within the Bills of Sale Acts, 1878 and 1882, the court looks to the substance of the transaction; see 3 HALSBURY'S LAWS (3rd Edn.) 259, para. 475. So, too, the court looks at the legal substance of the transaction in determining whether a letting is within the Rent Acts, and estoppel cannot prevent parties relying on their rights under those Acts; see 23 HALSBURY'S LAWS (3rd Edn.) 722, para. 1467.

on the goods, the requirements of s. 2 (1) shall be deemed to be satisfied. So in my view there is nothing in that section which compels the plaintiff to do something through the agency of the dealer. Unless certain things have been done by the dealer, the agreement is unenforceable, but that does not constitute the dealer their agent. A

Then it is said that the dealer receives the initial rental on behalf of the hire-purchase company. That is a matter which becomes very relevant on the consideration of the counterclaim; but in my judgment the position cannot be said to be so clear as to throw any light on the position of Boodof for the purpose of deciding whether he was the company's agent. It is true that the documents proceed on the assumption that if the hire-purchase agreement becomes effective, the money paid to the dealer shall be a payment of rent under that agreement to the hire-purchase company. At the stage which we are considering the agreement had not become effective, and it cannot be said that Boodof was receiving the deposit as agent for the plaintiff. For the plaintiff was not then concerned at all. It was wholly ignorant of the transaction. Undoubtedly Boodof was receiving the initial payment in order to hold it and give credit to the plaintiff for it if and when it accepted the transaction; but there was no certainty that it would accept it. The dealer had no general agreement with the plaintiff, and no general course of dealing with it. The plaintiff had had some previous transactions with his firm, Windsor Autos, but there was nothing in the circumstances before this transaction to constitute Boodof or Windsor Autos the plaintiff's agent. It is urged that the mere provision of hire-purchase forms by the plaintiff to dealers for transactions, such as the transaction with the plaintiff, showed that all such dealers were acting as the agents of the plaintiff. I cannot agree. The plaintiff provides forms to any dealers from whom it hopes for business; but that hope does not constitute an agency. Reliance was placed on a dictum of DIPLOCK, J., in *Lowe v. Lombank, Ltd.* (7), but that dictum did not express a concluded view, and the estoppel envisaged in it was based on different documents in different circumstances from those in the present case. B C D E

I find no sufficient evidence to show that the dealer was the agent of the plaintiff. Both dealer and hirer are concerned to bring the finance company into a deal whereby it will buy the car from the dealer and rent it to the hirer. They both play their part in trying to secure that result. They are both equally concerned to obtain the finance company's acceptance. The fact that the dealer is habitually so concerned, whereas the hirer is only occasionally so concerned, does not make the dealer any more an agent than the hirer. F

The plaintiff, on the other hand, contends that the dealer is the hirer's agent. In normal circumstances the dealer does not in my judgment act as agent for the hirer. Counsel for the plaintiff argues forcibly that the fact that a hirer arms a dealer with a signed hire-purchase document in order that the dealer may induce the hire-purchase company to enter into the transaction indicates that the dealer is acting as agent of the hirer. I do not accept that argument. In order to sell his car to the hire-purchase company he must get a signed hire-purchase agreement from the would-be hirer. It is in pursuance of his own interests that he procures and hands that document to the hire-purchase company: I see no reason to deduce that, in addition to acting on his own behalf, he is also the agent of the hirer for that purpose. G H

It is contended for the plaintiff that there was apparent authority, or estoppel by negligence, which would disentitle the defendant to disclaim liability for the contract. Counsel for the plaintiff relies on *Eastern Distributors, Ltd. v. Goldring* (8). There the facts were complicated and different from those in the present case. A dealer and an owner of a motor van had agreed that the dealer should sell the owner's van to a hire-purchase company, the owner agreeing to take back his van on hire-purchase. Sufficient money was thereby provided to enable I

A him to obtain enough to pay a deposit on the hire-purchase of a second car, which was the real object of the transaction. The dealer sold the van to the hire-purchase company, but it refused to enter into a transaction over the second car. The owner tried to repudiate as against the hire-purchase company the transaction relating to the van by saying that the dealer's authority was limited to selling either two cars or none. In this court DEVLIN, J., in giving judgment
B said (9):

“Equally it is clear that as against Murphy [the owner] the plaintiffs acquired a good title to the Bedford. Coker [the dealer] represented that the van was his, and Murphy was privy to that representation being made; so neither can be heard to say that Coker had not a good title to transfer to the plaintiffs. Or, if the matter be looked at as one of principal and agent,
C the plaintiffs, being ignorant of the limitation placed on Coker's authority, are not affected by it.”

That case is wholly different from the present case. Here the defendant, by signing the hire-purchase agreement, was not clothing Boodof with any authority or any agency; nor was the plaintiff misled into believing that he had any
D authority from the defendant. The plaintiff merely believed that it was a genuine document. The plaintiff did not know the defendant's signature or anything about the defendant save what the document told the plaintiff. The plaintiff did not know that the defendant had let Boodof fill in the form afterwards. There was no more apparent authority in this case than in any normal honest case.

The suggestion that the defendant is liable through his negligence and is estopped from denying the truth of the contract which he allowed to be put forward is met, I think, by the cases to which counsel for the defendant referred. Even if the dealer were his agent, there was no duty on the defendant to use care towards the plaintiff; *Wilson & Meeson v. Pickering* (10), where LORD
E GREENE, M.R., says (11):

“But it is sufficient for present purposes to say that this type of estoppel can only arise where there is some duty toward the person who seeks to rely upon it . . .”
F

Moreover the doctrine of estoppel by negligence applies only to negotiable instruments. In the same case LORD GREENE, M.R., says (12):

“The view which so far as my researches go appears to me to have the weight of judicial opinion behind it is that, apart of course from some specific representation of authority or some holding out or some special character of the agent from which his authority would naturally be inferred, the rule that a person who signs an instrument in blank cannot be heard, as against a person who has changed his position on the faith of it, to assert that the instrument as filled in is a forgery or that it was filled in in excess of the agent's authority, is confined to the case of negotiable instruments.”
G
H

Further it is argued (rightly, I think) that the negligence of the defendant was not the proximate cause of the loss; that cause was the fraud of Boodof, which was not to be anticipated; see *Swan v. North British Australasian Co.* (13). I doubt whether, even if the defendant would, apart from the agreement, be bound by estoppel, an agreement unenforceable under the Hire-Purchase Act, 1938, can by estoppel be rendered valid and enforceable. However, in my judgment the defendant is not bound by the purported hire-purchase agreement. It was not the contract that he made. The dealer was neither agent for
I

(9) [1957] 2 All E.R. at p. 528; [1957] 2 Q.B. at p. 606.

(10) [1946] 1 All E.R. 394; [1946] K.B. 422.

(11) [1946] 1 All E.R. at p. 396; [1946] K.B. at p. 425.

(12) [1946] 1 All E.R. at p. 397; [1946] K.B. at p. 427.

(13) (1863), 2 H. & C. 175.

the plaintiff nor for the defendant, and no estoppel arises. The plaintiff's claim, therefore, fails. A

The defendant has not made out his counterclaim for a return of the deposit. The dealer received the deposit, it being intended that it should go towards the first instalment of rent when the hire-purchase transaction became effective. If it had become effective, he would have received it as an instalment of rent as agent (*quo ad* the defendant) of the plaintiff. But no contract was ever made. Therefore, in my judgment, the dealer held that money not on behalf of the plaintiff but on behalf of the defendant, who could undoubtedly have sued the dealer for money had and received. It is argued that the plaintiff has obtained the benefit of the initial payment of £65 in that when it sent its cheque to the dealer for the purchase price of the car, the £65 was deducted from the price as an amount for which the dealer gave it credit. But in my view that fact raises no implications. So far as the merits are concerned, the defendant by his foolish and careless conduct has undoubtedly caused some loss to the plaintiff. What the extent of that loss is I know not; but it seems to me that he cannot complain as a matter of justice that he does not recover from it the £65. As a matter of law, in my judgment his claim to do so fails. I would, therefore, allow the appeal by dismissing both the claim and the counterclaim. B
C
D

HARMAN, L.J.: In order that either side should wholly succeed in this appeal it was necessary to show that there was an agency either as between the plaintiff and the dealer, or between the defendant and the dealer. **HOLROYD PEARCE, L.J.**, has reached the result that there was no agency involved in either direction, and I agree with him. It follows that neither side can wholly succeed. The plaintiff cannot enforce the so-called agreement, because there never was a valid agreement. The defendant cannot get back his deposit, which never reached the plaintiff because the dealer who received it was not the plaintiff's agent. It is, therefore, to some extent a drawn battle. E

The primary ground, in my judgment, on which the claim of the plaintiff fails is that there never was in fact an agreement between the plaintiff and the defendant at all. There was no consensus *ad idem*; and once one comes to the conclusion, as my Lord does (and so do I), that the dealer was not authorised to make an agreement, but was in fact acting on his own behalf and in furtherance of his own business, and using this blank form as an adjunct to his own trade, then one can see that there never was any consensus, and nothing on which the plaintiff could sue. Having treated the agreement as a nullity, neither can the defendant sue as the result of any breach of it; and, therefore, each party is left to bear its own loss. That means allowing the appeal. F
G

DAVIES, L.J.: I agree for the reasons which my Lords have stated.

Appeal allowed. Claim and counterclaim dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Lovell, White & King* (for the defendant); *Vizard, Oldham, Crowder & Cash* (for the plaintiff).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

A

CONNOLLY v. McGEE AND OTHERS.

[QUEEN'S BENCH DIVISION (Paull, J.), February 8, 9, 15, 1961.]

Building—Building regulations—Roof—Scaffolding—Meaning of words “cannot safely be done” in Building (Safety, Health and Welfare) Regulations, 1948 (S.I. 1948 No. 1145), reg. 5.

B

The plaintiff was employed as an asbestos roofer by the defendant. On May 11, 1955, the plaintiff, by means of Youngman's staging, obtained access to the roof of a building under construction. He was fixing asbestos sheets to the roof, using a recognised method, when one of the sheets broke, so that he lost his balance and fell thirty-five feet to the ground. As a result he sustained injuries to his back. In an action brought by the plaintiff for damages for breach of statutory duty imposed by reg. 5* of the Building (Safety, Health and Welfare) Regulations, 1948, which required suitable scaffolds to be provided “for all work that cannot safely be done” on or from the ground and sufficient safe means of access to be provided, so far as reasonably practicable, to every place at which a person had to work,

C

Held: the defendants were not in breach of statutory duty for the following reasons—

D

(i) although when Youngman's staging was providing access to a workman's place of work on a roof it was a scaffold, yet when the place of work had been reached the staging was not used as, and did not constitute, a scaffold within the meaning of reg. 3† of the Regulations of 1948.

E

(ii) the words “cannot safely be done” in reg. 5 connoted the test whether day-to-day experience had shown that the work inherently was not safe when done in the way that it was being done; in the present case the manner of doing the work was one used regularly throughout the trade, and, no history of accidents being proved, the plaintiff had not established that the work could not safely be done in that manner.

F

[For the Building (Safety, Health and Welfare) Regulations, 1948, reg. 5, see 8 HALSBURY'S STATUTORY INSTRUMENTS 213.]

Cases referred to:

Hopwood v. Rolls-Royce, Ltd., (1947), 176 L.T. 514; 24 Digest (Repl.) 1064, 266.
McCarthy v. Coldair, Ltd., [1951] 2 T.L.R. 1226; 24 Digest (Repl.) 1065, 272.
Sheppey v. Matthew T. Shaw & Co., Ltd., [1952] 1 T.L.R. 1272; 24 Digest (Repl.) 1076, 332.

G

Trott v. W. E. Smith, Ltd., [1957] 3 All E.R. 500; [1957] 1 W.L.R. 1154; 3rd Digest Supp.

Walker v. Bletchley Flettons, Ltd., [1937] 1 All E.R. 170; 24 Digest (Repl.) 1054, 212.

Action.

H

In this action the plaintiff, James Connolly, claimed damages against the defendant M. J. McGee, and the defendant company R. J. Symons, Ltd., for personal injuries suffered by reason of their negligence or breach of statutory duty under the Building (Safety, Health and Welfare) Regulations, 1948, reg. 5. The defendant company were roofing contractors and had sub-contracted the supplying and fixing of asbestos roofing to the premises subsequently mentioned.

I

On May 11, 1955, the plaintiff, who was then employed by the defendant as an asbestos roofer, was fixing asbestos sheets to the roof of a building at the premises of the National Benzole Co., Ltd., at River Road, Barking, Essex. The building was of one storey and the framework of the roof was of lattice-work girder construction with purlins four feet six inches apart running along the length of the building and resting on the girders. The asbestos sheets had to be laid on and fixed to the purlins. The sheets were, by and large, of sufficient strength

* The relevant terms of reg. 5 are at p. 112, letter G, post.

† The relevant terms of reg. 3 are at p. 112, letter H, post.

to let a man walk on them but the liability of asbestos to weaknesses due to its fibrous nature made it desirable to avoid placing too much weight on an unsupported asbestos sheet. The method of fixing was as follows: The work was carried out in rows from the bottom of the roof to the top and each sheet was mitred at the corners and drilled with holes before being carried to the roof. Youngman's staging, consisting of several strips of wood joined by cross battens, had been placed on the roof so that the weight of the sheeters when carrying the sheets up the roof was well distributed. Each sheet overlapped the corresponding sheet both on its right and in the row below. One man would insert a bolt from underneath through two holes and the other screw the nut down. The man putting in the bolt had to stretch his arm under the fresh sheet whilst lying along the line of a purlin, his legs in a downward position and the Youngman staging laid lengthways along the roof for support.

The sheets used on the day of the accident were from a load purchased by the defendant company from reputable suppliers. They were tested by the defendant and several were discarded as defective. His Lordship was satisfied that the method of work was a proper one, in accordance with the practice and experience of the trade, and that the defendant had tested the sheets in the recognised manner and with proper care. On the day of the accident the plaintiff put in the bolt and the defendant screwed down the nut. The plaintiff brought his left arm from underneath the sheet and for some unexplained reason leant his weight on his right arm near the edge of the sheet at a point beyond the double support of the overlap. The sheet cracked, the plaintiff lost his balance and fell with half the sheet on top of him. There was no evidence of the occurrence of any similar accident.

John Stephenson, Q.C., and R. Millner for the plaintiff.

Marven Everett, Q.C., and P. H. Ripman for the defendants.

Cur. adv. vult.

Feb. 15. PAULL, J., in a written judgment, reviewed the facts and, after finding that the defendants were not in breach of duty at common law, continued: I next turn to the Building (Safety, Health and Welfare) Regulations, 1948. Considering how frequently reg. 5 is invoked, it is surprising that it still leads to difficulties of interpretation. The part with which I am concerned in this case reads as follows:

"Suitable and sufficient scaffolds shall be provided for all work that cannot safely be done on or from the ground or from part of the building, or from part of a permanent structure or from a ladder or other available means of support . . ."

The first question which arises is whether or not the Youngman's staging constituted a scaffold for the purpose of this regulation. "Scaffold" is defined in reg. 3 as follows (leaving out immaterial words):

"'Scaffold' means any temporary structure on or from which persons perform work in connexion with an operation to which these regulations apply . . . and includes any working platform . . . together with any guard-rail, toe-board or other safeguards and all fixings . . ."

Counsel for the defendants contends that the Youngman's staging used was a temporary structure on or from which the plaintiff and the defendant were working and that there is no complaint made in the statement of claim that this scaffold in any way infringed any of the regulations relating to scaffolding. Counsel for the plaintiff, on the other hand, says that although the Youngman's staging was used to support the legs of the workmen working, it was not a temporary structure on or from which the workmen worked. He says that anyone being asked the question: "On what were the workmen working?" would answer "the roof", that is the asbestos sheeting already secured to the purlins, and argues that if "from" were substituted for "on", the answer would not

A be any different. The most that can be said is that the workmen to some extent used the staging as an extra means of support for a small part of their bodies.

In my judgment, counsel for the plaintiff is right. Undoubtedly the Youngman's staging was a scaffold when laid up the slope of the roof for the purpose of the workmen getting to their place of work. It was, within the definition, B a scaffold which enabled persons "to obtain access" to the work. It seems to me, however, that once the workmen had arrived at their place of work, they no longer used the Youngman's staging as a scaffold, nor was the staging there for such use. The plaintiff and the defendant relied on, and the defendant expected the plaintiff to rely on, the roof, supported as it was by the purlins.

Having held that the staging was not a scaffold, the next question which C arises is whether the work could safely be done from that part of the permanent structure on which the plaintiff and defendant were working, namely, the roof above the purlins.

It is important to notice that the precise material words in the half of reg. 5 which I have to consider is

D "shall be provided for all work that cannot safely be done . . . from part of the building, or from part of a permanent structure . . . or other available means of support."

Those words seem to envisage a rather different test to that to be applied to the words used in the second half of the regulation which states

E "sufficient safe means of access shall so far as is reasonably practicable be provided to every place at which any person has at any time to work."

The word "safe" in the second half has been considered in several cases. In *Hopwood v. Rolls-Royce, Ltd.* (1), LORD GREENE, M.R., seems to interpret the word as meaning "reasonably safe". Subsequent cases, however, seem to have put a more strict interpretation on the words. PARKER, J., in *Sheppey v. Matthew T. Shaw & Co., Ltd.* (2) said that he got "little help from adding the word F 'reasonably'" and returned to the test laid down by DU PARCQ, J., in *Walker v. Bletchley Flettons, Ltd.* (3). PARKER, J., said (4):

"A means of access is unsafe if it is a possible cause of injury to anybody acting in a way a human being may be reasonably expected to act in circumstances which may reasonably be expected to occur."

G PARKER, J., however, was careful to add (4):

"I do not say that that is the test necessarily, but it seems to me that it must be some test which takes into account the fact that workmen, trying to be careful, may on occasions, as it were, slip up."

This ratio decidendi of PARKER, J., was approved by the Court of Appeal in *Trott v. W. E. Smith, Ltd.* (5).

H In *McCarthy v. Coldair, Ltd.* (6) DENNING, L.J., said that the phrase used in the second half of the regulation meant "safe for all contingencies that may reasonably be foreseen, unlikely as well as likely, possible as well as probable", but the learned lord justice pointed out that that very high duty was qualified by the words "so far as reasonably practicable", and that those words showed that the duty depended on what was reasonably practicable having regard to I the degree of risk and the steps necessary to eliminate the risk.

The first half of reg. 5 which I have to consider contains no provision even limiting the duty to cases where it is reasonably practicable to provide scaffolding. On the other hand, it does contain the words "cannot safely be done", which seems to envisage that one looks not to whether an accident is foreseeable in

(1) (1947), 176 L.T. 514.

(3) [1937] 1 All E.R. at p. 175.

(5) [1957] 3 All E.R. 500.

(2) [1952] 1 T.L.R. 1272 at p. 1274.

(4) [1952] 1 T.L.R. at p. 1275.

(6) [1951] 2 T.L.R. at p. 1228.

the sense that an accident is possible, but to whether an accident is foreseeable as one which in all the circumstances is likely to occur. A

This meaning seems to fall in with the other words in the first half of the regulation. If one asks whether any work from a ladder can be safely done in the sense that one cannot foresee that an accident may possibly happen, the answer is that no work can safely be done from a ladder in that sense. However safely a ladder may be lashed, it is easy to foresee that a workman may meet with an accident while using the ladder. He may overstretch to one side and his hand holding the side of the ladder may slip. He may shift his feet and in shifting his feet the sole of his foot may slip on the rung and he may fall. Such accidents are almost of everyday occurrence, and certainly come before the courts on many occasions. Similarly, if a person is standing on perfectly solid stairs, he may, in endeavouring to exert pressure while forcing something into a wall, slip on the staircase and fall from top to bottom. Yet in neither of such cases could one really say that the work could not safely be done from the ladder or the staircase. B C

My attention was not drawn to any case in which the words "cannot safely be done" in reg. 5 have been judicially interpreted, nor am I aware of any such case. In my judgment, when considering whether any work could or could not safely be done in the circumstances in which it was being done, one is entitled to bear in mind what has been the day-to-day experience with regard to the doing of such work, and ask oneself whether that experience has shown that the work inherently was not safe when done in the way in which it was being done. D

In a case such as this where the work is work carried out regularly by the whole trade in the same way that this work was being carried out, and the plaintiff has failed to show any history of accidents in the trade, in my judgment the plaintiff fails to show that the work "cannot safely be done" in the way in which it was being done at the time of the accident. The accident rate must be of importance, although, of course, by no means conclusive. The result is that the plaintiff fails in the cause of action against the defendants, based on breach of statutory duty. E

So far as the defendant company is concerned, I cannot see how they can be liable to the plaintiff, and counsel for the plaintiff did not press any claim against them. Clearly they had no duty to the plaintiff beyond seeing that asbestos sheets of the proper size and quality were obtained from a reliable supplier. This they did. F

The result is that there must be judgment for the defendants. [His Lordship considered the quantum of damages in the event of a successful appeal. The plaintiff's injuries were two crush fractures of the vertebrae of the dorsal and the lumbar vertebra, and fractures, which had healed quickly and perfectly, of four ribs and the left clavicle. The plaintiff had been told that he could start light work on Aug. 9, 1955, but he was unable to obtain such work. He could have done bench assembly work, after training, but he declined an offer of training at a rehabilitation centre. He was earning £13 a week at the time of the accident, and would have been getting £18 a week today. There was no evidence of the wages of an assembler. The plaintiff was permanently incapacitated from doing any work above ground level and any work entailing the lifting of heavy-weight or continued bending. Taking these matters into consideration, His Lordship assessed damages at £2,750.] G H

Judgment for the defendants.

Solicitors: *Seifert, Sedley & Co.* (for the plaintiff); *Blount, Petre & Co.* (for the defendants).

[Reported by KATHLEEN J. H. O'BRIEN, *Barrister-at-Law.*]

A UNION OF INDIA v. COMPANIA NAVIERA AEOLUS S.A.

[COURT OF APPEAL (Sellers, Willmer and Donovan, L.JJ.), February 14, 15, 16, 1961.]

Shipping—Demurrage—Exception—Strike occurring while vessel on demurrage — Discharge prevented—Centrocon strike clause incorporated in Baltimore Form C charterparty—Whether demurrage payable during strike period.

B The plaintiffs were the holders of and the receivers under a bill of lading covering a shipment of wheat in bulk on board the defendants' vessel at Tacoma, for delivery at Bombay. The bill of lading provided that a charterparty dated London, Feb. 20, 1957, should be fully incorporated in the bill, and that the strike clause of the Centrocon charterparty should apply.

C The charterparty, dated Feb. 20, 1957, made between the defendants as owners of the vessel and Louis Dreyfus Corporation as charterers, was on Form C of the Approved Baltimore Berth Grain Charter. It provided for loading the vessel with a full and complete cargo of wheat in bulk for delivery at Bombay, and allowed the charterers six weather working days of twenty-four consecutive hours, Sundays and holidays excepted, for loading.

D By a typed clause (cl. 8) of the charterparty it was provided: "Cargo to be received at destination at the average rate of 1,000 tons of 2,240 lb. per weather working day of twenty-four consecutive hours . . ." Demurrage was payable (cl. 9) for time used in discharging in excess of laytime. The charterparty incorporated the strike clause from the Centrocon charterparty which was set out without alteration as follows, so far as is material: "If

E the cargo cannot be loaded by reason of . . . a strike . . . of any class of workmen, essential to the loading of the cargo . . . or if the cargo cannot be discharged by reason of . . . a strike . . . of any class of workmen essential to the discharge, the time for loading or discharging, as the case may be, shall not count during the continuance of such causes, provided that a strike . . .

F of the shippers' and/or receivers' men shall not prevent demurrage accruing if by the use of reasonable diligence they could have obtained other suitable labour . . . In case of any delay by reason of the before mentioned causes, no claim for . . . demurrage, shall be made by the . . . owners of the steamer". The vessel having arrived at Bombay, the discharging port, lay days for discharging expired at 1356 hours on July 2, 1957; the vessel then went on demurrage. On July 5, 1957, while she was still on demurrage, a strike

G broke out of workmen essential to the vessel's discharge and prevented discharge from 0700 hours on July 5 to 1700 hours on July 13, 1957, a period of eight days ten hours. The receivers of the cargo were unable to obtain other suitable labour during this period.

Held: the words of the last sentence of cl. 9, viz., "In the case of any delay . . .", which could not be construed literally because (if so construed)

H they would preclude shipowners from claiming demurrage at all, should be construed as intended to apply to a situation in which, but for their presence, a party would be exposed to a claim; accordingly, having regard to the protection afforded by previous provisions of cl. 9, these words relieved the receivers of cargo from liability for demurrage to the extent that the delay was due to the strike, and were clear enough to have this effect

I notwithstanding that the ship was already on demurrage (see p. 120, letter F, and p. 118, letter H, post).

Rederiakt. Transatlantic v. Compagnie Francaise des Phosphates de l'Océanie ((1926), 17 Asp. M.L.C. 216) and *Moor Line, Ltd. v. Distillers Co., Ltd.* (1912 S.C. 514) applied.

Decision of McNAIR, J. ([1960] 1 All E.R. 753) reversed.

[As to when demurrage is payable and when demurrage ceases, see 30 HALSBURY'S LAWS (2nd Edn.) 346, para. 525, 348, para. 527.]

Cases referred to:

Leonis S.S. Co., Ltd. v. Rank (Joseph) Ltd., (1908), 99 L.T. 513; 11 Asp. M.L.C. 142; 13 Com. Cas. 295; 41 Digest 572, 3959.

Moor Line, Ltd. v. Distillers Co., Ltd., 1912 S.C. 514; 49 Sc. L.R. 407; 41 Digest 558, o.

Rederiakt. Transatlantic v. Compagnie Francaise des Phosphates de l'Oceanie, (1926), 136 L.T. 619; 17 Asp. M.L.C. 216; 32 Com. Cas. 126; 41 Digest 576, 3996.

Appeal.

The plaintiffs, the Union of India, were the receivers of goods under a Baltimore Form C Berth Term Grain bill of lading dated May 5, 1957. The bill of lading was issued to the shippers, Louis Dreyfus Corporation, who were also the charterers of the steamship Spalmatori under a charterparty dated London, Feb. 20, 1957, and covered a shipment on board the Spalmatori, at Tacoma, Washington, of 9,950 long tons of wheat in bulk for delivery at Bombay, India, to the Ministry of Food and Agriculture, Bombay. The defendants, Compania Naviera Aeolus S.A., were the owners of the Spalmatori. The bill of lading provided:

"All terms, conditions and exceptions of charterparty dated London, Feb. 20, 1957, are to be considered fully incorporated herein and if there is any conflict between bill of lading and charterparty, provisions of charterparty to govern . . .

"10 [which was a printed clause] All terms, conditions and provisions of the strike . . . clause of the 'Centrocon' charterparty to apply."

The charterparty dated Feb. 20, 1957, which was on Form C of the Approved Baltimore Berth Grain Charter, was made between the defendants' agents and Louis Dreyfus Corporation, and provided that the Spalmatori should proceed to Puget Sound, there load a full and complete cargo of wheat in bulk, and should then proceed to Bombay. The charterparty went on to provide:

"Steamer to be loaded according to berth terms, with customary berth despatch, and if detained longer than six weather working days of twenty-four consecutive hours, Sundays and holidays excepted, charterers to pay demurrage at the rate of £200 (British sterling) per day, or pro rata, provided such detention shall occur by default of charterers or their agents . . ."

At the end of the printed terms of the charterparty a typed addition provided that certain typed clauses 7 to 21 as attached and strike clause 30 of the Centrocon charterparty were to be fully incorporated in the charterparty. After the typed clauses, there appeared in the charterparty the "'Centrocon' Strike Clause"; this clause was taken without alteration from the Centrocon charterparty, known as the River Plate Charterparty 14 Homewards, which is designed to cover homeward trade from the River Plate. The Centrocon strike clause as set out in the present charterparty read as follows:

"If the cargo cannot be loaded by reason of riots, civil commotions or of a strike or lock-out of any class of workmen, essential to the loading of the cargo . . . or if the cargo cannot be discharged by reason of riots, civil commotions, or of a strike or lock-out of any class of workmen essential to the discharge, the time for loading or discharging, as the case may be, shall not count during the continuance of such causes, provided that a strike or lock-out of the shippers' and/or receivers' men shall not prevent demurrage accruing if by the use of reasonable diligence they could have obtained other suitable labour at rates current before the strike or lock-out. In case of any delay by reason of the before mentioned causes, no claim for damages or demurrage, shall be made by the charterers, receivers of the cargo, or owners of the steamer. For the purpose, however, of settling despatch rebate

A accounts any time lost by the steamer through any of the above causes shall be counted as time used in loading."

The facts, which were agreed, were that lay days at the discharging port, Bombay, expired at 1356 hours on July 2, 1957. The Spalmatori then went on demurrage but three days later, on July 5, a strike of workmen essential to the discharge of the vessel intervened and as a result discharge was prevented from 0700 hours

B on July 5 to 1700 hours on July 13, 1957. The plaintiffs were unable to obtain other suitable labour during this period. In the present action, which was commenced by writ dated Jan. 18, 1960, the plaintiffs claimed a declaration that on the true construction of the charterparty and of the bill of lading, of which they were the holders at all material times, and having regard to the facts that (a) the lay days had expired at 1356 hours on July 2, (b) discharge of the cargo at Bombay from 0700 hours on July 5 to 1700 hours on July 13, 1957, was prevented by a strike of workmen essential to the discharge, (c) other suitable labour could not be obtained, they, the receivers of the cargo, were not liable to the defendants, the owners of the Spalmatori, for £1,683 6s. 8d. additional demurrage in respect of the period of 8 days 10 hours, from 0700 hours on July 5 to 1700 hours on July 13, during which discharge of the vessel was

D prevented by the strike.

The action was heard on Feb. 22, 1960, by McNAIR, J., who held that the plaintiffs were liable for demurrage during the strike because the Centrocon strike clause, as incorporated in the Baltimore charterparty, did not on its true construction exclude the operation of the general rule that once a vessel is on demurrage no exceptions operate to prevent demurrage continuing to be payable, and accordingly gave judgment, reported [1960] 1 All E.R. 753, for the defendants. The receivers of the cargo now appealed.

E *R. A. MacCrindle* for the receivers of the cargo, the plaintiffs.
M. J. Mustill for the shipowners, the defendants.

SELLERS, L.J.: The question in issue between the parties has been neatly put in the claim for a declaration indorsed on the writ, on which pleading alone the case went for trial before McNAIR, J. All the material clauses are clearly set out in the judgment (1).

After the lay days for discharging the cargo of wheat in bulk in the defendants' steamship Spalmatori at Bombay had expired, so that the ship came on demurrage, the plaintiffs as holders of the bill of lading and as receivers of the whole cargo were unable for a number of days to discharge any cargo by reason of a strike of workmen essential to the discharge as no other suitable labour could be obtained for the task.

G The charterparty alone need be regarded, as its material terms were incorporated expressly into the bill of lading, and by cl. 9 it provided that the receivers were "... to pay demurrage, if incurred ... for all time used in discharging in excess of allowed lay time ...". That clause is accepted by the parties as establishing the liability of the plaintiffs to pay demurrage for the days of the strike unless the Centrocon strike clause incorporated into this charterparty, which is described as the "Approved Baltimore Berth Grain Charterparty—Steamer", exempts them from that liability. McNAIR, J., held that the plaintiffs were not entitled to the declaration that they were so protected and exempt and the effect is that the plaintiffs have been held liable for demurrage at a sum which is not in dispute if there is liability in respect of these days of the strike.

I For the purpose of the argument here and below the strike clause was dissected into four parts and it is convenient to retain that designation for reference although the clause has to be construed as a whole. The argument was based on the acceptance of the proposition that when once a vessel is on demurrage no exceptions will operate to prevent demurrage continuing to be payable unless an

(1) Reported [1960] 1 All E.R. 753. These clauses are also set out at p. 116, letters D to I, ante.

exceptions clause is clearly worded so as to have that effect. The slogan (if I am not disrespectful in so describing it) "Once on demurrage, always on demurrage", which seems to have crept into use, is to be viewed with caution. If it means no more than that an exception which only protects lay days from running or counting will not cover days on demurrage, it is acceptable, but there is no insuperable difficulty in providing for relief from demurrage liability if either loading or discharging after the lay days have gone by is prevented by some stipulated cause. A
B

Part 1 of the clause, as analysed and as material to this case, is as follows:

"... if the cargo cannot be discharged by reason ... of a strike ... of any class of workmen essential to the discharge, the time for loading or discharging, as the case may be, shall not count during the continuance of such causes ..."; C

and part 2 provided that

"a strike ... of the ... receivers' men shall not prevent demurrage accruing if by the use of reasonable diligence they could have obtained other suitable labour at rates current before the strike ..."

The learned judge held that the words "the time for loading or discharging" clearly meant the time allowed for these operations, especially when read in conjunction with the provision that time "shall not count during the continuance of such causes". This finding was scarcely attacked and I fully agree with the judge in the matter. If that were the whole of the protection available to the plaintiffs, as the strike did not arise in the course of the lay days, their contention would fail. D
E

The argument before us was concentrated on part 3 of the clause, which is as follows:

"In case of any delay by reason of the before mentioned causes, no claim for damages or demurrage, shall be made by the charterers, receivers of the cargo, or owners of the steamer."

The learned judge says (2) that F

"Taken literally that sentence would mean that if there had been any delay at all, say only a couple of days, by reason of the strike, then the owners were to be disbarred from making any claim for damages or demurrage at all."

He adds, however, that quite plainly it cannot mean that; and I do not think it could. The learned judge then regards it, "if any sense is to be given to it at all", as "merely an inaccurate paraphrase of the detailed provisions which have gone before it". I think that the correct interpretation of the sentence would be, that no claim for damages or delay in respect thereof (that is the delay) should be made. G

It is with deference that I differ from the learned judge, who is so experienced in this branch of the law in particular, but I read this part of the clause as enlarging the protection given to the plaintiffs in this case so as to defeat the shipowners' claim here for demurrage. By cl. 9 demurrage was no doubt accruing when the strike arose, but by this provision the shipowners have agreed to make no claim (that is an emphatic prohibition) for demurrage in case of any delay by reason of the before-mentioned causes. These causes include a strike of any class of workmen essential to the discharge who cannot be replaced by other suitable labour. The delay in this demurrage period was due to that cause. It was here a complete stoppage. I regard this as a provision which is clearly worded so as to cover that which was not covered by the first part, which only applied to lay days. It may be that it overlaps the first part, but a charterparty is rarely if ever drawn up with the precision of the careful draftsman. It is a business document consisting of a standard form which, in accordance with common practice, is amended and amplified and then left to serve its purpose. H
I

A The two exemptions given by the whole clause are different in form as well as in substance. The first part prevents lay days from counting if a protecting cause is operating and whilst it continues. The count ceases for the period and resumes again when the cause is lifted. The protection given by the second provision on which the plaintiffs place reliance is that the shipowners will make no claim for that to which they would otherwise be entitled. Any claim by the charterers or receivers of the cargo against the shipowners for any delay for which the shipowners might be responsible unless the circumstances bring the event within the exceptions clause would likewise be barred by the clause.

B I would regard part 3 of the clause here, as at least as effective as the provision in *Rederiakt. Transatlantic v. Compagnie Francaise des Phosphates de l'Océanie* (3), "demurrage not to accrue". In that case SCRUTTON, L.J., said (4):

C "Ordinarily when lay days have expired the exceptions excusing delay do not apply to the demurrage days which are then running or consecutive days, the ship being, in fact, detained, or prevented from sailing. But in this charter the exceptions clause as to delay in loading by excepted causes ends up 'The lay days not to count during the period of such delay or hindrance and demurrage not to accrue'. This clause was not referred to before the judge below, but it appears to be intended to excuse the charterer from liability for demurrage in respect of days on which he was, in fact, prevented from loading by exceptions. It was argued that the last words were only intended to repeat the provision that lay days should not count, but if so, this repetition was quite superfluous, and in fact demurrage could not accrue till the lay days expired. In my opinion the exceptions clause applies to the demurrage days, and days in the demurrage period on which loading was prevented by bad weather did not count in assessing demurrage."

D The plaintiffs' argument also gets some support from the views expressed by LORD SALVESEN in *Moor Line, Ltd. v. Distillers Co., Ltd.* (5) but the case is not strictly in point and I do not refer to it further.

E Mr. Mustill, in a resourceful argument for the defendants, resisted the views which I have expressed and contended that the part of the clause relied on was not sufficiently clear to defeat the express liability for demurrage under cl. 9. Learned counsel sought to get assistance from part 4 of the strike clause, which is as follows:

F "For the purpose, however, of settling despatch rebate accounts any time lost by the steamer through any of the above causes shall be counted as time used in loading."

G The word "however" hardly seems appropriate. It would seem that the clause is to give some relief to the shipowners by providing that notwithstanding that lay days shall not run under the exceptions they shall be counted as if they had, so as to avoid a claim for despatch money. It does not seem to me to destroy in any way the effect of the preceding sentence.

H I would hold, in the terms of the declaration sought, that the plaintiffs are not liable to the defendants for £1,683 8s. 6d. additional demurrage in respect of a period of eight days ten hours; and I would allow the appeal.

I WILLMER, L.J.: I agree. In my judgment the learned judge was plainly right in the construction which he put on what have been described as parts 1 and 2 of the strike clause. I entertain no doubt that the words "the time for ... discharging" must mean the time stipulated by the charterparty for discharging, that is to say the lay days. The effect of this part of the clause is thus to continue the lay days if the cargo cannot be discharged during that time by reason of a strike. If the lay days have already expired before the strike begins, this provision can have no possible application. This view is in accordance with the decision of LORD SALVESEN in *Moor Line, Ltd. v. Distillers Co., Ltd.* (6), where the

(3) (1926), 17 Asp. M.L.C. 216.

(5) 1912 S.C. at p. 521.

(4) (1926), 17 Asp. M.L.C. at p. 218.

(6) 1912 S.C. at p. 519.

words to be construed were practically identical with those in the present case. A

The only real question, to my mind, is whether part 3 of the clause is to be construed as affording protection to the plaintiffs in the event which has happened —namely, a strike occurring and delaying the discharge after the lay days had expired and the ship was already on demurrage. It is agreed on both sides that, as pointed out by the learned judge, it is impossible to construe the words used in their literal sense. That would mean that in the event of a strike causing any delay, however small, the shipowners would be precluded from making any claim for demurrage at all, however long their ship was detained. Having pointed this out, the learned judge in effect gave up the attempt to construe the words, and dismissed this sentence (7) as “merely an inaccurate paraphrase of the detailed provisions which have gone before it”. He threw out the suggestion that this sentence was merely inserted for the purpose of leading up to the final sentence, that is part 4 of the clause, which deals only with the method of calculating despatch money at the loading port. This view was pressed on us by counsel for the shipowners, the defendants, in his very attractive argument before us, his contention being that the effect of the words is merely to exclude strike time from the calculation of lay days. Alternatively he contended that the words could be construed as covering, for the purposes of calculating lay days, delay caused by a mere partial prevention of loading, as opposed to the total prevention of loading contemplated by the words in part 1. It seems to me that if that was the intention the words used were singularly clumsy and inapt. Why should they refer to claims for damages and demurrage, if all that was intended to be provided for was the method of calculating lay days? I think counsel for the plaintiffs was well founded when he pointed out that part 3 is dealing with possible claims by both the receivers of the cargo and the owners of the ship. A claim for damages by the receivers of the cargo might arise just as well during a period when the ship is on demurrage as during the continuance of the lay days. *Prima facie*, therefore, in the case of a claim by the shipowners the words should equally be applicable to both periods. B C D E

In my judgment the words of part 3 must be construed as intended to apply to a situation in which, but for their presence, one party or the other would be exposed to a claim. As was said by FLETCHER MOULTON, L.J., in *Leonis S.S. Co., Ltd. v. Joseph Rank, Ltd.* (8), “this is a business document drawn up by business men to be used in business . . .”. Seeing that the plaintiffs are already protected under part 1 against delay due to a strike during the lay days, and bearing in mind that part 3 refers specifically to a claim for demurrage, I think the words can most naturally be construed as relieving the plaintiffs from liability for demurrage, to the extent that the delay was due to the strike, notwithstanding that the strike did not occur until the ship was already on demurrage. Similar words were construed in a similar sense in *Moor Line, Ltd. v. Distillers Co., Ltd.* (9). It is, of course, well established, as stated in SCRUTTON ON CHARTERPARTIES (16th Edn.), at p. 353, that F G H

“when once a vessel is on demurrage no exceptions will operate to prevent demurrage continuing to be payable, unless the exceptions clause is clearly worded so as to have that effect.”

In my judgment, however, the words in question in part 3 of the clause are sufficiently clear to have just that effect. This construction at least has the merit of attributing a sensible meaning to part 3 of the clause, and one which does provide for something not already covered by part 1. I

Although I confess that the question is not altogether free from difficulty, I am unable to agree with the construction which the learned judge put on part 3 of the clause. In my judgment, the words of this part are apt to protect the plaintiffs in the events which have happened. Accordingly, I am of opinion that

(7) [1960] 1 All E.R. at p. 758.

(8) (1908), 11 Asp. M.L.C. at p. 146.

(9) 1912 S.C. 514.

A the appeal should be allowed, and the plaintiffs held entitled to the declaration claimed.

DONOVAN, L.J.: I agree with both judgments, to which I can usefully add nothing.

B *Appeal allowed: declaration in the form prayed in the writ of summons. Leave to appeal to the House of Lords refused.*

Solicitors: *William A. Crump & Son* (for the receivers of the cargo, the plaintiffs); *Holman, Fenwick & Willan* (for the shipowners, the defendants).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

C HUNTER v. HUNTER AND WADDINGTON.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Scarman, J.), March 8, 15, 1961.]

D *Divorce—Settlement of wife's property—Jurisdiction—Wife domiciled and resident abroad—Property within the jurisdiction—Settlement for benefit of children—Whether person could be appointed to execute settlement if wife did not execute it—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5 c. 49), s. 47—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 24 (1).*

E The parties married in 1950 and were resident and domiciled in England. There were two sons of the marriage, aged eight and six. In December, 1959, the husband was granted a decree nisi of divorce on the ground of the wife's adultery. This decree was made absolute on Mar. 18, 1960. Four days later the wife re-married, acquiring, as her second husband was domiciled in Kenya, a domicile there. The wife had since been domiciled and resident in Kenya. The wife had inherited property from her father, who died in 1953; this comprised an absolute interest worth £12,563 when she received it and a reversionary interest (expectant on the death of her mother, aged fifty-seven) worth about £14,775. On Apr. 13, 1960, the husband applied under s. 24 of the Matrimonial Causes Act, 1950*, for the settlement of the wife's property in England for the benefit of the sons of their marriage. At that time the wife's absolute property had been largely dissipated; some had been invested in the purchase of a house in Kenya, and £2,000 had been invested in investments in Australia. She remained entitled, G however, to a half share (worth about £2,125) of the former matrimonial home in England. The wife, appearing to the notice of application under protest, objected that the court had no jurisdiction or no jurisdiction to make an effectual order. It was not suggested that effect would be given to any order that the court might make by the courts in Kenya.

H **Held:** (i) where a respondent wife (the guilty party to the marriage) was neither domiciled nor resident in England the court might nevertheless exercise its jurisdiction under s. 24 (1) of the Matrimonial Causes Act, 1950, to order a settlement of her property if the property to be settled were within the jurisdiction so that it might be the subject of an effectual order of the court (see p. 124, letter I, post).

I *Tallack v. Tallack and Broekema* ([1927] All E.R. Rep. 676) considered.

(ii) although the wife, being resident in Kenya, could not be proceeded against personally, the court could make an effectual order for such a

* Section 24 (1) reads—"If it appears to the court in any case in which the court pronounces a decree for divorce . . . by reason of the adultery . . . of the wife that the wife is entitled to any property either in possession or reversion, the court may, if it thinks fit, order such settlement as it thinks reasonable to be made of the property, or any part thereof, for the benefit of the innocent party, and of the children of the marriage, or either or any of them".

settlement, because it could order such settlement as it thought reasonable and, even if it had not jurisdiction to refer the drafting of the settlement to conveyancing counsel of the court (see p. 126, letter B, post), could approve a submitted draft and, if necessary, could appoint a person to execute the settlement by virtue of s. 47 of the Supreme Court of Judicature (Consolidation) Act, 1925* (see p. 126, letter G, and p. 127, letter B, post).

Re Cathcart ([1893] 1 Ch. 466) and *Howarth v. Howarth* ((1886), 11 P.D. 95) applied.

(iii) accordingly the wife would be ordered to execute a settlement of the property in England such that one-half of the wife's reversionary interest, subject to a life interest for herself therein, and the whole of her interest in the former matrimonial home, should be settled for the benefit of the two children of the marriage, so, however, that if both the children should die childless during her lifetime then the reversionary interest should revert to her (see p. 128, letters B and C, post).

[As to how practice and procedure are governed in the Divorce Division, see 12 HALSBURY'S LAWS (3rd Edn.) 221, para. 413, especially note (t) and Supplement.

As to settlement of property of a wife in fault, see 12 HALSBURY'S LAWS (3rd Edn.) 441-444, paras. 992-998 and Supplement; and for cases on the subject, see 27 DIGEST (Repl.) 637-640, 5989-5990, 5992-5997, 6005, 6015, 6017, 6019, 6022-6026, and 3rd DIGEST Supp.

For the Supreme Court of Judicature (Consolidation) Act, 1925, s. 47, see 18 HALSBURY'S STATUTES (2nd Edn.) 484.

For the Matrimonial Causes Act, 1950, s. 24 (1), see 29 HALSBURY'S STATUTES (2nd Edn.) 411.]

Cases referred to:

Barker v. Barker, [1944] 2 All E.R. 446; [1944] P. 77; 113 L.J.P. 44; 27 Digest (Repl.) 640, 6024.

Cathcart, Re, [1893] 1 Ch. 466; 33 Digest 219, 1280.

Howarth v. Howarth, (1886), 11 P.D. 68; *on appeal*, (1886), 11 P.D. 95; 55 L.J.P. 49; 55 L.T. 303; 50 J.P. 376; 16 Digest 175, 806.

Lorrimer v. Lorrimer and Clair, [1908] P. 282; 77 L.J.P. 108; 99 L.T. 314; 27 Digest (Repl.) 637, 5994.

Savage v. Norton, [1908] 1 Ch. 290; 77 L.J.Ch. 198; 98 L.T. 382; 3 Digest (Repl.) 135, 49.

Style v. Style and Keiller, [1954] 1 All E.R. 442; [1954] P. 215; [1954] 2 W.L.R. 306; 3rd Digest Supp.

Tallack v. Tallack and Broekema, [1927] All E.R. Rep. 676; [1927] P. 211; 96 L.J.K.B. 117; 137 L.T. 487; 27 Digest (Repl.) 637, 5992.

Application to confirm a registrar's report adjourned into court.

This was an application by the husband, Desmond Saville Hunter, under s. 24 (1) of the Matrimonial Causes Act, 1950, to confirm the report of Mr. Registrar RUSSELL, dated Jan. 26, 1961, concerning the settlement of the property of the wife, Sonia Hunter (now Sonia Sullivan) on the two children of the marriage, both boys, aged eight and six years respectively. Both parties had re-married and the wife had a child by her second marriage. The wife entered appearance under protest, there accordingly being no submission to the jurisdiction. The facts and contentions of counsel are set out in the judgment. The registrar in his report recommended that the wife should be ordered to execute a settlement (a) of the whole of her reversionary interest (expectant on the death of her mother, aged fifty-seven) arising under the will, dated June 30, 1952, of her late father Henry James Osman and (b) of her interest in the joint tenancy of the matrimonial home, Warmans, Wedmore, Somerset, on trustees,

* The relevant part of s. 47 is set out at p. 126, letter I, post.

A the former to be held in trust to pay the income therefrom to the wife for life with remainder as to both capital and income to the two children of the marriage in equal shares on their respectively attaining the age of twenty-five years or in the event of their dying under that age but leaving issue who attain the age of twenty-one years to such issue in equal shares per stirpes and the latter to be held on similar trusts for the said children and issue but excluding any life interest in favour of the respondent. The registrar also recommended that the wife should be ordered to prepare and submit the required settlement for approval of the court within thirty-five days; or, alternatively, should she consent thereto, that the matter be referred to conveyancing counsel of the court to prepare the necessary settlement and that, should the wife fail to comply with the order, the husband be given leave to submit a settlement for the approval of the court and apply under s. 47 of the Supreme Court of Judicature (Consolidation) Act, 1925, for a settlement to be executed by a person nominated by the court. The registrar directed the case to be argued before a judge in open court and the matter came before SCARMAN, J., on Mar. 8, 1961, on which date His LORDSHIP reserved judgment.

D *D. G. A. Lowe and B. H. Anns* for the petitioner husband.
R. L. Bayne-Powell for the respondent wife.

Cur. adv. vult.

E Mar. 15. SCARMAN, J., read the following judgment: This is an application under s. 24 (1) of the Matrimonial Causes Act, 1950, by a husband petitioner for settlement of the property of the guilty wife, the respondent in the suit, for the benefit of the two children of the marriage, boys aged respectively eight and six years, the custody of whom has been awarded to their father. The marriage was celebrated in England on June 3, 1950, and was dissolved on the ground of the wife's adultery by decree absolute made on Mar. 18, 1960. The parties to the marriage were domiciled in England but on Mar. 22, 1960—four days after the decree absolute—the wife married one Michael Gerard Sullivan, not the co-respondent. Mr. Sullivan was at the date of his marriage and has remained domiciled in Kenya, where he and the wife reside. Thus since her re-marriage the wife has been both domiciled and resident in Kenya. The husband has also re-married and a child of this marriage is expected shortly.

G The husband, a practising solicitor, earns a gross income of about £2,670 per annum and in April, 1959, inherited a fortune of some £20,000. He has a half-share with the wife in a house, Warmans, which was the matrimonial home. Such resources as the children have independently of the means of their parents are so slight that they may be disregarded for the purposes of this application.

H The wife's property is inherited. She received under her father's will an absolute interest in possession worth £12,563 and a reversionary interest which, were it to fall into possession today, would be worth at least £14,775. There was before me some dispute as to the value of her reversionary interest, to which I shall return when considering the question of amount.

I The husband's application for a settlement of the wife's property was made by notice dated Apr. 13, 1960, by which time the fund in possession of £12,563 had been largely dissipated. It is now represented by her share in the matrimonial home, Warmans, worth about £2,125, some assets in Kenya including the house where she is living with her new husband, and investments in Australia worth about £2,000. In these circumstances the learned registrar reported in favour of a settlement for the benefit of the two children of the marriage of all the wife's property in England, i.e., her reversionary interest under her father's will and her half-share in Warmans, on terms which would give her a life interest in the former but not the latter. The husband seeks confirmation of the report, while counsel for the wife submits first that the court has no jurisdiction to make any order, secondly, and alternatively, that in all the circumstances more

property than is reasonable is included in the settlement proposed by the registrar. A

Counsel for the wife's first proposition in support of his submission of no jurisdiction was that lack of English domicile necessarily entails lack of jurisdiction. In my opinion this is altogether too sweeping a proposition, as may be seen from an examination of the decision on which he principally relies: *Tallack v. Tallack and Broekema* (1). In that case a husband petitioner moved to confirm a registrar's report under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 191 (1)—predecessor of s. 24 (1) of the Act of 1950—in which the registrar had reported in favour of ordering a settlement for the benefit of the children of the marriage of certain property of the guilty wife so as to provide each child with an annual income for life. The wife's property consisted of foreign, mainly Dutch, investments: she had no property in England. Within a few weeks of the decree absolute the wife had married the co-respondent, a Dutchman, in Holland and had acquired a Dutch domicile. On these facts the respondent wife protested against the jurisdiction to order a settlement. Her protest was upheld. In the course of his reserved judgment, LORD MERRIVALE, P., said (2): B C

"As to the property of a guilty wife, which is subjected by the statutes in question to the jurisdiction of the court, it is sufficient to say generally that, prima facie, what is dealt with is property of a woman domiciled in England subject by reason of her domicile to the jurisdiction of English tribunals." D

The learned President then proceeded to consider the scope and limitations of the court's jurisdiction under the section over a respondent not domiciled in England, thereby plainly recognising that in some circumstances there is jurisdiction. After indicating that an English court would not claim a jurisdiction which would infringe the authority of foreign tribunals over the domestic affairs of families domiciled within their jurisdiction, he said that the following question must be answered (3): "Can this court give an effective judgment as to the [respondent's] property so as to bind the property?" And he came to the conclusion that in the case before him a decree of the court would be "an idle and wholly ineffectual process". The reason for his conclusion was that the respondent's property was abroad, being largely in Holland where it was proved effect would not be given to a decree of the English court under the section. LORD MERRIVALE, P., had also to consider whether, even if the decree would be ineffectual against the property, the court would yet have jurisdiction because its decree could operate in personam against the respondent. It was said she had appeared and was, therefore, subject to a personal judgment, though execution was not available. This contention, however, failed because in fact there had been no submission to the jurisdiction of the court and the respondent was beyond the reach of the court (4). Finally the learned President declared (4): E F G

"... that, in the absence of evidence of the existence within the jurisdiction of any property of the [respondent] subject to be dealt with ... [under the section], the court makes no order." H

In my opinion the true principle to be gathered from the judgment of LORD MERRIVALE, P., in *Tallack v. Tallack and Broekema* (1) is that in a case where the respondent is neither domiciled nor resident in England the court may nevertheless exercise its jurisdiction to order a settlement if the property to be settled is within the jurisdiction so that it may be the subject of an effectual order of the court. I

(1) [1927] All E.R. Rep. 676; [1927] P. 211.

(2) [1927] All E.R. Rep. at p. 679; [1927] P. at p. 220.

(3) [1927] All E.R. Rep. at p. 680; [1927] P. at p. 221.

(4) [1927] All E.R. Rep. at p. 681; [1927] P. at p. 223.

A Faced with this test of jurisdiction, counsel for the wife argued that, even where property suggested for settlement was, as in this case, within the general jurisdiction of the court, yet no jurisdiction under the section arose unless it was possible for the court to make an effectual order. He said that no such order could be made in this case, and submitted that in the last resort an order under the section could only be enforced by personal coercion and that the wife was
B beyond the reach of the court, or alternatively that it would be infringing the authority of the Kenya courts to seek to enforce it personally against her. It was not suggested before me that effect could be given to the court's order in Kenya, and neither evidence nor argument was directed to show that it could be. The wife, therefore, resident and domiciled abroad (her appearance to this application was under protest), cannot be proceeded against personally: she
C is out of the reach of the court. It is, however, submitted by the husband that, since the property to be settled is within the jurisdiction, this court can make an effectual order: and it is further said that the registrar in his report has formulated an order to which effect can be given without personal coercion of the wife or any infringement on the authority of the courts of Kenya.

The court having ordered a settlement of property of the wife situate in
D England, the wife refusing to execute any settlement, the problem is whether, without resort to attachment and without infringement of the authority of the courts of Kenya the court can give effect to its order. Counsel for the wife maintains that the answer to this question must be in the negative for the following reasons: (i) the settlement cannot be drafted: there is no power under the section to refer the matter to conveyancing counsel of the court (*Style*
E v. *Style and Keiller* (5)) and it would be contrary to principle to allow the husband or his advisers to draft the instrument; (ii) if it can be drafted, it cannot be executed, s. 47 of the Supreme Court of Judicature (Consolidation) Act, 1925, having no application to an instrument of settlement.

It would be odd if the court had power to order such settlement as it thought reasonable but no power to provide for its drafting save by keeping a respondent
F wife in prison until she purged her contempt by agreeing either to instruct her advisers, or to allow conveyancing counsel of the court to draft the necessary instrument. The difficulty arises because there is no power expressly given by s. 24 (1) of the Act of 1950 to the court to refer the matter to conveyancing counsel of the court. In *Style v. Style and Keiller* (6) SINGLETON, L.J., impressed with the difference between s. 19 (2) of the Act, which contains in the matter of
G secured provision for a wife on divorce an express power to refer the question of drafting to conveyancing counsel of the court, and s. 24 of the same Act, which makes no mention of any such power, found it "difficult to see" how the court could of its own motion so refer the question; but he went on to add that counsel had been most helpful and had agreed to such a reference. Neither JENKINS, L.J., nor HODSON, L.J., the other two members of the court, mentioned the
H point in so many words, but each agreed with the judgment of SINGLETON, L.J. (7).

I do not read the judgment of SINGLETON, L.J., as deciding the point. Indeed, counsel's consent to the reference made a decision unnecessary. I do not, therefore, consider myself bound by the decision in *Style v. Style and Keiller* (5) to hold that the absence of express words in s. 24 empowering the reference means
I that the court has no such power. Nevertheless the views of the Court of Appeal on the point clearly have very great persuasive force. But for the fact that both s. 19 (2) of the Act of 1950 which deals with secured provision for a divorced wife, and s. 22 (4) of the same Act, which deals with secured provision for a wife whose husband has failed to comply with a decree of restitution

(5) [1954] 1 All E.R. 442; [1954] P. 215.

(6) [1954] 1 All E.R. at pp. 444-446; [1954] P. at pp. 217-220.

(7) [1954] 1 All E.R. at pp. 446, 447 and p. 447, respectively; [1954] P. at pp. 220-223 and p. 223 respectively.

of conjugal rights, contain such an express reference, the absence of any such reference from s. 24 could not, in my view, be interpreted as meaning that the court, acting under that section, has no such power. Had the statute been consistently silent on the matter, the conjunction of R.S.C., Ord. 51, r. 7, and r. 82 of the Matrimonial Causes Rules, 1957, would, in my view, have been decisive in favour of the existence of the power. Whatever may have been the position prior to the introduction of these rules, I have to confess that, but for the views expressed by the Court of Appeal in *Style v. Style and Keiller* (8), I would not have thought that their operation was ousted by the silence of the section, there being no express enactment excluding them. On the contrary, I would have been inclined to think that the effect of the rules was to fill the void left by s. 24 on the matter and to empower the court to refer to conveyancing counsel of the court the drafting of the settlement that it ordered. Further, the view of the matter which, unaided by authority, I would be inclined to take receives a measure of support from the course taken prior to *Style v. Style and Keiller* (8) by at least two very experienced judges when dealing with applications to settle the property of a guilty wife. In *Lorriman v. Lorriman and Clair* (9) BUCKNILL, J., clearly assumed that the court had power in the absence of consent to refer the drafting of the settlement to conveyancing counsel of the court: and I think that HODSON, J., acted on the same assumption in *Barker v. Barker* (10). In neither of these cases, however, was the point taken.

It is, however, unnecessary for me to reach a conclusion on the point, as I am of the opinion that the court, even if it cannot of its own motion refer the drafting to conveyancing counsel of the court, has power to give directions for the preparation of the instrument it considers to be necessary. The words of the section seem to me conclusive on the point: for the court, having power, "if it thinks fit", to order "such settlement as it thinks reasonable", must have power to give directions as to its drafting and to approve finally a submitted draft. The language is quite clear, requiring the court first to decide whether the case is a fit one for settlement and then to decide and order whatever settlement it considers reasonable. Counsel for the wife, however, submitted that it would be very unjust to the wife if, in face of her refusal to consent to the drafting of the instrument either by her advisers or conveyancing counsel of the court, the husband should be given liberty to submit a draft to the court for its approval. I see nothing unjust in such a course. The wife would have the safeguard of the court's approval of the draft before it was submitted for execution. Accordingly, I think that the court has power, without resort to attachment proceedings, to provide for the drafting of the settlement that it thinks reasonable to order should be made.

The second reason advanced for asserting that the court is helpless when faced with a respondent wife domiciled and resident abroad who refuses her consent was that the court has no power to effect the execution of the settlement. Counsel for the wife, I think, conceded that, if the power contained in s. 47 of the Supreme Court of Judicature (Consolidation) Act, 1925, is available to the court when exercising the jurisdiction given it by s. 24 of the Matrimonial Causes Act, 1950, the court would be able to ensure execution of the settlement even though the respondent were to refuse and were outside the reach of the court.

Section 47 of the Act of 1925, so far as material, provides as follows:

"Where any person neglects or refuses to comply with a judgment or order directing him to execute any conveyance, contract or other document ... the High Court may ... order that the conveyance, contract or other document shall be executed ... by such person as the court may nominate for that purpose ..."

(8) [1954] 1 All E.R. 442; [1954] P. 215.

(9) [1908] P. at pp. 283, 284, 290.

(10) [1944] 2 All E.R. 446; [1944] P. 77.

A In my judgment the section is applicable if the settlement which the court may order under s. 24 (1) falls within the scope of the phrase "any conveyance, contract or other document". I was referred by counsel to *Re Cathcart* (11), *Savage v. Norton* (12) and *Howarth v. Howarth* (13). The settlement envisaged by s. 24 (1), as is that proposed by the registrar in this case, is an instrument whereby property is transferred to trustees to be held on certain trusts. Being

B a transfer of property it falls, in my opinion, within the term "any conveyance, contract or other document" as used in s. 47. It is the same sort of instrument as a deed ordered under s. 19 (2) of the Act of 1950 making secured provision for a wife, and in *Howarth v. Howarth* (14) the court did appoint a person to execute the necessary deed in a case where it had ordered a secured provision. The latter case is also helpful in that the Court of Appeal (15) made it plain that

C the power conferred on the court by s. 47 (then s. 14 of the Supreme Court of Judicature Act, 1884) is quite independent of the power of attachment. "Such a person" (i.e., one who refuses to execute an instrument to which the section applies) "has no right to say that he prefers going to prison..." It was, therefore, held not beyond the power of the court to appoint a person to execute the deed instead of enforcing its order by imprisonment.

D For these reasons I am of opinion that in a case where a respondent wife has property in England, although she herself be neither resident nor domiciled in England, the court has jurisdiction under the section to make an order settling the whole or part of the property situate in England. In my view the court can in such a case make an effectual order without resort to personal coercion of the respondent.

E There remains the alternative submission of the wife that, assuming the existence of jurisdiction, the registrar's report should be varied by reducing the amount of the property to be settled. Counsel for the wife submits that it would be unreasonable to order a settlement for the benefit of the two children of the marriage of all the wife's property in England. He suggests that, if there be

F jurisdiction, it would be reasonable to limit the settlement to the wife's interest in the matrimonial home, Warmans, and to half her reversionary interest under her father's will. The principles which guide the court's discretion in matters of amount in such a case as this are well known, and need no restatement by me: see, for instance, *Lorriman v. Lorriman and Clair* (16). The husband possesses a modest fortune and, in addition, is in receipt of a substantial income from his profession. It is clear that his resources both of capital and of income are very

G considerable advantages which the two children will continue to enjoy notwithstanding the break-up of the marriage. The wife's resources consist of her interest in Warmans, such interest as she may have in the Kenya home which she has bought and furnished and conveyed into the name of her new husband, some £2,000 invested now in Australia, and her reversionary interest under her father's will, the value of which is not precisely known. On the figures given to

H the registrar the fund in which she has her reversionary interest was worth about £29,550 (her share being £14,775), consisting largely of stocks and shares valued in 1954 at £23,832 17s. 2d.: at the hearing before me I allowed counsel for the wife, on an undertaking to put the matter on affidavit, to introduce an up-to-date valuation which, making certain assumptions as to dealings with the fund which, though probable, were not proved, showed the stocks and shares of

I the fund to be worth today about £31,500. I do not think it necessary to determine the exact value of this fund: it is sufficient to note that the wife's interest in it is contingent on the life interest of her mother and that, had the wife not broken up her marriage, the two children of the marriage might in due course

(11) [1893] 1 Ch. 466.

(12) [1908] 1 Ch. 290.

(13) (1886), 11 P.D. 68; on appeal, (1886), 11 P.D. 95.

(14) (1886), 11 P.D. 68.

(15) (1886), 11 P.D. at pp. 99, 100, per COTTON, L.J. (LINDLEY and LOPES, L.JJ., concurring).

(16) [1908] P. 282.

have expected to receive substantial benefit from this source. One must, however, bear in mind, as indeed the learned registrar mentions in his report, that, had the marriage continued, there might well have been further children and the husband might have received at least a life interest in his wife's estate had he survived her. Though the learned registrar refers to these matters, yet the effect of the settlement proposed by him would be to direct to the benefit of these two children the whole of this reversionary interest subject to their mother's life interest together with the whole of her interest in Warmans and to leave out of settlement only some £2,000 in Australia and such assets as she possesses in Kenya. In all the circumstances I think that the reduction in amount to be settled suggested by counsel for the wife should be made and that it would be reasonable to order a settlement for the benefit of the two children of the marriage of one-half of the wife's reversionary interest, subject to a life interest to her therein, and of the whole of her interest in Warmans. A B C

Counsel for the wife also criticised the terms of the settlement proposed by the registrar for the reversionary interest. He pointed out that no provision is made for the event of both children dying childless during the lifetime of their mother. I think the criticism is sound and order that in that event the interest should revert to the wife. D

For these reasons I hold that there is jurisdiction to order a settlement of the English property and I vary the registrar's report by ordering:—

that the respondent wife be ordered to execute a settlement

(a) of half of her reversionary interest, arising under the will dated June 30, 1952, of her late father, Henry James Osman,

(b) of her interest in the joint tenancy of the matrimonial home Warmans, Wedmore, the said interests to be vested in trustees upon the following trusts:— E

as to (a) on trust to pay the income therefrom to the respondent wife for life with remainder as to both capital and income to the two children of the marriage in equal shares on their respectively attaining the age of twenty-five years, or in the event of either or both dying under that age but having issue who attain the age of twenty-one years to such issue in equal shares per stirpes, or in the event of both dying without issue during the life of the respondent wife to her absolutely: F

as to (b) on similar trusts for the said children but excluding any life interest or remainder in favour of the respondent wife.

Save as aforesaid I confirm the registrar's report and order accordingly. G

Order accordingly.

Solicitors: *Ralph Bond & Rutherford* (for the petitioner husband); *Gibson & Weldon* (for the respondent wife).

[Reported by N. P. METCALFE, ESQ., *Barrister-at-Law.*]

A

NAYLOR v. NAYLOR.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Scarman, J.), January 17, 18, February 27, 1961.]

B

Magistrates—Husband and wife—Maintenance—Wilful neglect to maintain—Desertion—Wife in state of desertion—Right to claim maintenance suspended—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 4.

C

Magistrates—Husband and wife—Maintenance—Wilful neglect to maintain child—Desertion—Wife in state of desertion—Right to claim maintenance suspended—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 4.

D

Magistrates—Husband and wife—Maintenance order—Enforceability of and liability under order—"Resides with"—Wife in state of desertion but continuing to live in same house as husband—Whether wife residing with husband—Summary Jurisdiction (Separation and Maintenance) Act, 1925 (15 & 16 Geo. 6 c. 51), s. 1 (4).

E

It would be contradictory to hold that two spouses, one of whom remains in a state of desertion, were residing with each other within the meaning of s. 1 (4) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, because they lived under the same roof (see p. 141, letter E, post); and the point of conflict between the decisions of the Divorce Court in *Smith v. Smith* ([1939] 4 All E.R. 533), *Wilkes v. Wilkes* ([1943] 1 All E.R. 433), and of the Divisional Court of the Probate, Divorce and Admiralty Division in *Angel v. Angel* ([1946] 2 All E.R. 635) on the one hand and the decisions of the Divisional Court of the Queen's Bench Division in *Evans v. Evans* ([1947] 2 All E.R. 656), *Wheatley v. Wheatley* ([1949] 2 All E.R. 428) and *Hewitt v. Hewitt* ([1952] 2 All E.R. 250) on the other hand (see p. 133, letter B, post) was resolved by the Court of Appeal in *Hopes v. Hopes* ([1948] 2 All E.R. 920) in favour of the decisions of the Probate, Divorce and Admiralty Division (see p. 141, letter E, post).

F

G

In March, 1960, the wife quarrelled with the husband and, by casting off her wedding ring, indicated her intention of no longer being a wife to him. Thereafter, although the husband and the wife and the children continued to live in the matrimonial home, the husband and the wife lived separate lives; the husband slept alone, the wife performed no wifely services and there was a complete absence of any family life. On Apr. 2, 1960, the husband gave the wife money for housekeeping, but thereafter refused to make any further payment because of her conduct. On July 26, 1960, the wife took proceedings by complaint before the justices against her husband on the ground that he had wilfully neglected to provide reasonable maintenance for herself and for the children. On Aug. 19, 1960, the husband paid and thereafter continued to pay to the wife 30s. weekly as maintenance for each child. This sum was accepted by the wife as reasonable. On Sept. 5, 1960, the justices dismissed the wife's complaint, considering her to be in desertion. On appeal,

H

I

Held: (i) a wife who had deserted her husband and remained in desertion could not obtain an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, either on a complaint to provide reasonable maintenance for herself or on a complaint to provide reasonable maintenance for any children whom the husband was legally liable to maintain (see p. 143, letters B and H, post); on the facts the wife was in desertion, although she and the husband still lived under the same roof (see letter D, above) and, therefore, was not entitled under the Acts of 1895 to 1949 to maintenance for herself and for the children while she remained in desertion.

Jones v. Newtown & Llanidloes Guardians ([1920] 3 K.B. 381), *Price v.*

Price ([1951] P. 413), and *Kinnane v. Kinnane* ([1953] 2 All E.R. 1144) applied. A

(ii) even if the wife's desertion were no defence to her complaint that the husband had wilfully neglected to provide reasonable maintenance for the children, nevertheless the court had a discretion under s. 5 of the Summary Jurisdiction (Married Women) Act, 1895, whether or not to make an order, and, in the circumstances of the present case, there were reasonable grounds for refusing to make an order (see p. 144, letter G, post). B

Appeal dismissed.

[**Editorial Note.** The jurisdiction of the magistrates' court in matrimonial proceedings is now conferred by the Matrimonial Proceedings (Magistrates' Courts) Act, 1960 (8 & 9 Eliz. 2 c. 48), which came into operation on Jan. 1, 1961 (S.I. 1960 No. 2223). It seems that the principle stated at p. 129, letter D, ante, is applicable a fortiori under the Act of 1960. The words "resides with" do not appear in s. 7 (1), which corresponds to s. 1 (4) of the Act of 1925. Under the new enactment a maintenance order is rendered unenforceable only while there is cohabitation (c.f., *Wheatley v. Wheatley*, [1949] 2 All E.R. at p. 430, letters C, D). C

Jurisdiction to award maintenance for children under the Guardianship of Infants Acts, 1886 and 1925, is not excluded by the wife's desertion (see p. 144, letter A, post). D

As to the enforcement of an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, where wife resides with husband, see 12 HALSBURY'S LAWS (3rd Edn.) 500, para. 1103; and for cases on the subject, see 27 DIGEST (Repl.) 698, 699, 6682-6684; 719-721, 6884-6900. E

For the Summary Jurisdiction (Married Women) Act, 1895, s. 4, s. 5, s. 6, see 11 HALSBURY'S STATUTES (2nd Edn.) 849-852; and for the Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 1 (4), see *ibid.*, 864.]

Cases referred to:

Angel v. Angel, [1946] 2 All E.R. 635; 176 L.T. 90; 111 J.P. 14; 27 Digest (Repl.) 696, 6659. F

Beard v. Beard, [1945] 2 All E.R. 306; [1946] P. 8; 114 L.J.P. 33; 174 L.T. 65; 27 Digest (Repl.) 408, 3369.

Buchler v. Buchler, [1947] 1 All E.R. 319; [1947] P. 25; [1947] L.J.R. 820; 176 L.T. 341; 111 J.P. 179; 27 Digest (Repl.) 350, 2899.

Curtin v. Curtin, [1952] 1 All E.R. 1348; [1952] 2 Q.B. 552; 116 J.P. 361; 3rd Digest Supp. G

Dawson v. Dawson, (1929), 93 J.P. 187; 27 Digest (Repl.) 366, 3033.

Diver v. Diver, unreported.

Evans v. Evans, [1947] 2 All E.R. 656; [1948] 1 K.B. 175; [1948] L.J.R. 276; 112 J.P. 23; 27 Digest (Repl.) 698, 6682.

Hay v. Hay, (Jan. 25, 1961), unreported.

Hewitt v. Hewitt, [1952] 2 All E.R. 250; [1952] 2 Q.B. 627; 116 J.P. 434; 3rd Digest Supp. H

Hopes v. Hopes, [1948] 2 All E.R. 920; [1949] P. 227; [1949] L.J.R. 104; 113 J.P. 10; 27 Digest (Repl.) 340, 2818.

Jackson v. Jackson, [1924] P. 19; 27 Digest (Repl.) 335, 2791.

Jones v. Newtown & Llanidloes Guardians, [1920] 3 K.B. 381; 89 L.J.K.B. 1161; 124 L.T. 23; 84 J.P. 237; 27 Digest (Repl.) 82, 627. I

Kinnane v. Kinnane, [1953] 2 All E.R. 1144; [1954] P. 41; 117 J.P. 552; [1953] 3 W.L.R. 782; 3rd Digest Supp.

National Assistance Board v. Parkes, [1955] 3 All E.R. 1; [1955] 2 Q.B. 507; [1955] 3 W.L.R. 347; 3rd Digest Supp.

National Assistance Board v. Wilkinson, [1952] 2 All E.R. 255; [1952] 2 Q.B. 648; 116 J.P. 428; 3rd Digest Supp.

Price v. Price, [1951] 2 All E.R. 580, n.; [1951] P. 413; 115 J.P. 468, n.; 27 Digest (Repl.) 85, 636.

- A *Smith v. Smith*, [1939] 4 All E.R. 533; [1940] P. 49; 109 L.J.P. 100; 162 L.T. 333; 27 Digest (Repl.) 339, 2814.
Starkie v. Starkie (No. 2), [1953] 2 All E.R. 1519; 118 J.P. 59; [1954] 1 W.L.R. 98; 3rd Digest Supp.
Wanbon v. Wanbon, [1946] 2 All E.R. 366; 27 Digest (Repl.) 339, 2806.
Wheatley v. Wheatley, [1949] 2 All E.R. 428; [1950] 1 K.B. 39; 113 J.P. 459; 27 Digest (Repl.) 699, 6684.
B *Wilkes v. Wilkes*, [1943] 1 All E.R. 433; [1943] P. 41; 112 L.J.P. 33; 168 L.T. 111; 27 Digest (Repl.) 340, 2816.

Appeal.

This was an appeal by the wife against an order of the Kingston-upon-Thames magistrates, dated Sept. 5, 1960, whereby they dismissed her complaint under the Summary Jurisdiction (Married Women) Act, 1895, s. 4, that the husband had been guilty of wilful neglect to provide reasonable maintenance for herself and for the infant children whom he was legally liable to maintain. The facts appear in the judgment.

K. B. Campbell for the wife.

W. R. K. Merrylees for the husband.

Cur. adv. vult.

Feb. 27. LORD MERRIMAN, P., read the following judgment of the court: The facts leading up to the complaint may be summarised as follows. The parties were married in January, 1945. A girl was born to them in October, 1945, and a boy in August, 1947. At all material times the matrimonial home was at 74, Devon Way, Chessington, premises owned jointly by husband and wife subject to a mortgage, the repayment instalments of which were met by the husband until a fortnight or so before the trial of divorce proceedings.

In February, 1959, the wife petitioned for divorce, alleging cruelty. The parties continued, however, living in the same house, namely, 74, Devon Way, but at about the time of service of the petition they began to occupy separate bedrooms. It is not absolutely clear when intercourse ceased, but certainly ever since July, 1959, there has been no intercourse, and they have slept in separate rooms. In May, 1959, the husband filed his answer which included a cross-prayer on the ground of the wife's cruelty, and the suit came to trial before Mr. Commissioner FLOWERS, Q.C., in March, 1960. On Mar. 29, 1960, the learned commissioner dismissed both the petition and the cross-prayer. During almost the whole period between the service of the petition in February, 1959, and the end of the divorce suit on Mar. 29, 1960, husband, wife and children were all living in the matrimonial home, the husband providing the wife with a monthly sum for the housekeeping and paying the mortgage instalments on the house. In the month immediately preceding the divorce hearing there was a change: for in March he paid her housekeeping not monthly in the sum of £34 as previously, but at a weekly rate of £8 10s. Also in March he began to allow the mortgage repayments to fall into arrears, and the house is now, by the wish of both spouses, up for sale.

On the night of Mar. 29, when the husband returned to the matrimonial home after the conclusion of the divorce suit, there was a serious quarrel, as to which the magistrates have made certain findings, which were not seriously challenged before us. The quarrel was about money and the magistrates found that the wife deliberately caused the trouble that night and, by casting off her wedding ring, indicated her intention of no longer being a wife to him. She has never since worn it. After the quarrel there was certainly one more payment made by the husband on account of housekeeping, namely, £8 10s. on or about Apr. 2; there may also have been another, but the evidence is not clear. It is, however, plain that the husband was dissatisfied with the state of affairs at 74, Devon Way, and in consequence instructed his solicitors to write to his wife's solicitors. There ensued in April and May a correspondence between solicitors

of which the first six letters only were read to the magistrates or ourselves, in the course of which it was complained on behalf of the husband that the wife was wholly failing to look after him, and asserted on behalf of the wife that the husband was continuing to live an entirely separate life. A

The wife's complaint came before the magistrates on Sept. 5, 1960. Between the quarrel of Mar. 29 and the date of the hearing before the magistrates it is clear that the husband and wife did indeed live separate lives. A fair summary would be that the husband used one small room for sleeping, that the wife performed no wifely services, and that there was a complete absence of any communal or family life. During this period until Aug. 19, 1960, the husband, with the exception of the payment on Apr. 2, made no payment to the wife. On Aug. 19, after issue of the wife's summons and on advice, he began to pay the wife 30s. a week for each child, which the wife accepted and accepts as reasonable in amount. At the hearing of the complaint, the husband—presumably because he had in mind the period during which he had made no payments in respect of the children—pleaded guilty to the complaint that he had failed to maintain the children, and one of the points taken before us is that the wife was at least entitled to an order in respect of them, if not for herself. Notwithstanding this plea, the magistrates dismissed the whole of the wife's complaint, finding that she had deserted the husband. B C D

On these facts the following questions arise: First, was there evidence to support the finding of the magistrates that the wife had deserted the husband? This question really falls to be sub-divided under two heads: (A) At the time when the wife's complaint was issued on July 26, 1960, were the parties living, though under the same roof, in two separate households, or were they still living together? and (B) if separately, there being no suggestion that it was a consensual separation, was this state of things the fault of the husband or the fault of the wife? Secondly, if the wife was in desertion at the time when she issued her complaints in respect of wilful neglect, does her desertion bar her from obtaining an order of maintenance for herself or in respect of the children? E

We can deal at the outset with question (B)—whether the separation, if any, was the fault of the husband or the wife? In our opinion, the effect of the magistrates' findings is as follows. By the time of the quarrel on Mar. 29, 1960, the wife had already formed the intention of no longer being a wife to her husband. This intention informed all her subsequent actions and it was her endeavour thereafter to make his life so unbearable that he would leave the house. It is material to observe that the wife's intention to abandon her husband was formed before Apr. 2, 1960, when the husband made his last payment on account of housekeeping and that this payment was immediately followed by complaints made through his solicitors of the wife's failure to perform wifely services. The magistrates clearly took the view that the money ceased because of the wife's conduct and not that the wife only behaved as she did because of the absence of the money. We are of the opinion that these findings are amply supported by the evidence. If, therefore, there was a separation between these spouses, we are of the opinion that it arose not because of a failure by the husband to provide reasonable maintenance but because, without just cause (her case of cruelty having failed), she intended no longer to live with him. The money was withheld after Apr. 2, only because the wife by words and actions had made her intention clear. For these reasons we think that the magistrates were fully entitled to consider any separation there was to be the fault of the wife and that the wife had formed an intention to desert her husband. Thus the real issue becomes whether her intention was realised—that is to say, whether there was, in fact, a separation. Before, however, we turn to this question, we should add that we are not impressed by the twelfth reason of the magistrates, which relates to the joint intention of the parties to put the matrimonial home up for sale and which finds that the husband was justified in thinking that his wife's share of the proceeds of the sale would sufficiently provide for her. We do not accept this F G H I

A finding. We are, however, satisfied that it has occasioned the wife no real injustice since the rest of the evidence, coloured as it is by the wife's gesture with the wedding ring, suffices to establish that any separation there was came about by the fault of the wife.

This brings us to question (A). The question of desertion by one spouse of the other when the spouses are living under the same roof has to be determined in the light of a conflict between, on the one hand, decisions in the Divorce Court in *Smith v. Smith* (1), *Wilkes v. Wilkes* (2), and in the Divisional Court of this Division in *Angel v. Angel* (3), following and approving those two decisions, and, on the other hand, decisions in the Divisional Court of the Queen's Bench Division in *Evans v. Evans* (4), *Wheatley v. Wheatley* (5), and *Hewitt v. Hewitt* (6) reaffirming *Evans v. Evans* (4), and finally in the light thrown on this conflict by C the decision of the Court of Appeal in *Hopes v. Hopes* (7).

The point of conflict arose as follows. In *Smith v. Smith* (1), *Wilkes v. Wilkes* (2), and *Angel v. Angel* (3), it had been held that one spouse could desert the other, although they were residing in the same house if, to quote BUCKNILL, L.J., in *Hopes v. Hopes* (8): "... The court can say that the spouses were living lives separate and apart from one another". Essentially the same test was adopted by D DENNING, L.J., in the same case, where he said (9):

"It is most important to draw a clear line between desertion, which is a ground for divorce, and gross neglect or chronic discord, which is not. That line is drawn at the point where the parties are living separately and apart. In cases where they are living under the same roof, that point is reached when they cease to be one household and become two households, or, in other words, when they are no longer residing with one another or cohabiting with one another."

Put in very broad terms, the conflict is whether a wife who is rightly found to be deserted by her husband, in spite of the fact that they are living in the same house, must be held to "reside with" (10) her husband because they are living in the same house.

F The judges of this Division have taken the view that such a finding is impossible. The Queen's Bench Divisional Court have held, in *Evans v. Evans* (4) and the other cases mentioned, that it is not only possible, but that they are bound so to hold.

It is perhaps worth noting at the outset that this conflict was one of the main reasons for the amendment in 1953 of R.S.C., Ord. 59, by the addition to r. 29 G of para. 2 (a) transferring to a Divisional Court of this Division appeals against any order or determination by justices in regard to the enforcement of, inter alia, an order for the payment of money made under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949 (11). One object in this change of the rules was to entrust the enforcement of maintenance orders, and the like, to judges who are accustomed to administer the matrimonial law governing the making of such orders.

H In *Evans v. Evans* (12) it appears from the report of the judgment of LORD GODDARD, C.J., that the original order in favour of the wife had been made on the grounds of cruelty and desertion, and that the order contained a non-cohabitation clause, though it was said that neither of these facts was stated in

- I (1) [1939] 4 All E.R. 533; [1940] P. 49.
 (2) [1943] 1 All E.R. 433; [1943] P. 41. (3) [1946] 2 All E.R. 635.
 (4) [1947] 2 All E.R. 656; [1948] 1 K.B. 175.
 (5) [1949] 2 All E.R. 428; [1950] 1 K.B. 39.
 (6) [1952] 2 All E.R. 250; [1952] 2 Q.B. 627.
 (7) [1948] 2 All E.R. 920; [1949] P. 227.
 (8) [1948] 2 All E.R. at p. 924; [1949] P. at p. 234.
 (9) [1948] 2 All E.R. at p. 925; [1949] P. at pp. 235, 236.
 (10) See the Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 1 (4):
 11 HALSBURY'S STATUTES (2nd Edn.) 864.
 (11) 1961 Annual Practice at p. 1745. (12) [1948] 1 K.B. at p. 178.

the case. In another report (13) it is said that it was a separation order on the ground of desertion. If a non-cohabitation clause was in fact included it had, as will appear, no effect on the situation of the spouses. A

As regards desertion, it is elementary that it is an essential ingredient of that offence that there is de facto separation of the spouses at the material time. It is plain from the findings of the magistrates in the Case Stated in *Evans v. Evans* (14) on the wife's complaint to enforce her order that the desertion depended on the findings of fact that there was no common household and that in every sense the husband and wife were living separate and apart from each other and using separate parts of the house. The finding of desertion was obviously based on the decisions in *Smith v. Smith* (15), *Wilkes v. Wilkes* (16) or *Angel v. Angel* (17), or all three. *Smith v. Smith* (15) and *Wilkes v. Wilkes* (16) were cited to the Divisional Court in support of the argument for the wife. The magistrates also stated as a fact that there had been no change in the relations between husband and wife since the date of the making of the original order. That is to say, there had been no appeal from that order and the spouses were still living separate and apart from each other and using separate parts of the house. Nevertheless, the wife's complaint for enforcement was resisted, on the ground that within the meaning of s. 1 (4) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, the wife was "residing with her husband". This view, although rejected by the magistrates, prevailed with LORD GODDARD, C.J., and HUMPHREYS, J., CROOM-JOHNSON, J., dissenting. B C D

LORD GODDARD, C.J., said (18) that he was willing to assume that if the facts came de novo before the Divorce Division it might, and perhaps would, be held that the husband deserted the wife. In spite of this qualified recognition of the divorce cases, there was apparently no examination of their possible application to the facts stated by the magistrates, and in spite of those findings LORD GODDARD, C.J., held that the wife was residing with the husband. He said (19) that he knew of no case in which before this Act was passed it had been held that a woman could come to the court and say "I have left my husband and I am living separately from him although I am living in the same house". HUMPHREYS, J., said (20) that counsel for the wife had referred to cases in the Divorce Division, but was quite unable to answer the question (21): E F

"What is the meaning of the words, 'resides with her husband' if they do not mean 'resides in the same house as her husband'?"

In our opinion, the answer to this question was given correctly by CROOM-JOHNSON, J. (22), who recognised that the key word was "with". He thought that the question whether the wife was residing with her husband was one of fact for the magistrates to determine. In our opinion, it is immaterial that the "desertion" is found on the wife's complaint under s. 4 of the Act of 1895 and the "residing with" is found by virtue of s. 1 (4) of the Act of 1925 on a complaint for enforcement of the order made on the ground of that desertion, for we think that there is no escape from the point made by DENNING, L.J., in *Hopes v. Hopes* (23), that to say of two spouses in identical circumstances that the husband has deserted and is still deserting the wife, and that the wife is "residing with" the husband is self-contradictory. Moreover, in our opinion LORD GODDARD, C.J., was mistaken in saying, as he did, in *Wheatley v. Wheatley* (24), that the part of the judgment of DENNING, L.J., in *Hopes v. Hopes* (23), in G H

(13) [1947] 2 All E.R. at p. 656. (14) [1947] 2 All E.R. 656; [1948] 1 K.B. 175.

(15) [1939] 4 All E.R. 533; [1940] P. 49. (16) [1943] 1 All E.R. 433; [1943] P. 41.

(17) [1946] 2 All E.R. 635. (18) [1947] 2 All E.R. at p. 657; [1948] 1 K.B. at p. 178.

(19) [1947] 2 All E.R. at p. 657; [1948] 1 K.B. at pp. 178, 179.

(20) [1947] 2 All E.R. at p. 658; [1948] 1 K.B. at p. 181.

(21) [1948] 1 K.B. at p. 177.

(22) [1947] 2 All E.R. at p. 659; [1948] 1 K.B. at p. 183.

(23) [1948] 2 All E.R. at p. 925; [1949] P. at p. 236.

(24) [1949] 2 All E.R. at p. 429; [1950] 1 K.B. at p. 41.

A which he criticised the decision in *Evans v. Evans* (25), was "entirely obiter". Whatever may be said about other parts of that judgment of DENNING, L.J., we think that this part was at the crux of the decision of the Court of Appeal in *Hopes v. Hopes* (26), as we hope to show when we examine that case more closely later.

We will begin by examining the three cases, *Smith v. Smith* (27), *Wilkes v. Wilkes* (28), and *Angel v. Angel* (29), already referred to. In *Smith v. Smith* (27), the facts were somewhat complicated, and SIR BOYD MERRIMAN, P., invoked the assistance of the King's Proctor. The statutory period in respect of which the wife alleged desertion was from February, 1935, to February, 1938, when the petition was presented. The separation had lasted, however, much longer than that. The parties were married in 1922, and in 1925, despite the wife's remonstrances, the husband withdrew from cohabitation. The house belonged to him, and his mother was occupying the basement. The husband went to live with her, but slept with his son on the first floor, leaving the ground floor to the wife, save only that he had to pass through it on the way from the basement to his sleeping quarters. Down to 1933 he paid his wife £1 a week. The mother died in 1932, and in the summer of 1933 the husband suddenly stopped the weekly payments which he had made for eight-and-a-half years. The wife made a complaint of wilful neglect to maintain her. This was defended by the husband on the ground that he had withheld payments because, in effect, the wife was rendering him no services in return for the payment, and the magistrates dismissed her complaint on this ground. This finding unquestionably formed a considerable obstacle to any assertion by the wife that up to this point two separate households had been formed. However, it became clear that thereafter an attempt at reconciliation, at the instance of the magistrates, failed; the wife being ready and willing to make a fresh start, while the husband made it equally clear that he was not willing to take his wife back. From that point the living and sleeping arrangements were the same as they had been before. The husband, of course, no longer lived with his mother, but he continued to live in the basement which had been occupied by her, and the wife continued to occupy the ground floor. As regards money, though there was no regular payment of a fixed amount nor any further suggestion that the wife was to render any services in return, it appeared that the husband just gave the wife 5s. or 10s. as the case might be, and put that money in some place where she could pick it up without any word being said between them. She had no option in the matter; she just took it or left it. That, for all practical purposes, was the only form of communication between the spouses from the time when the attempt at reconciliation failed in 1933 until the presentation of the petition in 1938.

The court came to the conclusion that it was impossible, in the circumstances, to describe the parties as living together, where the only element of living together was that they were actually residing in one house, though there was no physical separation between the parts of the house in which they were living respectively. This conclusion was reached after a very full examination of the authorities which were put before the court by counsel for the King's Proctor. In the present case the period of separation is very much shorter, beginning as it does with the dismissal of the petition and the cross-prayer on Mar. 29, 1960, and ending with the complaint on July 26, 1960—although it is of course legitimate to take account of the situation as it existed at the time of the hearing on Sept. 5. The shortness of the period, as such, is immaterial because here we are not concerned with any statutory period ending with the presentation of the petition, and it is a commonplace to say that desertion is a matrimonial offence

(25) [1947] 2 All E.R. 656; [1948] 1 K.B. 175.

(26) [1948] 2 All E.R. 920; [1949] P. 227. (27) [1939] 4 All E.R. 533; [1940] P. 49.

(28) [1943] 1 All E.R. 433; [1943] P. 41.

(29) [1946] 2 All E.R. 635.

irrespective of its duration: see *Beard v. Beard* (30), per SCOTT, L.J., and that it has the same meaning in whatever court the issue arises. A

In *Wilkes v. Wilkes* (31) the circumstances which induced HODSON, J., to follow *Smith v. Smith* (32) bore a strong resemblance to the facts of the present case, especially inasmuch as the period of alleged desertion by the husband began with his saying "This is the end", thereby putting into words that which was conveyed in the present case by the discarding of the wedding ring. HODSON, J., also referred (33) to the judgment of HILL, J., in *Jackson v. Jackson* (34) where he said: B

"There may be desertion though the husband continues to live under the same roof with the wife, but in such case the facts must be very strong. They must show that the husband really causes the wife to live apart against her will—not only sleep apart, but to live apart." C

HODSON, J., also referred (33) to what HILL, J., had said (35) about his earlier decision in *Diver v. Diver* (unreported), a case in which it was necessary to prove desertion for two years. The husband had actually departed physically from where the wife lived for one year and ten months. HILL, J., said (35):

"The only question was whether the separation had begun a few months sooner than the date when he actually left the house. It appeared that not only was he insisting upon sleeping in a separate room, but that he never spoke to the wife, that when the wife spoke to him he never answered her, and when she asked him why he so treated her, he knocked her down. It does not seem to me that in that case it was a very strong inference to draw that he had already begun his desertion two months before he left the house." D

In *Angel v. Angel* (36), it appears from the headnote that early in January, 1946, the wife arrived back in England after a period in South Africa, and lived in the same house as the husband, but sexual relations were never resumed; that in February, 1946, the husband took one room in the house for his own use, locked himself in it away from his wife, and got his meals outside the house. On the appeal from the dismissal of the complaint of desertion LORD MERRIMAN, P., said (37) that he regarded this case as one of considerable importance, for it raised for the first time in any appellate court, so far as he was aware, E

"the question whether or not a wife is precluded from asserting a charge of desertion by the mere fact that she and her husband were residing in the same house." F

As the magistrates had, for a wrong reason, stopped the case, it was necessary to order a re-hearing but both members of the court (38) were of opinion that *Smith v. Smith* (32) and *Wilkes v. Wilkes* (31) were rightly decided as instances of what must necessarily be the rare class of case where it is possible for one spouse or the other to assert desertion in spite of the fact that the spouses are physically living in the same house. G

Wheatley v. Wheatley, according to the judgment of LORD GODDARD, C.J. (39), raised exactly the same question as arose in *Evans v. Evans* (40). This is so, inasmuch as the Case Stated arose out of a wife's complaint for enforcement of an order for £2 a week, variously described as (41) a "maintenance order" and as (42) "a separation order on the ground of desertion", and that the complaint was resisted on the ground, in reliance on *Evans v. Evans* (40), that the wife was H

(30) [1945] 2 All E.R. at p. 314; [1946] P. at p. 21.

(31) [1943] 1 All E.R. 433; [1943] P. 41.

(32) [1939] 4 All E.R. 533; [1940] P. 49.

(33) [1943] 1 All E.R. at p. 434; [1943] P. at p. 42.

(34) [1924] P. at p. 26. (35) [1924] P. at p. 28. (36) [1946] 2 All E.R. 635.

(37) [1946] 2 All E.R. at p. 635. (38) LORD MERRIMAN, P., and BYRNE, J.

(39) [1949] 2 All E.R. at p. 428; [1950] 1 K.B. at p. 41.

(40) [1947] 2 All E.R. 656; [1948] 1 K.B. 175. (41) [1950] 1 K.B. at p. 39.

(42) The headnote, and cf. statement of facts, in [1949] 2 All E.R. 428.

- A residing with her husband. The magistrates found (43) that the spouses were not living as one household, but as two households. Their attention had been called to the criticism which DENNING, L.J., had directed (44) against the decision of *Evans v. Evans* (45), in the Court of Appeal in *Hopes v. Hopes* (46). On the assumption that the original order was on the ground of desertion the same inconsistency arose between the finding in proof of that complaint that the spouses were living in two households, and, as a ground for resisting the complaint for enforcement of the order, that the wife was residing with the husband.

- B The facts on which desertion was found may not have been so cogent as those in *Evans v. Evans* (45). However that may be, the magistrates in the Case Stated found, following *Hopes v. Hopes* (46), that the spouses were not living as one household but as two households. LORD GODDARD, C.J., said (47), that he
- C did not propose in the case before him to canvass the question whether or not, if the parties were before a court which had jurisdiction in the matter, the court would, on the facts proved, come to the conclusion that there was desertion or no desertion. He did, however, repeat the assumption made in *Evans v. Evans* (48) that if these facts came de novo before the Divorce Division it might, and perhaps would, be held that the husband had deserted the wife. With all
- D respect, this seems to overlook the fact that he was actually dealing with a finding of desertion by a court which by virtue of s. 4 of the principal Act of 1895 had jurisdiction to decide a complaint of desertion.

- LORD GODDARD, C.J., added (49) that what the court had to do was to construe not the Matrimonial Causes Act, 1937, but the Summary Jurisdiction (Separation and Maintenance) Act, 1925. This is quite true, but we would observe that both
- E Acts deal with matrimonial offences between husband and wife, and, although the relief afforded differs, the law about the principal offences themselves is the same, and in particular that, duration apart, desertion means the same thing in whichever jurisdiction it comes in question. Thus, the absurdity of magistrates holding in identical circumstances that the spouses were living separate and apart from each other for the purpose of determining the issue of desertion, but
- F were residing with each other in connexion with the enforcement of an order based on that desertion is as great whether the issue of desertion arises in the High Court under the Matrimonial Causes Acts, or in a magistrates' court under the Summary Jurisdiction (Separation and Maintenance) Acts. This is forcibly pointed out by DENNING, L.J., in *Hopes v. Hopes* (46). This led him to say (50):

- G "There are really only three choices, either to say that the line of the decisions in the Divorce Division is wrong, or to say that the decision in *Evans v. Evans* (45) is wrong, or to say that a deserted wife cannot enforce her maintenance order."

- We agree, if we may say so respectfully, that LORD GODDARD, C.J., was right in criticising, as he did in *Wheatley v. Wheatley* (51), certain observations of DENNING, L.J., in *Hopes v. Hopes* (52) on the inability to distinguish between
- H "residence" and "cohabitation". It may be that this introduced an element of confusion into an issue which was otherwise clear cut. The comments of STABLE, J., in *Wheatley v. Wheatley* (53) on this aspect of the matter, with which we are in agreement, tend to support this suggestion. LORD GODDARD, C.J., had in effect said the same thing in *Wheatley v. Wheatley* (51), and in *Evans v. Evans* (54).

(43) [1950] 1 K.B. at p. 40.

(44) [1948] 2 All E.R. at p. 925; [1949] P. at p. 236.

(45) [1947] 2 All E.R. 656; [1948] 1 K.B. 175.

(46) [1948] 2 All E.R. 920; [1949] P. 227.

(47) [1950] 1 K.B. at p. 41.

(48) [1947] 2 All E.R. at p. 657; [1948] 1 K.B. at p. 178.

(49) [1950] 1 K.B. at p. 42. (50) [1948] 2 All E.R. at p. 926; [1949] P. at p. 238.

(51) [1949] 2 All E.R. at p. 430; [1950] 1 K.B. at p. 43.

(52) [1948] 2 All E.R. at pp. 925, 926; [1949] P. at p. 237.

(53) [1949] 2 All E.R. at p. 431; [1950] 1 K.B. at p. 46.

(54) [1947] 2 All E.R. at p. 657; [1948] 1 K.B. at p. 180.

Before leaving *Wheatley v. Wheatley* we must deal with the concluding paragraph of the judgment of LORD GODDARD, C.J., which reads as follows (55):

"At any rate, *Evans v. Evans* (56) has not been overruled, and it is therefore the duty of the justices to follow that decision unless and until it is overruled. If that case comes directly before the Court of Appeal in some way, and the Court of Appeal overrules it, this court will loyally follow the decision of the Court of Appeal, even although it may have come before them in a divorce case. If the Court of Appeal, as a court, had said that *Evans v. Evans* (56) was wrong, the position would have been different, but at present that case has not been overruled by the Court of Appeal. The position is merely that one member of the Court of Appeal has expressed disapproval of the case, and that that expression of disapproval was obiter. For myself, I confess that at the moment I am unrepentant. I think the decision in *Evans v. Evans* (56) was right. It has not been overruled, and therefore the appeal in this case must be allowed."

With all due deference to LORD GODDARD, C.J., the question was not that of loyally following some future decision of the Court of Appeal, "*even although it may have come before them in a divorce case*" (the italics are ours), but of appreciating the point that, on the first occasion on which the topic had come before them, albeit in a divorce case, the Court of Appeal as a whole had held that spouses could be living separate and apart from each other, and that one could be deserting the other, although they were living in the same house, and that by approving specifically *Smith v. Smith* (57), as the criterion by which the degree of separation necessary to constitute desertion is to be decided the Court of Appeal had cut at the root of the decision in *Evans v. Evans* (56), that "residence with" means the same as "living in the same house as". It was to rebut this very suggestion that *Smith v. Smith* (57) and *Wilkes v. Wilkes* (58) had been cited in *Evans v. Evans* (56), but ignored. It does not appear to have been mentioned, however, that these two cases had been expressly approved by this court in *Angel v. Angel* (59).

In *Hopes v. Hopes* (60), it was held, allowing the appeal from a commissioner who had pronounced a decree nisi in favour of the husband on the ground of the wife's desertion, that there was no de facto separation. The headnotes show that there was one household in the sense that the husband, wife and two daughters shared the same living room, kitchen, stairs, passages, and offices, although the spouses always occupied separate bedrooms and the wife behaved in such a way to her husband as to indicate that she wished him to depart from the house and not return there. There was a very full review of the authorities, including *Smith v. Smith* (57), *Wilkes v. Wilkes* (58), and *Angel v. Angel* (59). Just as *Angel v. Angel* (59) was the first time that the problem of desertion while spouses are living in the same house had been considered by any appellate court, so this, so far as we know, was the first time that it had been considered by the Court of Appeal. This relieves LORD MERRIMAN, P., who decided *Smith v. Smith* (57) and presided in this court when *Angel v. Angel* (59) was decided, from the embarrassment of relying solely on his own decisions.

BUCKNILL, L.J., said (61) that it raised the question whether there can be desertion while the parties are under the same roof. He thought that the most helpful case was *Smith v. Smith* (57), and at the end of his judgment, after a full examination of the cases including also *Wilkes v. Wilkes* (58) and *Angel v. Angel* (59), he said (62):

(55) [1950] 1 K.B. at p. 45.

(56) [1947] 2 All E.R. 656; [1948] 1 K.B. 175.

(57) [1939] 4 All E.R. 533; [1940] P. 49.

(58) [1943] 1 All E.R. 433; [1943] P. 41.

(59) [1946] 2 All E.R. 635.

(60) [1948] 2 All E.R. 920; [1949] P. 227.

(61) [1948] 2 All E.R. at p. 922; [1949] P. at p. 231.

(62) [1948] 2 All E.R. at p. 924; [1949] P. at p. 234.

- A "The cases to which I have referred establish that there may be desertion, although husband and wife are living in the same dwelling, if there is such a forsaking and abandonment by one spouse of the other that the court can say that the spouses were living lives separate and apart from one another. On the other hand, when husband and wife are living together, as
- B on the ground of conduct by the wife which ex hypothesi did not amount to cruelty and which did not amount to a life separate and apart from her husband would be to introduce a new ground for divorce."

As a preface to the passage already quoted from his judgment, DENNING, L.J., said (63):

- C "The matrimonial offences of cruelty and adultery can, of course, be committed by the guilty party (and be not condoned by the innocent party) while they are living under the same roof, but, can the matrimonial offence of desertion be committed? One of the essential elements of desertion is the fact of separation. Can that exist while the parties are living under the same roof? My answer is 'Yes'. The husband who shuts himself up in one
- D or two rooms of his house and ceases to have anything to do with his wife is living separately and apart from her as effectively as if they were separated by the outer door of a flat. They may meet on the stairs or in the passageway, but so they might if they each had separate flats in one building. If that separation is brought about by his fault, why is that not desertion? He has forsaken and abandoned his wife as effectively as if he had gone into lodgings.
- E The converse is equally true. If the wife ceases to have anything to do with, or for, the husband, and he is left to look after himself in his own rooms, why is not that desertion? She has forsaken and abandoned him as effectively as if she had gone to live with her relatives. The judges of the Divorce Division have adopted this realistic view with complete unanimity right from the decision of HILL, J., in *Diver v. Diver* (64) to the decision of the Divisional Court of the Probate, Divorce and Admiralty Division in *Angel v. Angel* (65). I find myself in agreement with all the decisions of the Divorce Division, except, perhaps, *Wanbon v. Wanbon* (66) where the parties were said to be still in one household. If that means that, although living at arms' length, they were still sharing the same living room, eating at the same table and sitting by the same fire, then I cannot agree with the finding of desertion."

- G At the end of his judgment DENNING, L.J., said (67):

"Relieved of *Wanbon v. Wanbon* (66) and *Evans v. Evans* (68) the law becomes consistent throughout this subject, and I agree with all that BUCKNILL, L.J., has said about it, and as to the application of it to the facts of this case."

- H HARMAN, J., agreeing that there was no desertion and that the appeal must be allowed, said (67):

- "It is, however, well settled now that there can be desertion, though the same roof has covered the parties even up to the time when the petition is heard . . . desertion must connote, in my judgment, a real separation of one spouse from the other. There must be something more than a mere intention or design to end the conjugal society. That, no doubt, is the animus, but it is not the factum of desertion, and both elements are necessary, as the judgment of LORD GREENE, M.R., in *Buchler v. Buchler* (69) clearly shows."

(63) [1948] 2 All E.R. at p. 924; [1949] P. at p. 235.

(65) [1946] 2 All E.R. 635.

(67) [1948] 2 All E.R. at p. 926; [1949] P. at p. 238.

(68) [1947] 2 All E.R. 656; [1948] 1 K.B. 175.

(69) [1947] 1 All E.R. 319; [1947] P. 25.

(64) Unreported.

(66) [1946] 2 All E.R. 366.

And he said (70):

"The degree of separation necessary to constitute desertion has been discussed in a number of cases. Of these I would wish to rely on *Smith v. Smith* (71), a case decided by [SIR BOYD MERRIMAN, P.,] after a careful argument addressed to him at his request on the part of the King's Proctor. This case decided that there could be separation where the spouses lived in different parts of the same house, but it is to be noted that there was nothing else in common between them."

After expressing a doubt about *Wanbon v. Wanbon* (72), HARMAN, J., said (70):

"This case was an undefended cause and is not fully reported. It may well be that the facts brought it within the limits of *Smith v. Smith* (71) and, if so, the decision was justified. If not, I should not be disposed to follow it. I am of opinion that the true criterion is that of *Smith v. Smith* (71), not, of course, that the facts must be the same, but the degree of separation, and judged by that the husband must here fail."

It was of the essence of the appeal in *Hopes v. Hopes* (73) to determine whether or not the degree of separation proved was sufficient to constitute desertion. It was vital, therefore, to examine *Smith v. Smith* (71), *Wilkes v. Wilkes* (74), and *Angel v. Angel* (75), in which both decisions had been approved by this court. But when it is said (76) that *Evans v. Evans* (77) was mentioned by DENNING, L.J., only, and that his observations were "entirely obiter", it seems to us that once the Court of Appeal had become aware, whether by citation by counsel (of which no trace appears in the report) or by its own researches, that it had been held by a Divisional Court of the King's Bench Division that in spite of the findings of the magistrates a wife was "residing with" her husband because they were living in the same house the court would have been obliged to consider the case before approving *Smith v. Smith* (71) and other like decisions. The mere fact that DENNING, L.J., alone (78) mentioned *Evans v. Evans* (77) seems to us to be immaterial. If the other members of the court thought that it had been introduced irrelevantly or erroneously they could have said so. On the contrary, we think that, so far from the comments on *Evans v. Evans* (77) being entirely obiter, it would have been wrong if the case had not been dealt with in the Court of Appeal at all.

Nevertheless, *Evans v. Evans* (77) managed to survive and even flourish as an authority notwithstanding these criticisms, and was followed in *Curtin v. Curtin* (79) and *Hewitt v. Hewitt* (80). At the beginning of his judgment in *Hewitt v. Hewitt* (80), DEVLIN, J., said (81):

"The presumed object of s. 1 (4) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, has been several times stated by this court and cannot be in doubt. Parliament intended to relieve a wife of the necessity of having to leave home without knowing what support she could count on. It followed that she must be given a reasonable time (which Parliament considered to be three months) after she got her order within which to arrange for another dwelling."

In this passage, and, for example, in *Wheatley v. Wheatley* (82) per LORD GODDARD, C.J., it seems to have been overlooked that the condition in s. 4 of

(70) [1948] 2 All E.R. at p. 927; [1949] P. at p. 239.

(71) [1939] 4 All E.R. 533; [1940] P. 49.

(72) [1946] 2 All E.R. 366.

(73) [1948] 2 All E.R. 920; [1949] P. 227.

(74) [1943] 1 All E.R. 433; [1943] P. 41.

(75) [1946] 2 All E.R. 635.

(76) See *Wheatley v. Wheatley*, [1949] 2 All E.R. at p. 429; [1950] 1 K.B. at p. 41.

(77) [1947] 2 All E.R. 656; [1948] 1 K.B. 175.

(78) [1948] 2 All E.R. at p. 925; [1949] P. at p. 236.

(79) [1952] 1 All E.R. 1348; [1952] 2 Q.B. 552.

(80) [1952] 2 All E.R. 250; [1952] 2 Q.B. 627.

(81) [1952] 2 All E.R. at p. 253; [1952] 2 Q.B. at p. 633.

(82) [1949] 2 All E.R. at p. 429; [1950] 1 K.B. at p. 42.

- A the Act of 1895 about the husband having caused the wife to leave and live separately and apart applied only to his cruelty or neglect to maintain, but not to any of the other causes of complaint in the section, including desertion. The repeal of that condition by s. 1 (1) of the Act of 1925, therefore, made no difference as regards desertion. There was no impediment at any time after the Act of 1895 to a deserted wife obtaining an order on that ground. Moreover,
- B when it is suggested, as it was in *Evans v. Evans* (83), that there was no precedent for saying that before the Act of 1925 spouses could be living separate and apart though under the same roof, we would refer to what HILL, J., said in *Jackson v. Jackson* (84), already quoted, and his earlier decision in *Diver v. Diver* (85).

- C It seems to us that if what is connoted by the term desertion may develop, as it appears to be conceded in *Evans v. Evans* (86), so as to include social circumstances unknown to an earlier generation of lawyers, so likewise must the connotation of the corresponding term "residing with".

- In *Evans v. Evans* (86) the court was concerned with a couple of whom it was found as a fact that they were living separately and apart. The facts summarised in the headnote were not controverted, and it was even assumed—rightly, as
- D we have attempted to show—that the facts so found would satisfy the degree of separation required by law for divorce on the ground of desertion. Yet the Divisional Court found that, in law, they must hold that Mrs. Evans was residing with Mr. Evans on the ground that "residing with" means "living in the same house".

- We think that it emerges quite clearly from a review of all the foregoing cases
- E that the Court of Appeal has accepted the view of the divorce judges to the effect that it is self-contradictory, even though the contradiction arises when construing different statutory provisions, to declare that two spouses, one of whom remains in a state of desertion, are residing with each other. We recently expressed the same opinion, incidentally, in *Hay v. Hay* (87), but that appeal was decided on another ground (88). In the present case we think that the magistrates
- F were right in their finding of desertion because we take the view that these two spouses were at least from the end of March, 1960, leading entirely separate lives, residing separately from each other, albeit under the same roof. We, therefore, hold that there is no ground for differing from their finding that the wife was guilty of desertion.

- Secondly, we must consider the consequences of the wife's desertion. It is
- G necessary to go fully into the position of a deserting wife in regard to maintenance because counsel for the wife has pressed the argument that whereas by s. 6 of the Act of 1895 adultery, unless condoned, connived at, or condoned to, is a bar to the making of any order under that Act in favour of a wife, there is no such provision in the Act in the case of her desertion. Therefore it is suggested that Parliament cannot have meant that the judicial expositions of the common law
- H on this subject should take effect in respect of orders under this Act. The position at common law of a wife who has deserted her husband, but with no suggestion of adultery, is explained in the judgment of the EARL OF READING, C.J., in *Jones v. Newtown & Llanidloes Guardians* (89):

- "There is no doubt that at common law if a wife chooses wilfully and without justification to live away from her husband she cannot, so long as she continues absent, render him liable for necessities supplied to her, or for her maintenance by the union, for the reason that she has of her own free will
- I

(83) [1947] 2 All E.R. at p. 657; [1948] 1 K.B. at pp. 178, 179.

(84) [1924] P. at p. 26.

(85) Unreported.

(86) [1947] 2 All E.R. 656; [1948] 1 K.B. 175. (87) (Jan. 25, 1961), unreported.

(88) That the magistrates' court had failed to determine whether when the wife separated herself from the husband, she intended to desert or whether she intended merely to remain apart temporarily in order to avoid the effect of s. 1 (4) of the Act of 1925.

(89) [1920] 3 K.B. at p. 384.

deprived herself of the opportunity which the husband was affording her of being maintained in the home. But the relief of the husband from the obligation of maintenance continues only so long as she voluntarily remains absent. Her absence, although wrongful, does not affect the relationship of husband and wife. She is entitled after however long a period of absence to return at any time."

This passage was quoted and relied on by HODSON, L.J., in *Price v. Price* (90), where he said:

"A wife has no right to separate maintenance in a different home unless she can justify the fact that she is living apart from her husband . . . the right to separate maintenance is not destroyed but suspended, and as soon as she expresses her willingness to go back, if that offer is rejected, that suspension comes to an end."

In the following paragraph HODSON, L.J., said (90):

"... if a wife becomes a deserter she would not be entitled to maintenance just because she is a wife, that is to say, to separate maintenance. The question of her right to maintenance may depend on whether she is a deserter or whether she is deserted or whether there is a contract between them. I do not think that the law recognises a sort of undefined condition where parties are living apart in conditions which may be described as of drift, or in some not very clearly defined condition in so far as rights to maintenance are concerned. It is necessary that those conditions should be clearly defined, and I think that they were clearly defined by LORD READING, C.J., in *Jones v. Newtown & Llanidloes Guardians* (91)."

SOMERVELL, L.J., agreed (92) with what HODSON, L.J., had said.

It is important to note that, unlike the case of a wife's adultery, the disability may be only temporary, since the wife may, if the circumstances permit, be able to put herself right by being ready and willing to resume cohabitation. But so long as the separation has the quality of desertion on her part, the bar to recovery is, in our opinion, as complete as in the case of adultery. This state of the law is recognised in *National Assistance Board v. Parkes* (93). In that case the Court of Appeal affirmed the decision of the Divisional Court of the Queen's Bench Division (94). In both courts the decision was unanimous that s. 42 (1) (a) of the National Assistance Act, 1948, gave the National Assistance Board an independent right to recover from a husband money paid by way of assistance to the wife; and that a separation agreement, whether for a fixed, or insufficient, or no maintenance did not relieve a husband of this obligation; but, on the other hand, that if the wife has committed adultery, or remains in a state of desertion, the husband is not bound to support her, and therefore the National Assistance Board, if they support her, cannot recover from the husband: per LORD GODDARD, C.J. (95). In the Court of Appeal this result is said to depend on s. 43 (2) which provides that the court shall have regard to "all the circumstances". With reference to these words, DENNING, L.J., said (96):

"I think that under that provision the court must have regard, amongst other things, to any circumstances recognised by the law as sufficient to relieve a husband of his obligation to maintain his wife. From the very earliest times, both in the ecclesiastical courts and in the common law courts, a husband has been under no liability to maintain his wife if she has been guilty of adultery or desertion, and, when various statutes have been passed, the courts have held that his statutory duty is subject to the same

(90) [1951] P. at p. 421.

(91) [1920] 3 K.B. 381.

(92) [1951] P. at p. 422.

(93) [1955] 3 All E.R. 1; [1955] 2 Q.B. 507.

(94) [1955] 1 All E.R. 700; [1955] 1 Q.B. 486.

(95) [1955] 1 All E.R. at pp. 705, 706; [1955] 1 Q.B. at pp. 496, 497.

(96) [1955] 3 All E.R. at p. 3; [1955] 2 Q.B. at p. 515.

A exception . . . likewise, it has been held by the Divisional Court in *National Assistance Board v. Wilkinson* (97), that a husband has an answer in law to any summons by the National Assistance Board if his wife has been guilty of adultery or desertion. That decision, I think, was perfectly right on this ground, that her guilt is one of the circumstances of the case to which the magistrates must have regard. It is so strong a circumstance that it affords

B an answer in law to the claim."

This being the common law, we find ourselves unable to accede to the suggestion that greater weight must be attributed to the statutory bar under s. 6 of the Summary Jurisdiction (Married Women) Act, 1895, in the case of adultery than to the bar imposed by the common law, so long as the wife continues in a state of desertion. We have no doubt, therefore, that it is not open to the wife who

C is in a state of desertion to obtain an order on a complaint of wilful neglect to provide maintenance for herself. There remains, however, the question of wilful neglect to provide reasonable maintenance for the children whom the husband is legally liable to maintain. About the legal liability to maintain there can no longer be any doubt, having regard to s. 42 (1) (a) of the National Assistance Act, 1948. .

D In dealing with the adverse effect of her desertion on the wife's rights under the Act of 1895 and the amending Acts, excluding the recent Matrimonial Proceedings (Magistrates' Courts) Act, 1960 (98), which was not in force at the material time, it is important to bear in mind what this court laid down in *Kinnane v. Kinnane* (99), from which we quote below. In *Starkie v. Starkie* (No. 2) (100) where it was held that the wife had failed to prove her complaint

E of neglect to maintain herself, but had proved her complaint of neglect to maintain the child in respect of whom the maximum sum of 30s. had been awarded, it was held proper to award a nominal sum only in respect of maintenance for herself. The latter case left open the question, which now falls to be determined, whether a deserting wife could succeed on a complaint of wilful neglect to maintain the child alone (101).

F In our opinion, the same considerations about the scheme of the Acts apply equally to both orders. The principle on which both these cases was decided was described as the underlying basis of the Summary Jurisdiction (Married Women) code. In a sentence (see *Kinnane v. Kinnane* (102)), this was

" . . . that it is the wife who is the applicant and that it is in her favour, and in that of nobody but her, that whichever of the permitted orders

G the court decides to make is made. We talk loosely of an order for the children. It is not an order for the children."

LORD MERRIMAN, P., continued (103):

" . . . any sum awarded for the maintenance of the wife, and any sum ordered to be paid to the wife for the support of the children is, as it always has been, an order for the wife. Speaking generally, any of these orders . . .

H can only be made if it is established that one of the complaints made by the wife under the code is found to be proved."

It is plain that under s. 6 of the Act of 1895 an adulterous wife, unless the proviso applies, cannot even have an order committing the legal custody of any children of the marriage to her, still less an order providing that the husband shall pay her a weekly sum for the maintenance of each such child. Nor, in our

I opinion, could such a wife succeed on a complaint for wilful neglect to provide reasonable maintenance for a child. At the same time, it is common practice in such cases to resort to the Guardianship of Infants Acts, 1886 and 1925, under

(97) [1952] 2 All E.R. 255; [1952] 2 Q.B. 648.

(98) Matrimonial Proceedings (Magistrates' Courts) Act, 1960 (Commencement) Order, 1960 (S.I. 1960 No. 2223), appointed Jan. 1, 1961, as the day on which the Act came into force.

(100) [1953] 2 All E.R. 1519.

(99) [1953] 2 All E.R. 1144; [1954] P. 41.

(101) [1953] 2 All E.R. at p. 1521.

(102) [1953] 2 All E.R. at p. 1145; [1954] P. at p. 43.

(103) [1953] 2 All E.R. at p. 1146; [1954] P. at p. 43.

which Acts her misconduct does not disentitle the wife to an order if the court is satisfied that the welfare of the infant is best provided for by entrusting the wife with the guardianship. It is well recognised that if the wife's complaint under the Summary Jurisdiction (Married Women) Act, 1895, fails for any reason it is customary, by consent, to allow the complaint under the Guardianship of Infants Acts, 1886 and 1925, to be issued forthwith and served in court, so that the question of custody can be dealt with without further delay or expense.

We find it difficult to appreciate the argument that in contrast with s. 6 of the Act of 1895 in relation to adultery, desertion as a bar depends on judge-made law; still less the concomitant plea about the injustice of "leaving the poor children unsupported". The law is of the same force and effect whether it depends on statute or on the common law, and as we have already pointed out, if a wife cannot get an order of any sort under the Act of 1895 because she has committed adultery, the inevitable result is that no order can be made for maintenance in respect of the children, and the remedy is to proceed under the Guardianship of Infants Acts. There is no more hardship in her being obliged to do that because she is a deserter than because she is an adulteress. The power to award maintenance is identical in either case, while, as regards her own conduct, she is in a rather more favourable position inasmuch as she may be able, by her own act, to terminate the desertion. In our opinion, a deserting wife cannot obtain an order on a complaint of neglect to maintain the children.

In so far as the wife claims an order in respect of the children, there is, however, a narrower ground on which she fails. The husband, as we have mentioned, pleaded guilty to wilful neglect in that respect. Nevertheless, from Aug. 19, 1960, he had instructed his solicitors to pay regularly to the wife's solicitors 30s. in respect of each child, which was accepted as adequate. This payment was continuing at the time of the hearing before the magistrates and, we were informed, was still continuing at the time of the appeal. In these circumstances, it was urged that the wife, having proved wilful neglect to maintain the children between the above dates, was entitled, subject to the possible defence of desertion, to an order for their maintenance. We will assume, contrary to our view, that desertion is no defence. Nevertheless, s. 5 of the Act of 1895 provides that the magistrates "may" make an order; this, for all practical purposes, would operate prospectively. The section confers a discretion. We appreciate that the discretion must be exercised judicially (*Dawson v. Dawson* (104)), but we think that the circumstances of the present case, including the fact that the neglect was of short duration and had ended before the hearing, and that there was no reason either to criticise the amount being paid or to doubt the husband's intention to maintain the payments, justified the exercise of the discretion in the husband's favour. That is to say, there were reasonable grounds for refusing the order.

For these reasons, we think that the magistrates were right in finding the wife to have deserted her husband, and in holding that desertion was a bar to her complaint in respect of both herself and the children. We, therefore, dismiss the appeal.

Appeal dismissed.

Solicitors: *George C. Carter & Co.* (for the wife); *Marcan & Dean* (for the husband).

[*Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.*]

A

HALSEY v. ESSO PETROLEUM CO., LTD.

[QUEEN'S BENCH DIVISION (Veale, J.), February 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 20, 23, 1961.]

B

Nuisance—Oil depot—Smuts—Smell Smuts damaging clothes in plaintiff's garden and plaintiff's car on highway—Smell emanating from depot—No injury to health from smell—Liability of owners of oil depot.*

Nuisance—Noise—Boilers on neighbouring oil depot operating at night—Road tankers entering and leaving depot at night—Noise from tankers partly from highway outside depot and partly from depot itself—Liability in nuisance for noise of tankers on highway—Public or private nuisance.

C

Nuisance—Principle of Rylands v. Fletcher—Acid smuts containing sulphate emitted from chimneys of oil depot—Damage to plaintiff's car on highway outside his house—Damage to clothing in garden of house.

D

The plaintiff occupied a house in Rainville Road, Fulham, which was a road zoned for residential purposes. The defendants, Esso Petroleum Co., Ltd., operated an oil distributing depot at premises adjoining Rainville Road which were situated in an area zoned for industrial purposes. In this industrial area there were other premises dealing with oil. The defendants' depot dealt with fuel oil in its light, medium and heavy grades, the oil being pumped from river tankers on to the depot and from the depot into road tankers. It was necessary to heat the medium and heavy grades of oil for the purpose of pumping them and these grades were kept hot throughout their transportation, including the time while they were at the depot. The through-put of oil at the depot had increased from 30,414,000 gallons in 1953 to 56,607,000 gallons in 1957. In 1956 night shift working was re-introduced. On the depot and opposite to the plaintiff's house there was a boilerhouse with two boilers heated by burning oil and used for producing steam to heat the fuel oil. Two metal chimneys projected from the roof of the boilerhouse. From these chimneys acid smuts containing sulphate

F

were emitted and were visible falling outside the plaintiff's house. There was proof that the smuts had damaged clothes hung out to dry in the garden of the plaintiff's house and also paintwork of the plaintiff's car which he kept on the highway outside the door of his house. The depot emitted a pungent and nauseating smell of oil which went beyond a background smell

G

and was more than would affect a sensitive person but the plaintiff had not suffered any injury to health from the smell. During the night there was noise from the boilers which at its peak caused windows and doors in the plaintiff's house to vibrate and prevented the plaintiff sleeping. The defendants had attempted to reduce this noise by soundproofing the walls of the boilerhouse but it remained and was more than trivial. Further, during the night shift from 10 p.m. to 6 a.m. there was noise from road tankers which arrived at and left the depot at points close to the plaintiff's house. The tankers were enormous vehicles and made a very loud noise. Up to fifteen tankers came to and left the depot at different times during the night shift and sometimes up to four tankers arrived or left together. The noise from the tankers was made partly in the public highway outside the depot, as they manoeuvred on entering or leaving the depot, and partly in the depot itself. In an action by the plaintiff for nuisance by acid smuts, smell and noise,

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Held: the defendants were liable to the plaintiff in the following respects and on the following grounds—

(i) for the emission of acid smuts—

(a) under the rule in *Rylands v. Fletcher* ((1868), L.R. 3 H.L. 330) in respect of the damage to clothing on the plaintiff's land and of the damage to his car while it was on the public highway since in both cases the damage was

caused by the escape from the defendants' premises of a harmful substance, viz., noxious acid smuts (see p. 152, letters D and H, post).

Charing Cross Electricity Supply Co. v. Hydraulic Power Co. ([1914] 3 K.B. 772) and *Miles v. Forest Rock Granite Co. (Leicestershire), Ltd.* ((1918), 34 T.L.R. 500) followed.

(b) as a private nuisance in respect of damage to the clothes since the damage was a material injury to the plaintiff's property resulting from trade carried on by the defendants in neighbouring property (see p. 152, letter H, and p. 153, letter I, to p. 154, letter A, post).

St. Helen's Smelting Co. v. Tipping ((1865), 11 H.L. Cas. 642) applied.

(c) as a public nuisance in respect of which the plaintiff had suffered special damage by reason of the action of the noxious smuts on his car on the public highway (see p. 152, letters D and H, post).

Holling v. Yorkshire Traction Co., Ltd. ([1948] 2 All E.R. 662) applied.

(ii) in respect of nuisance by smell because the smell emanating from the defendants' premises amounted to a private nuisance, notwithstanding that there was no proof of injury to the plaintiff's health, for injury to health was not a necessary ingredient in the cause of action for nuisance by smell (see p. 155, letters B and D, and p. 159, letter E, post).

Dictum of LORD ROMILLY, M.R., in *Crump v. Lambert* ((1867), L.R. 3 Eq. at p. 412) applied.

(iii) in respect of a private nuisance by noise from the boilers and the road tankers when in the depot, in either instance at night, because the noise was an inconvenience which materially interfered with the ordinary physical comfort of human existence according to plain, sober and simple notions among ordinary people, such as the plaintiff, living in this part of Fulham (see p. 156, letter F, p. 158, letter E, and p. 159, letter E, post).

Dictum of KNIGHT BRUCE, V.-C., in *Walter v. Selfe* ((1851), 4 De G. & Sm. at p. 322) applied.

(iv) for the noise from road tankers made at night on the public highway—

(a) as a public nuisance, since the concentration of moving vehicles in a small area of the public highway, viz., outside the depot, was an unreasonable user of the highway and caused special damage to the plaintiff whom it affected more than the ordinary members of the public (see p. 159, letter A, post).

A.-G. v. Sheffield Gas Consumers Co. ((1853), 3 De G.M. & G. 304) and *A.-G. v. W. H. Smith & Sons* ((1910), 103 L.T. 96) applied.

(b) as a private nuisance, since the noise was directly related to the operation of the depot and it was not a prerequisite of private nuisance that the matter complained of emanated from the defendants' land so long as it affected the plaintiff's property, and in the present case the noise from the highway materially interfered with the plaintiff's enjoyment of his house (see p. 158, letter E, post).

Dictum of DEVLIN, J., in *Southport Corpn. v. Esso Petroleum Co., Ltd.* ([1953] 2 All E.R. at p. 1207) applied.

Bartlett v. Marshall ((1896), 60 J.P. 104) and *Vanderpant v. Mayfair Hotel Co., Ltd.* ([1929] All E.R. Rep. 296) applied.

[As to nuisance between neighbouring properties, see 28 HALSBURY'S LAWS (3rd Edn.) 131-142, paras. 167-181; and as to public nuisance, see *ibid.*, 128, para. 156.]

As to the rule in *Rylands v. Fletcher*, see 28 HALSBURY'S LAWS (3rd Edn.) 145-148, paras. 192-195.

For cases on nuisance by noise from commercial operations, see 36 DIGEST (Repl.) 258-260, 82-108; for cases on nuisance from offensive trades and from noxious effluent and fumes, see *ibid.*, 262-269, 116-221; for a case on public nuisance, see 36 DIGEST (Repl.) 256, 68; and for cases on *Rylands v. Fletcher*, see *ibid.*, 285-287, 343-355.]

A Cases referred to:

Anger v. Northern Construction Co., [1938] 4 D.L.R. 738; 36 Digest (Repl.) 260, 30.

A.-G. v. Sheffield Gas Consumers Co., (1853), 3 De G.M. & G. 304; 22 L.J.Ch. 811; 21 L.T.O.S. 49; 43 E.R. 119; 36 Digest (Repl.) 251, 28.

A.-G. v. Smith (W. H.) & Sons, (1910), 103 L.T. 96; 74 J.P. 313; 36 Digest (Repl.) 252, 33.

B

Bartlett v. Marshall, (1896), 60 J.P. 104; 44 W.R. 251; 36 Digest (Repl.) 260, 102.

Charing Cross Electricity Supply Co. v. Hydraulic Power Co., [1914] 3 K.B. 772; 83 L.J.K.B. 1352; 111 L.T. 198; 78 J.P. 305; 36 Digest (Repl.) 284, 338.

C

Colls v. Home & Colonial Stores, Ltd., [1904] A.C. 179; 73 L.J.Ch. 484; 90 L.T. 687; 19 Digest 123, 830.

Cunard v. Antifyre, Ltd., [1932] All E.R. Rep. 558; [1933] 1 K.B. 551; 103 L.J.K.B. 321; 148 L.T. 287; 36 Digest (Repl.) 248, 10.

Crumph v. Lambert, (1867), L.R. 3 Eq. 409; 15 L.T. 600; 31 J.P. 485; *affd.*, 17 L.T. 133; 36 Digest (Repl.) 250, 22.

D

Gaunt v. Fynney, (1872), 8 Ch. App. 8; 42 L.J.Ch. 122; 27 L.T. 569; 37 J.P. 100; 36 Digest (Repl.) 259, 87.

Goold v. Evans & Co., [1951] 2 T.L.R. 1189; 22 Digest (Repl.) 179, 1631.

Hare v. British Transport Commission, [1956] 1 All E.R. 578; [1956] 1 W.L.R. 250; 3rd Digest Supp.

E

Holling v. Yorkshire Traction Co., Ltd., [1948] 2 All E.R. 662; 26 Digest (Repl.) 500, 1825.

Miles v. Forest Rock Granite Co. (Leicestershire), Ltd., (1918), 34 T.L.R. 500; 36 Digest (Repl.) 292, 381.

Polsue & Alfieri, Ltd. v. Rushmer, [1907] A.C. 121; 76 L.J.Ch. 365; 96 L.T. 510; 36 Digest (Repl.) 300, 451.

F

Read v. J. Lyons & Co., Ltd., [1946] 2 All E.R. 471; [1947] A.C. 156; [1947] L.J.R. 39; 175 L.T. 413; 36 Digest (Repl.) 292, 379.

Rylands v. Fletcher, (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70; 36 Digest (Repl.) 282, 334.

St. Helen's Smelting Co. v. Tipping, (1865), 11 H.L. Cas. 642; 35 L.J.Q.B. 66; 12 L.T. 776; 29 J.P. 579; 11 E.R. 1483; 36 Digest (Repl.) 263, 127.

G

Sedleigh-Denfield v. O'Callaghan, [1940] 3 All E.R. 349; [1940] A.C. 880; 164 L.T. 72; sub nom. *Sedleigh-Denfield v. St. Joseph's Society for Foreign Missions*, 109 L.J.K.B. 893; 36 Digest (Repl.) 316, 629.

Shelfer v. City of London Electric Lighting Co., Meux's Brewery Co. v. City of London Electric Lighting Co., [1895] 1 Ch. 287; 64 L.J.Ch. 216; 72 L.T. 34; subsequent proceedings, [1895] 2 Ch. 388; 19 Digest 185, 1356.

H

Southport Corpn. v. Esso Petroleum Co., Ltd., [1953] 2 All E.R. 1204; [1953] 3 W.L.R. 773; *revsd.*, C.A., [1954] 2 All E.R. 561; [1954] 2 Q.B. 182; 118 J.P. 411; [1954] 3 W.L.R. 200; *revsd. in part* sub nom., *Esso Petroleum Co., Ltd. v. Southport Corpn.*, [1955] 3 All E.R. 864; [1956] A.C. 218; 120 J.P. 54; [1956] 2 W.L.R. 81; 3rd Digest Supp.

I

Vanderpant v. Mayfair Hotel Co., Ltd., [1929] All E.R. Rep. 296; [1930] 1 Ch. 138; 99 L.J.Ch. 84; 142 L.T. 198; 94 J.P. 23; 36 Digest (Repl.) 260, 105.

Walter v. Selfe, (1851), 4 De G. & Sm. 315; 20 L.J.Ch. 433; 17 L.T.O.S. 103; 15 Jur. 416; 64 E.R. 849; *affd. on other grounds*, (1852), 19 L.T.O.S. 308; 36 Digest (Repl.) 247, 1.

Wood v. Conway Corpn., [1914] 2 Ch. 47; 83 L.J.Ch. 498; 110 L.T. 917; 78 J.P. 249; 36 Digest (Repl.) 328, 722.

Action.

In this action, commenced by a writ dated Mar. 10, 1956, the plaintiff, Thomas Henry Halsey, the occupier of a house situated at 28, Rainville Road, Fulham, in the county of London, claimed injunctions and damages against the defendants, Esso Petroleum Co., Ltd., for alleged nuisance arising from the conduct of the defendants' oil depot adjoining Rainville Road. The injunctions claimed were to restrain the defendants: (i) from causing excessive and prolonged vibration from the boilers and pumps installed at the depot; (ii) from causing excessive and prolonged noise from the boilers and pumps; (iii) from causing or permitting a harmful chemical substance to be emitted from two chimney stacks projecting from the roof of the boilerhouse; (iv) from causing or permitting excessive or prolonged noise from road tankers arriving at or leaving the depot; (v) from causing or permitting obnoxious vapours or fumes to be emitted from the depot. By way of special damage from the chemical substance the plaintiff claimed £5 for damage to clothing and £100 for damage to the paintwork of his motor car which he kept parked outside his house. The plaintiff also claimed general damages. In fact, the plaintiff's claim was for pollution of the atmosphere by smell and deposits of acid smuts and oily drops and for noise from boilers, pumps and vehicles.

The following is a summary of the introductory facts stated by the trial judge, VEALE, J. The defendants had occupied the oil depot since 1896. Up to 1939, the depot stocked and distributed all kinds of oil, petrol and kerosene, as well as stoves and heaters. From 1936 to 1939 there was a night shift at the depot but only six road tankers were then used on the shift. In 1956 a night shift from 10 p.m. to 6 a.m. was commenced and the scale of this shift was much greater than in the years 1936 to 1939. After 1957 or 1958 the depot dealt solely with the three grades of fuel oil, namely, light, medium and heavy grades. Between 1953 and 1957 the through-put of oil on the depot had risen from 30,414,000 to 56,607,000 gallons and was continually increasing, the oil being pumped from river tankers into oil storage tanks at the depot and from the depot into road tankers. It was desirable to pre-heat all fuel oil before pumping it, and it was necessary to heat the medium grade oil to 120 degrees Fahrenheit and the heavy grade oil to 140 degrees Fahrenheit. These two grades were kept hot throughout transportation including the time while they were in the depot. There were two boilers at the depot; one, installed in 1921, had a metal chimney stack thirty feet high, the top of which was forty feet above the ground and the other, installed in 1949, had a metal stack fifty-two feet high. There were also a number of tanks and pumps. The pumps were originally steam driven but most of them had now been, or were being, changed over to electricity. The defendants had attempted to reduce the noise from the pumps but were only partly successful in so doing. In about 1958 complaints began about smuts from the chimneys. At that time the manager of the depot was aware that the effluent from the chimneys at times stained the pavement on both sides of Rainville Road. There followed a long history of complaints by local residents and in November, 1958, the residents, including the plaintiff, presented a petition to the manager of the depot complaining among other things of contaminated atmosphere. In response to a letter of complaint dated Dec. 31, 1959, from the medical officer of health the defendants had lagged the chimneys. They did nothing about the height of the chimneys which might have been a cause of the smuts.

The facts relating to the specific complaints of nuisance by the plaintiff are contained in the judgment, post.

Leonard Caplan, Q.C., and N. C. Lloyd-Davies for the plaintiff.

Gerald Gardiner, Q.C., and M. E. F. Corley for the defendants.

A Feb. 23. VEALE, J., read the following judgment: The plaintiff in this action lives at 28, Rainville Road, a small terrace house in Fulham. The defendants are a very large and well-known company with many activities relating to oil. They operate an oil distributing depot at Fulham. The plaintiff alleges that the defendants are guilty of nuisance in law in relation to their operations at that depot.

B Eleven days were occupied in hearing the evidence in the case and the argument of counsel. I have heard the evidence of forty-one witnesses, twenty-four of whom were local residents; but in this action I am concerned with Mr. Halsey who is the only plaintiff. This is a case, if ever there was one, of the little man asking for the protection of the law against the activities of a large and powerful neighbour. I hasten to say that there is not, and there has never been, and there
C could not be, any suggestion of deliberate annoyance. Indeed the defendants have gone to great lengths in some directions to do what they can to minimise causes of annoyance. On the other hand the plaintiff alleges that the conduct of the defendants in other directions entitles him to exemplary damages.

The claim is broadly put on two bases: pollution of the atmosphere and noise; but that is perhaps an over-simplification. The alleged pollution takes the
D form of smells (which do not cause any real injury to health unless one is allergic to such smells) and also to deposits consisting of acid smuts and oily drops which fall on washing put out to dry, on fabrics inside the house such as curtains and on paintwork, including the paintwork of a motor car. The alleged noise comprises noise from boilers, pumps and vehicles, the latter category embracing not only the noise of the vehicle itself in motion but noises caused by the driver
E and workmen such as shouting, slamming doors and banging pipes.

It is important that the nature of the district should be borne in mind. I have seen a map of the district and also certain photographs. These are helpful but not as helpful as an actual view. There is an undoubted strip of industrial development on the river bank. This strip is zoned for industrial purposes. There are various kinds of industrial activity carried on, and the defendants' premises are not the only place where oil is dealt with. On the other hand the houses in Rainville Road and in the streets adjacent to Rainville Road are in a residential area. They are not affected by traffic in Fulham Palace Road. They are what might be described as nice small terrace houses. This area is zoned for residential purposes. In assessing the character of the neighbourhood, I have been assisted by what I have seen myself. On Feb. 22, 1961, at ten
G o'clock in the morning, I attended a formal view when I went inside the depot as well as walking along certain of the neighbourhood roads. I was accompanied by counsel representing both parties. In addition, on two occasions, entirely unaccompanied, I have walked along Wingrave Road and part of Rainville Road, namely, at approximately ten minutes to nine on Thursday morning, Feb. 9, and at approximately half-past eleven at night on Friday, Feb. 10. This
H enabled me the better to see the character of the neighbourhood by day and by night. It also enabled me to understand the nature of the alleged smell and of the alleged noise, both of which are matters which are extremely difficult to put into words. The parties were made aware of these visits as soon as possible and of the times at which they were made. This is a course which has been taken in other cases, for instance by LORD GODDARD, C.J., in *Hare v. British Transport Commission* (1), and is in my view within the exception mentioned by DENNING, L.J., in *Gould v. Evans & Co.* (2). Nevertheless, I do not think it would be right to regard anything I saw, heard or smelt on those occasions as of itself evidence, and I decide this case on the evidence that I have heard in the witness-box and on the view in the presence of representatives of both parties, and disregard for this purpose the two unaccompanied visits, except in so far as those visits assisted me in coming to a conclusion as to the character of the neighbourhood and as to

the nature of the alleged smell and noise. In no circumstances, of course, do such visits assist me as to the frequency or duration of an alleged nuisance. The official view on Feb. 22 besides being helpful in other respects, confirmed the provisional conclusion to which I had come on two matters, namely, first, that it is quite possible for the defendants to conduct their operations without any or any appreciable smell at all, and secondly, that no nuisance by noise exists by day.

I have been referred to a very large number of authorities, but it seems to me that, save on one point to which I will refer later, there can be little dispute as to the law which has to be applied to the facts. As long ago as 1865, in *St. Helen's Smelting Co. v. Tipping* LORD WESTBURY, L.C., said (3):

"... in matters of this description it appears to me that it is a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. With regard to the latter, namely, the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint, because to himself individually there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighbourhood of another, and the result of that trade, or occupation, or business, is a material injury to property, then there unquestionably arises a very different consideration. I think, my Lords, that in a case of that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours, would not apply to circumstances the immediate result of which is sensible injury to the value of the property."

In this case smell and noise come into one category, actual deposits in the way of harmful smuts and oily drops come into the other. I bear in mind the observations of LORD LOREBURN, L.C., in *Polsue & Alfieri, Ltd. v. Rushmer* (4). LORD LOREBURN, L.C., said:

"The law of nuisance undoubtedly is elastic, as was stated by LORD HALSBURY in the case of *Colls v. Home & Colonial Stores, Ltd.* (5). He said: 'What may be called the uncertainty of the test may also be described as its elasticity. A dweller in towns cannot expect to have as pure air, as free from smoke, smell, and noise as if he lived in the country, and distant from other dwellings, and yet an excess of smoke, smell, and noise may give a cause of action, but in each of such cases it becomes a question of degree, and the question is in each case whether it amounts to a nuisance which will give a right of action'. This is a question of fact."

Later in his speech LORD LOREBURN said (4):

(3) (1865), 11 H.L. Cas. at p. 650.

(5) [1904] A.C. at p. 185.

(4) [1907] A.C. at p. 123.

A "I agree with COZENS-HARDY, L.J. (6) when he says: 'It does not follow that because I live, say, in the manufacturing part of Sheffield I cannot complain if a steam-hammer is introduced next door, and so worked as to render sleep at night almost impossible, although previously to its introduction my house was a reasonably comfortable abode, having regard to the local standard; and it would be no answer to say that the steam-hammer is of the most modern approved pattern and is reasonably worked'."

B One useful approach to the considerations to be taken into account in a case of alleged nuisance by noise is to be found in the judgment of LUXMOORE, J., in *Vanderpant v. Mayfair Hotel Co., Ltd.* (7). LUXMOORE, J., said:

C "Apart from any right which may have been acquired against him by contract, grant or prescription, every person is entitled as against his neighbour to the comfortable and healthy enjoyment of the premises occupied by him, and in deciding whether, in any particular case, his right has been interfered with and a nuisance thereby caused, it is necessary to determine whether the act complained of is an inconvenience materially interfering with the ordinary physical comfort of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions obtaining among English people: see *Walter v. Selfe* (8) and the remarks of KNIGHT BRUCE, V.-C. It is also necessary to take into account the circumstances and character of the locality in which the complainant is living. The making or causing of such a noise as materially interferes with the comfort of a neighbour, when judged by the standard to which I have just referred, constitutes an actionable nuisance, and it is no answer to say that the best known means have been taken to reduce or prevent the noise complained of, or that the cause of the nuisance is the exercise of a business or trade in a reasonable and proper manner. Again, the question of the existence of a nuisance is one of degree and depends on the circumstances of the case."

F So far as the present case is concerned, liability for nuisance by harmful deposits could be established by proving damage by the deposits to the property in question, provided, of course, that the injury was not merely trivial. Negligence is not an ingredient of the cause of action, and the character of the neighbourhood is not a matter to be taken into consideration. On the other hand nuisance by smell or noise is something to which no absolute standard can be applied. It is always a question of degree whether the interference with comfort or convenience is sufficiently serious to constitute a nuisance. The character of the neighbourhood is very relevant and all the relevant circumstances have to be taken into account. What might be a nuisance in one area is by no means necessarily so in another. In an urban area, everyone must put up with a certain amount of discomfort and annoyance from the activities of neighbours, and the law must strike a fair and reasonable balance between the right of the plaintiff on the one hand to the undisturbed enjoyment of his property, and the right of the defendant on the other hand to use his property for his own lawful enjoyment. That is how I approach this case.

H It may be possible in some cases to prove that noise or smell have in fact diminished the value of the plaintiff's property in the market. That consideration does not arise in this case, and no evidence has been called in regard to it. I The standard in respect of discomfort and inconvenience from noise and smell that I have to apply is that of the ordinary reasonable and responsible person who lives in this particular area of Fulham. This is not necessarily the same as the standard which the plaintiff chooses to set up for himself. It is the standard of the ordinary man, and the ordinary man, who may well like peace and quiet,

(6) [1906] 1 Ch. at p. 250, C.A.

(7) [1929] All E.R. Rep. at p. 308; [1930] 1 Ch. at p. 165.

(8) (1851), 4 De G. & Sm. 315 at p. 322.

will not complain for instance of the noise of traffic if he chooses to live on a main street in an urban centre, nor of the reasonable noises of industry, if he chooses to live alongside a factory. A

Nuisance is commonly regarded as a tort in respect of land. In *Read v. J. Lyons & Co., Ltd.* (9), LORD SIMONDS said "... only he has a lawful claim who has suffered an invasion of some proprietary or other interest in land". In this connexion the allegation of damage to the plaintiff's motor car calls for special consideration, since the allegation is that when the offending smuts from the defendants' chimney alighted on it, the motor car was not actually on land in the plaintiff's occupation, but was on the public highway outside his door. Whether or not a claim in respect of private nuisance lies for damage to the motor car in these circumstances, in my judgment such damage is covered by the doctrine in *Rylands v. Fletcher* (10). If it be the fact that harmful sulphuric acid or harmful sulphate escaped from the defendants' premises and damaged the motor car in the public highway, I am bound by the decision of the Court of Appeal in *Charing Cross Electricity Supply Co. v. Hydraulic Power Co.* (11), and *Miles v. Forest Rock Granite Co. (Leicestershire), Ltd.* (12) in neither of which cases was the plaintiff in occupation of land. This doctrine of *Rylands v. Fletcher* (10), whether or not it is strictly based on nuisance, applies to the sulphuric acid or sulphate in smuts or oily drops wherever they alight: on washing hung out to dry, as well as on to a motor car in the street. In my judgment the plaintiff is also right in saying that if the motor car was damaged in this way while on the public highway, it is a public nuisance in respect of which he has suffered special damage. This view occurs in the judgment of OLIVER, J., on very different facts in *Holling v. Yorkshire Traction Co., Ltd.* (13) and I have no evidence as to the period during which the plaintiff's motor car was outside his door; but even if the plaintiff was using the road as a place to garage his motor car, and he was not entitled to do so, I do not regard those facts as disentitling him to claim damages in respect of injury to the motor car. B

Bearing all these considerations in mind, I turn to the facts of the case. [HIS LORDSHIP, having stated the introductory facts, went on to deal with the specific complaints. As to acid smuts, the evidence established that laundry hung out to dry in the immediate vicinity of the defendants' chimneys had been damaged by smuts causing holes in the laundry after it had been washed to remove the stains from the smuts. Black smuts up to the size of a sixpence were seen coming from the chimneys and falling in front of the plaintiff's house. The smuts when analysed showed a strong positive reaction for iron (the defendants' chimneys were iron) and for sulphuric acid, and in HIS LORDSHIP'S opinion this was strong evidence of pollution of the atmosphere by a harmful substance. Further tests on smuts collected from Rainville Road indicated that the pollution consisted of sulphate. HIS LORDSHIP continued:] I have no doubt at all that the defendants had been the cause of the emission into the atmosphere of noxious smuts which had caused damage to the plaintiff's washing and to his motor car. The smuts are noxious acid smuts, and it does not matter whether they contain sulphate or sulphuric acid. For this damage the defendants in my judgment are liable, both as for a nuisance and under *Rylands v. Fletcher* (10). It is not necessary for the plaintiff to prove or for me to decide precisely why this has happened. It is necessary for the plaintiff to prove the fact of it happening, and this I am satisfied that he has done. E

Owing to what was said to be a misunderstanding, the plaintiff's experts were refused access to the depot. The reason given for this refusal was that only tests outside the depot were relevant. In these circumstances I regard it as remarkable that a table of tests in the depot was put in evidence by the defendants. Further, the refusal was dated Nov. 23, 1960, a few days after tests were in fact carried out. F

(9) [1946] 2 All E.R. at p. 482; [1947] A.C. at p. 183.

(10) (1868), L.R. 3 H.L. 330.

(12) (1918), 34 T.L.R. 500.

(11) [1914] 3 K.B. 772.

(13) [1948] 2 All E.R. 662.

A in the depot. Counsel for the defendants agreed that this refusal was unfortunate. The defendants were, of course, under no obligation to allow any tests or inspection by the plaintiff; but I regard the reason given for the refusal as another unsatisfactory feature of this case. Be that as it may, the changes made at the defendants' depot and the increasing through-put may be or may not be merely a coincidence. This nuisance to the plaintiff may, partly at all events, be due to the shortcomings of one of the chimney stacks. I do not know and I do not have to decide. The fact is that noxious smuts have come from the defendants' depot and have done damage.

I am not impressed by any argument based on the fact that noxious smuts are to be found elsewhere and on many urban buildings. In the vast majority of such places, although they may be unsightly, they do no damage or no appreciable damage, and their origin cannot be traced. In the present case, acid smuts have done damage and their origin has been traced. There is not and cannot be any doubt that the emission of acid smuts is a well-known problem. As is stated at p. 23 of the thirty-first report of the Department of Scientific and Industrial Research on the Investigation of Atmospheric Pollution, this is—and I quote—"a form of pollution which is particularly troublesome in its effect". One of the defendants' witnesses regarded it as being a particularly well-known trouble in the case of metal chimneys. Wherever fuel, whether coal or oil, is burnt, sulphur dioxide is discharged into the air. This does not depend on the efficiency of the combustion. The amount of sulphur dioxide so discharged depends on the amount of sulphur in the fuel. Although fuel oil frequently contains between three per cent. and four per cent. of sulphur, the manager of the defendants' depot told me on the fourth occasion that he gave evidence, that ninety per cent. of the oil burnt by the defendants comes from Thames Haven as opposed to ten per cent. from Purfleet. The sulphur content of Thames Haven oil is 2.2 per cent. on the average, which is low. But this case is not a complaint of damage by sulphur dioxide; it is a complaint of damage by H_2SO_4 (14). What may happen is that the sulphur dioxide discharged up the chimney may combine with water vapour, as may very small quantities of sulphur trioxide, and it is then that sulphate or SO_4 is formed. This condenses and when in contact with particles of carbon, acid smuts may also be formed, and it is for this reason that lagging of the chimney may be important, since thereby this process is stayed and the chimney temperature is higher and above what has been called the acid dew-point.

G The defendants' chimneys were lagged approximately two months after the complaint in December, 1959, by the medical officer of health, that is in approximately March, 1960. I have no details of what was done. It has certainly not stopped the emission of acid smuts, though it may have made them less frequent. [After referring to expert evidence, HIS LORDSHIP continued:] I find as a fact that lagging has not cured the emission of acid smuts, though they may now be less frequent. There is no defence to this action so far as noxious smuts are concerned.

I find the question of oily droplets more difficult to decide—not unnaturally, because they are not visible to the naked eye and the plaintiff cannot say that he has seen them fall. No claim for damage to his curtains is included in the statement of claim. On balance, after some considerable hesitation, I do not think that I can say that the plaintiff's laundry is in real and constant danger from oily droplets as opposed to acid smuts emitted from the defendants' depot. I have no doubt that there are occasions when these oily droplets do not disperse into the atmosphere as completely as they are said to do, and I am not prepared to dismiss, as I am asked to do, the tests carried out for the plaintiff. Nevertheless, I find myself in doubt on this one point as to the frequency and extent of any oily droplets as opposed to acid smuts, and I limit my finding that the defendants

(14) The chemical formula of sulphuric acid.

are guilty of nuisance causing damage to the plaintiff to the emission of acid A
smuts.

I turn now to the question of smell. At the time of my official view of the locality yesterday, on Feb. 22, there was no appreciable smell at all, either inside or outside the defendants' depot. But a large body of witnesses have given evidence of smell, and I have no doubt but that smells escape from the defendants' depot. That is not surprising of itself, because the depot is after all an oil depot. B
The defendants contend first that there is no smell escaping; alternatively that if any smell escapes, it does not amount to a nuisance; alternatively that if there is any smell, there is a prescriptive right to cause it.

Over a period of much more than twenty years, the defendants have dealt with different kinds of oil at the depot. I think from time to time, over the years, smells of oil have escaped. No doubt the frequency and intensity of these smells has varied, but more than one witness has told me that there has always been some sort of smell. What I might call the general background of occasional oily smells, is something in respect of which, in my judgment, the plaintiff is not entitled to complain. It is not, however, of this type of smell that the plaintiff does complain in this action. "On occasions," he says, "the smell is much worse. You have to be there to realise it", he said, "it really makes you feel sick". D
The further and better particulars to para. 8 of the statement of claim refer to the smell which arises from heating oil and also use the words, "a pungent rather nauseating smell of an oily character". It is of this that the plaintiff complains in this action.

It is often very difficult to put into words the nature of a smell. I have had various descriptions given to me. The plaintiff ascribed it to hot oil. His wife said it was an awful smell of burning oil, a sickly smell which made her feel sick in the stomach. "Absolutely horrible", "absolutely shocking", "nauseating", "definitely vile", are only some of the epithets which have been used by the witnesses. "Nauseating" was a word used by Dr. Barton-Wright (15) among others. I have carefully considered the evidence of the different witnesses on this point. I find as a fact that over and above the occasional smell of oil which has been present from time to time for many years, during recent years and growing over the years in frequency and intensity, there has been emitted from the defendants' depot a particularly pungent smell, which goes far beyond any triviality, far beyond any background smell of oil, and it is a serious nuisance to local residents, including the plaintiff. I have no doubt whatever but that this smell comes from the defendants' depot. This smell is not only strictly local to the defendants' depot but I accept the evidence which tracks it down to the depot. It is not necessary for the plaintiff to prove or for me to decide how and why it is caused; but it is significant that the defendants have in recent years turned over their total through-put to fuel oil. Fuel oil in its medium and heavy grades is heated, and the more you heat such oil the more it smells. I bear in mind that those working in the depot itself say they are not conscious of any smell except when, for instance, a cover on a tank is lifted. It is said that if an extremely sensitive person stood at the side of an oil tanker, he might smell something. It may be that those who work at the depot or for the defendants' company are used to oily smells and do not notice anything. The plaintiff does not work in the depot, and I am quite satisfied that there is on occasion a smell escaping from the depot, which is far more than what would affect a sensitive person. There is something which is a nauseating smell, and this is so frequent as to be an actionable nuisance. E
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It is true that neither the plaintiff nor his wife before the action made a specific complaint of smell; but they have in my judgment many matters of which they were entitled to complain. It is sufficient for me to say that I accept their

(15) Dr. Barton-Wright was consulted by the plaintiff and conducted certain experiments for him.

A evidence. The plaintiff did in fact sign the petition which complained of contaminated atmosphere. Whether or not this smell amounts to a nuisance depends of course on the whole of the circumstances, including the character of the neighbourhood and the nature, intensity and frequency of the smell. I hold that this smell, of which the witnesses have given evidence, and which may or may not be due to heated oil, does amount to a nuisance and further, that any
B defence of prescription in respect of it fails because the frequency and intensity of it which constitute the nuisance have not continued for anything approaching twenty years.

I approach this question with caution, as counsel for the defendants asked me to do, since there has been no injury to health, but injury to health is not a necessary ingredient in the cause of action for nuisance by smell, and authority
C for that proposition is to be found in the judgment of LORD ROMILLY, M.R., in *Crump v. Lambert* (16). I reject the contention that the evidence for the plaintiff has been exaggerated by people who feel strongly against the defendants on other grounds. I accept the evidence for the plaintiff, and it is right to add that the description by the witnesses of the nature of the smell was confirmed by my own experience on the night of Feb. 10. On that night at half-past eleven at night,
D there was in Rainville Road and Wingrave Road, clearly emanating from the defendants' depot, a nasty smell, which could properly be described, as the plaintiff has described it in his further and better particulars, namely, "a pungent, rather nauseating smell of an oily character". The defendants in my judgment are liable for nuisance by smell.

E I turn now to the question of nuisance by noise. This question relates to two distinct matters: the noise of the plant and the noise of the vehicles, the latter complaint including the noise of the vehicles themselves and the attendant noises made by drivers shouting and slamming doors and banging pipes. It is in connexion with noise that, in my judgment, the operations of the defendants at night are particularly important. After all, one of the main objects of living
F in a house or flat is to have a room with a bed in it where one can sleep at night. Night is the time when the ordinary man takes his rest. No real complaint is made by the plaintiff so far as the daytime is concerned; but he complains bitterly of the noise at night.

In dealing with the question of noise, I disregard entirely complaints of noise on new installations, such as pile driving. Although no doubt they are
G annoying to local residents, such noise is of a temporary character.

So far as the plant is concerned, there are really two distinct noises; that from the boilerhouse and that from the pumps. The latter are being changed from steam to electricity, and I think it is the fact that there are two noises, which has made the descriptions given by the witnesses vary. It is the noise from the boilerhouse which is of main importance to the plaintiff, because he lives opposite
H to it. The plaintiff says it goes on through the night, at some times being heavier than others, but when it comes to its peak his windows and doors vibrate terrifically. He cannot sleep through it. Mrs. Edy of 29, Rainville Road, puts a mattress against her door to stop the vibration. The defendants have very recently done something to make things better by soundproofing the walls of the boilerhouse; but it nevertheless remains. Mrs. Carter at 19, Rainville Road, says she gets
I accustomed to it when it is quiet, but when it is noisy, it wakes her up.

I accept the evidence of the plaintiff as to noise and I hold it is a serious nuisance, going far beyond a triviality, and one in respect of which the plaintiff is entitled to complain. Because of the noise made by the boilers, I think that the plaintiff is not so much, certainly since the throbbing of the steam pumps ceased, troubled by the noise of the electric pumps. But that is because the noise of the pumps is largely drowned by the noise of the boilers and even if the noise

of the boilers stopped, it might be that the plaintiff could justifiably complain A
of the noise of the pumps.

I have been assisted on this aspect of the case by the evidence of Mr. Glover (19). Scientific evidence is helpful in that it may tend to confirm or disprove the evidence of other witnesses. The scale of decibels from nought to 120 can be divided into colloquial descriptions of noise by the use of words: faint, moderate, B
loud, and so on. Between 40 and 60 decibels the noise is moderate, and between 60 and 80 it is loud. Between 80 and 100 it is very loud, and from 100 to 120 it is deafening. On Nov. 29, 1960, Mr. Glover took readings on a dawmeter outside the plaintiff's house. Six tests between nine and eleven o'clock in the evening showed readings of 64 to 68 decibels, all rising to about 68 as a peak. There was, therefore, a constant loud noise outside the plaintiff's house. When a tanker passed the reading was 83 decibels, though at the moment I am concerned C
with the plant and in particular the boilers. On Jan. 25, 1961, between six and eight o'clock in the evening inside the house, with the window open three inches, further tests showed that the noise inside the house was substantially above the maximum permissible intrusive noise, which is the level at which a noise would interfere with ordinary conversation. The noise outside the house was again found to be 68 decibels. This is something which happened, no doubt with D
variations in intensity, not just now and again, but every night and all night, and I have no doubt at all but that it is an actionable nuisance. I think that it would disturb an ordinary man.

It is contended for the defendants that the tests they made showed 59 decibels with the plant in operation, and 53 with the plant shut down, an increase of only six decibels. I find that the noise of the boilers is not the same at all times. E
I accept Mr. Glover's figure of 68. I think that this accords more with the plaintiff's description of the roar which I also accept. [His LORDSHIP, after further referring to the scientific evidence, continued:] I bear in mind the observations of LORD SELBORNE, L.C., in *Gaunt v. Fynney* (17), where he deals with the difficulty of proof of nuisance by noise. Bearing in mind, I hope, all the relevant considerations, in my judgment the defendants are liable in nuisance for the F
noise of their plant, though only at night. Applying and adapting the well-known words of KNIGHT BRUCE, V.-C., in *Walter v. Selfe* (18), this inconvenience is, as I find to be the fact, more than fanciful, more than one of mere delicacy or fastidiousness. It is an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to the elegant or G
dainty modes of living, but according to plain and sober and simple notions among ordinary people living in this part of Fulham.

The question of noise does not stop there. At intervals through the night tankers leave and come to the defendants' depot. It has been urged on me that the public highway is for the use of all, and that is true. But it must be borne in mind that these tankers are not ordinary motor cars; they are not ordinary H
lorries which make more noise than a motor car; they are enormous vehicles, some when laden weighing twenty-four tons, which, apart from the loud noise of the engine, may rattle as they go, particularly when empty and especially if they hit something in the road like a grating. They all enter the depot almost opposite the plaintiff's house, which involves a sharp turn in order to do so, often changing down into low gear at the same time. They leave by the exit gate which is also close to the plaintiff's house. Mr. Glover (19) found that the noise of a tanker was 83 decibels—in the very loud category. So did Mr. Murphy (20). The plaintiff complains of this noise, especially when three or four vehicles arrive or leave at a time. This, again, is not something which happens at odd times. It now happens every night, though not always in convoy, and has happened since the night shift was introduced in November, 1956. Previous night I

(17) (1872), 8 Ch. App. at pp. 11, 12.

(18) (1851), 4 De G. & Sm. at p. 322.

(19) The plaintiff's expert.

(20) The defendants' expert.

A shift work before the war was, in my view, small. In 1957 the through-put was 56,607,000 gallons. In 1960 the through-put was probably seventy million gallons. There has been a corresponding increase in night tanker traffic, the deliveries having been approximately twenty-five per cent. of the total on night shifts in 1959 and 1960. The defendants operate twenty-seven tankers of their own, and in winter hire as many as thirty-three, making a total of sixty. Twenty-five per cent. of sixty is fifteen. I appreciate that tankers do not all have the same capacity; but this means that almost every night very roughly fifteen vehicles will both leave and return. In summer it is less; but in times of high winter demand the plaintiff's house is very much within range of some fifteen vehicles both arriving and leaving at different times during the night, and as the district manager truly states in the correspondence, "Any noise always sounds at its greatest at night."

It is said by the defendants that since the public highway is for the use of everyone, the plaintiff cannot complain if all that the defendants do is to make use of their right to use the public highway. I agree, if that is all that the defendants have done. If a person makes an unreasonable use of the public highway, for instance, by parking stationary vehicles on it, a member of the public who suffers special damage has a cause of action against him for public nuisance. Similarly, in my view, if a person makes an unreasonable use of the public highway by concentrating in one small area of the highway vehicles in motion and a member of the public suffers special damage, he is equally entitled to complain, although in most cases concentration of moving as opposed to stationary vehicles will be more likely to be reasonable. This is a question of reasonable user, which was the test applied by NEVILLE, J., in *A.-G. v. W. H. Smith & Sons* (21), and the same question of reasonableness was stressed by LORD CRANWORTH, L.C., in *A.-G. v. Sheffield Gas Consumers Co.* (22).

In the particular circumstances of this case I do not think that it matters very much whether one regards the alleged nuisance by vehicular noise as a private or a public nuisance. The history as a cause of action for a private nuisance is set out by LORD WRIGHT in *Sedleigh-Denfield v. O'Callaghan* (23). The ground of responsibility is the possession and control of the land from which the nuisance proceeds, though LORD WRIGHT refers to (24) "possibly certain anomalous exceptions." Public nuisance, on the other hand, can, as DENNING, L.J., said in the Court of Appeal in *Southport Corpn. v. Esso Petroleum Co., Ltd.* (25), cover a multitude of sins, great and small. In this latter case DEVLIN, J., said (26):

"It is clear that to give a cause of action for private nuisance the matter complained of must affect the property of the plaintiffs. But I know of no principle that it must emanate from land belonging to the defendant. Counsel for the defendants cited *Cunard v. Antifyre, Ltd.* (27) and I think that the statement of the principle is put there as clearly and concisely as it can be. TALBOT, J., said (27): 'Private nuisances, at least in the vast majority of cases, are interferences for a substantial length of time by owners or occupiers of property with the use or enjoyment of neighbouring property; and it would manifestly be inconvenient and unreasonable if the right to complain of such interference extended beyond the occupier, or (in case of injury to the reversion) the owner, of such neighbouring property.' It is clear from this statement of principle that the nuisance must affect the property of the plaintiff, and it is true that in the vast majority of cases it is likely to emanate

(21) (1910), 103 L.T. 96.

(22) (1853), 3 De G.M. & G. at pp. 339, 340.

(23) [1940] 3 All E.R. at p. 364; [1940] A.C. at pp. 902, 903.

(24) [1940] 3 All E.R. at p. 364; [1940] A.C. at p. 903.

(25) [1954] 2 All E.R. at p. 571; [1954] 2 Q.B. at p. 196.

(26) [1953] 2 All E.R. at p. 1207; [1956] A.C. at p. 224.

(27) [1932] All E.R. Rep. at p. 560; [1933] 1 K.B. at p. 557.

from the neighbouring property of the defendant. But no statement of principle has been cited to me to show that the latter is a prerequisite to a cause of action, and I can see no reason why, if land or water belonging to the public or waste land is misused by the defendant, or if the defendant as a licensee or trespasser misuses someone else's land, he should not be liable for a nuisance in the same way as an adjoining occupier would be."

DENNING, L.J., on the facts of that particular case (28) thought that there was no private nuisance because the offending oil had come from a ship at sea, and with that LORD RADCLIFFE in the House of Lords (29) agreed.

In the present case the offending noise is partly in the depot before and as the vehicles emerge into the highway, and as they re-enter, and partly in the short stretch of highway immediately outside the entrance and exit to the depot, which is also immediately outside the plaintiff's house. There is no element of obstruction of or danger on and to the highway as such. The noise is an interference with the enjoyment by the plaintiff of his house. It is not an interference with the rights of the plaintiff or his visitors as members of the public to use the highway. The fact is that the defendants concentrate at their premises a number of particularly heavy and noisy vehicles. They send them out at night, making a very loud noise as they go, and they direct them to return, and the vehicles make a further very loud noise as they come back.

The noise outside and inside the plaintiff's house is, in my judgment, attributable to the defendants' mode of operation of their depot, and the principles of law to be applied seem to me to be the same as those in respect of alleged nuisance by noise of the plant itself. Applying those principles which involve consideration of the whole of the relevant circumstances, I hold that the defendants are also guilty of nuisance in this respect, but only during the night shift. I do not think that any proper comparison can be made with noisy undertakings like railways, which are carried on under statutory authority, nor, in my judgment, can Rainville Road, Fulham, properly be compared with the Great North Road. It is said that a decision in the plaintiff's favour on this point involves making new law. I do not think so. I do not regard motor vehicles, even the defendants' tankers, as dangerous within *Rylands v. Fletcher* (30); but I do not really think that there is anything new in the circumstances of this case, if the defendants are held liable for nuisance in respect of this particular noise. Part of the offending noise, indeed, comes from inside the depot itself, as the vehicles enter or leave. The rest of it is directly related to the operation of the depot. In *Bartlett v. Marshall* (31), the nuisance of noise, as in the present case, was committed at all events largely on the public highway. In *Vanderpant v. Mayfair Hotel Co., Ltd.* (32), LUXMOORE, J., granted an injunction in respect of nuisance by noise committed by the staff of the defendants' hotel as they arrived at and left the hotel, and by the delivery of goods from the street to the hotel premises. There is a similar case in Canada, namely, *Anger v. Northern Construction Co.* (33).

If these cases are more properly to be regarded as instances of public nuisance, I do not think, as already indicated, that the result is any different. If I treat this part of the case as public nuisance, as counsel for the plaintiff argued in the alternative, I ask myself: Is it reasonable to concentrate outside the plaintiff's house during the night, not on odd occasions, but every night, and not once a night, but at irregular intervals during the night and early hours of the morning, particularly noisy vehicles, sometimes in convoy, the noise of one of which is approximately 83 decibels? I bear in mind the importance of the defendants' business. I also, I hope, bear in mind all the circumstances, including the circumstance that a man is entitled to sleep during the night in his own house. I have

(28) *Viz., Southport Corpn. v. Esso Petroleum Co., Ltd.*, [1954] 2 All E.R. at p. 570; [1954] 2 Q.B. at p. 196. (29) [1955] 3 All E.R. at p. 871; [1956] A.C. at p. 242.

(30) (1868), L.R. 3 H.L. 330.

(31) (1896), 60 J.P. 104.

(32) [1929] All E.R. Rep. 296; [1930] 1 Ch. 138.

(33) [1938] 4 D.L.R. 738.

A no hesitation in saying that the plaintiff has satisfied me that the defendants' user of their tankers in all the circumstances is unreasonable. On this view they are liable as for a public nuisance, since it is conceded that noise can be special damage if it affects the plaintiff more than the ordinary member of the public. On this alternative view also the defendants are liable, since I find that the plaintiff has indeed suffered a special damage which is substantial and not transient or fleeting.

B The joint effect of the noise of the tankers and of the plant has been, in my judgment, to create a very serious interference with the enjoyment by the plaintiff of his occupation of 28, Rainville Road. Some noise has in the past been made by the activities of the drivers as distinct from the noise of the vehicles themselves. C The defendants have been at great pains to keep this noise to the minimum, and in my judgment, it is the vehicles rather than the drivers themselves which are the trouble. I think a noise made by drivers and workmen might easily of itself become a nuisance if they are not continually kept under strict control. I emphasise that the plaintiff lives almost opposite to the entrance to the depot. By saying that in my view the degree of noise of the tankers constitutes in his case D the same conclusion in so far as residents in other streets are concerned. But there is more than one household where the occupants have to sleep in a room at the back instead of in the front, and also have to keep their windows shut at night in order to escape so far as possible from the noise. I understand that Mrs. Carter at 19, Rainville Road, said that when she went away on holiday, she had to get used at night to the quiet.

E In my judgment, therefore, the defendants are liable to the plaintiff in respect of pollution, that is both smuts as well as smell, and also in respect of noise, that is both from the plant and from the tankers. I do not think that the senior executives of the defendants can have realised how serious an interference since 1956 their activities have been to the plaintiff's enjoyment of his property. Mr. Knight, one of the depot's supervisors, would not live in the plaintiff's house if F he were paid, though he may have been expressing that view solely because of the smuts.

It is pleaded in para. 10 of the defence that any nuisance has been legalised by prescription. There is no substance in this contention, except in so far as I have already dealt with it in relation to smell. The nuisances for which I hold the G defendants liable have not continued for anything approaching twenty years, and there have been persistent complaints. No question of prescription can arise until a nuisance is first committed. The nuisances of which the defendants are guilty are all of recent origin.

H The plaintiff is therefore entitled to damages. For his damaged linen he claims £5. This is a modest claim and he is entitled to it. He is also entitled, in my view, to damages in respect of his motor car, but I do not think that the alleged loss of value due to the damaged paintwork is proved. I think a new coat of paint would have maintained the value of the motor car. I have evidence as to what amount this would have been at the time the damage was sustained, and it might amount to £50. On this head I award £30. I do not think a perfect result would be necessary.

I Since the end of 1956 the plaintiff has suffered very considerable discomfort. It is something which cannot easily be assessed in terms of money. I am asked by counsel for the plaintiff to award exemplary damages in view of the conduct of the defendants. I agree that there are matters in respect of which the defendants' conduct does not seem to have been satisfactory; but in my judgment this is clearly not a case for exemplary damages. Although the plaintiff fainted twice in the witness-box, there is no evidence before me of any injury to his health. I must do the best I can to award to him a sum in respect of the nuisances by noise and smell which have been inflicted on him over the last few years. On

this head, which is limited to noise and smell over the past few years, I award £200. The plaintiff is therefore entitled to £235 damages. A

So far as the future is concerned, I have considered the authorities to which I have been referred by both parties. I will not burden this judgment by reciting them. An injunction is a discretionary remedy (34), but the discretion should be exercised in accordance with accepted principles. One, but only one, of those principles is that the court is not a tribunal for legalising wrongful acts by an award of damages. I am fully conscious of the importance of the defendants' business. The question of remedy by injunction must be considered separately in respect of noise, smell, and smuts. B

As to noise, I bear in mind the effect on the defendants of closing the night shift. Indeed, the evidence quantified the possible and probable loss of profit. I am asked to bear in mind the effect on the customers of the defendants, but the figures of estimated loss of profit are on the basis of the defendants making alternative arrangements to keep their customers supplied. I bear in mind that the defendants have in some respects done what they can to minimise the noise. Nevertheless, the plaintiff is entitled, in my judgment, to an injunction to limit it to the hours of the present night shift, namely, ten o'clock at night to six o'clock in the morning. There will be an injunction restraining the defendants by themselves, their servants or agents from so operating their plant at the depot, and from so driving their vehicles as, by reason of noise, to cause a nuisance to the plaintiff between the hours of 10 p.m. and 6 a.m. I am prepared to suspend the operation of this order for a reasonable time so that the defendants may make appropriate arrangements. C

As to smell, again I think that the plaintiff is entitled to an injunction. I have felt some difficulty on this aspect of the case because I do not think that the occasional slight smell of oil per se is a matter which can be complained about as opposed to what is described as the pungent, rather nauseating smell. It is difficult to find precise words which will cover my findings on the facts, but I propose to grant an injunction in general terms restraining the defendants by themselves, their servants or agents from so conducting their operations at the depot as, by reason of smell, to cause a nuisance to the plaintiff. In this case there is no limitation as to the time of day or night, but again, I am prepared to suspend the operation of my order for a reasonable time if the defendants desire to make alterations or adjustments. D

As to smuts, despite the argument of counsel for the plaintiff based on *Wood v. Conway Corpn.* (35), I do not propose either to grant an injunction or to award damages for the future. If future damage is caused by the defendants to the plaintiff, he will be able to bring a fresh action. I take this course primarily because the whole boilerhouse and the offending chimneys are to be pulled down. A new boilerhouse in a different position will be erected, and the chimney will be of brick and sixty-five feet high. It is to be hoped that the construction and operation of the new boilerhouse will be such that this particular nuisance will be remedied. If it is not, and this nuisance continues as it was, I have little doubt at all that an injunction could be obtained to restrain it. But I do not propose to make such an order in this action. I regard this aspect of the case as being within the four conditions mentioned by A. L. SMITH, L.J., in *Shelfer v. City of London Electric Lighting Co.* (36). It would be possible to award damages for the future, but I decline to do so. In the short time this boilerhouse has to live, there may be no damage to the plaintiff, although there may be smuts elsewhere. I desire to make it clear only that I take this course because of the evidence given by the defendants that the new boilerhouse will be in operation by June, 1961. I require an undertaking from the defendants that that will be so by E

(34) For the principles for granting an injunction, see 28 HALSBURY'S LAWS (3rd Edn.) 166, para. 240. (35) [1914] 2 Ch. at p. 57. (36) [1895] 1 Ch. at p. 322. F

A June 30, 1961. They will have liberty to apply to cover the case of unforeseen circumstances arising; but I do not think in this respect they have hitherto shown any real sense of urgency. Such sense of urgency they must now show. In the absence of a suitable undertaking I shall grant an injunction. In the result there will be judgment for the plaintiff for £235 and injunctions as indicated.

B *Judgment accordingly for the plaintiff; both injunctions suspended for six weeks and if notice of appeal filed within six weeks, injunction for smell only further suspended; undertaking by defendants to operate new boilerhouse by June, 1961, with liberty to apply for extension of time.*

Solicitors: Tatton, Gaskell & Tatton (for the plaintiff); Piesse & Sons (for the defendants).

C [Reported by WENDY SHOCKETT, Barrister-at-Law.]

Re FOOTMAN BOWER & CO., LTD.

[CHANCERY DIVISION (Buckley, J.), March 6, 16, 1961.]

D *Company—Winding-up—Proof—Balance on current account for goods supplied—Limitation of action—Nature of indebtedness—Payments on account—Compulsory winding-up order dated Mar. 23, 1959—Balance owing at Mar. 23, 1953—Payments on account generally made between then and appointment of receiver on Aug. 11, 1953—Proof for sum owing by company at date of appointment of receiver—Whether balance owing at Mar. 23, 1953, less subsequent payments on account was statute-barred—Whether rule in Clayton's Case applicable—Limitation Act, 1939 (2 & 3 Geo. 6 c. 21), s. 23 (4).*

E The applicant, who carried on business as a timber merchant, supplied goods to a company for the purposes of its business of cabinet makers. The applicant debited the company with the cost of goods as and when supplied and the company from time to time made payments generally on account, which were made in sums of £50 or multiples of £50 and were not made in respect of any particular debit. The company's books contained corresponding entries. The account was thus a running account and was operated in this way until Aug. 11, 1953, when a receiver of the company's business was appointed. He continued to trade with the applicant, but made specific payments for goods supplied. On Mar. 23, 1959, the company was ordered by the court to be wound up. Six years before the date of the winding-up order, the balance owing by the company to the applicant was £815 7s. 1d. Between Mar. 23, 1953, and the appointment of the receiver on Aug. 11, 1953, goods were supplied by the applicant to the company of a value of £80 2s. 9d., and the company made six payments to the applicant each of £50, the last being paid on July 10, 1953. On Apr. 20, 1959, the applicant lodged a proof in the winding-up for £595 9s. 10d. (viz., £815 7s. 1d., less £300, plus £80 2s. 9d.) for the balance of account, being the sum owing by the company to the applicant immediately before the appointment of the receiver. The liquidator admitted proof for £80 2s. 9d. and rejected the balance of £515 7s. 1d. on the ground that it was statute-barred.

I **Held:** the indebtedness of the company for the balance (£515 7s. 1d.) outstanding on account with the applicant was not statute-barred and accordingly the proof should be admitted in full, because—

(i) where, as in the present case, liabilities and payments were carried in order of date into one entire account extending over a considerable period the true nature of the debtor's liability was a single undivided debt for the amount of the balance without regard to the several items which contributed to that balance (see p. 165, letter A, post).

Dictum of SIR WILLIAM GRANT, M.R., in *Devaynes v. Noble, Clayton's Case* ((1816), 1 Mer. at p. 608) applied. A

(ii) each of the six payments of £50 made between Mar. 23 and July 10, 1953, being made on account generally, was a payment on account of the whole balance outstanding at the date of the payment, and therefore each was "in respect of" that balance for the purposes of the Limitation Act, 1939, s. 23 (4)* so that time started to run afresh on the occasion of each payment (see p. 166, letter E, post). B

Dictum of STIRLING, J., in *Friend v. Young* ([1897] 2 Ch. at p. 436) applied.

[As to acknowledgment or part payment of debt after time has run, see 24 HALSBURY'S LAWS (3rd Edn.) 298, para. 591; and for cases on the subject, see 32 DIGEST 379-381, 620-628.]

For the Limitation Act, 1939, s. 23 (4), see 13 HALSBURY'S STATUTES (2nd Edn.) 1184.] C

Cases referred to:

Banner v. Berridge, (1881), 18 Ch.D. 254; 50 L.J.Ch. 630; 44 L.T. 680; 4 Asp. M.L.C. 420; 32 Digest 368, 522.

Deeley v. Lloyds Bank, Ltd., [1912] A.C. 756; 81 L.J.Ch. 697; 107 L.T. 465; 21 Digest 343, 1313. D

Devaynes v. Noble, Clayton's Case, (1816), 1 Mer. 572; 35 E.R. 781; 3 Digest (Repl.) 192, 370.

Friend v. Young, [1897] 2 Ch. 421; sub nom. *Re Friend, Friend v. Friend*, 66 L.J.Ch. 737; sub nom. *Re Friend, Friend v. Young*, 77 L.T. 50; 32 Digest 393, 746.

Mills v. Fowkes, (1839), 5 Bing. N.C. 455; 2 Arn. 62; 7 Scott, 444; 8 L.J.C.P. 276; 132 E.R. 1174; 32 Digest 379, 623. E

Nash v. Hodgson, (1855), 6 De G.M. & G. 474; 3 Eq. Rep. 1025; 25 L.J.Ch. 186; 43 E.R. 1318; 32 Digest 393, 742.

Sherry, Re, London & County Banking Co. v. Terry, (1884), 25 Ch.D. 692; 53 L.J.Ch. 404; 50 L.T. 227; 26 Digest (Repl.) 93, 640.

Walker v. Butler, (1856), 6 E. & B. 506; 25 L.J.Q.B. 377; 119 E.R. 953; 32 Digest 394, 751. F

Adjourned Summons.

This was an application by originating summons dated Dec. 29, 1960, by S. Leboff, Ltd., for an order that the rejection by Henry Sainer, the liquidator of Footman Bower & Co., Ltd., by notice dated Dec. 8, 1960, of the applicant's proof of debt lodged on Apr. 20, 1959, in the sum of £595 9s. 10d. to the extent of £515 7s. 1d. on the ground that the last-mentioned debt had become statute-barred, should be reversed and that the liquidator should be ordered to admit the proof in full. On Jan. 16, 1961, the summons came before the Registrar of Companies who refused to make the order. The facts appear in the judgment. G

Muir Hunter for the applicant.

Lloyd Stott for the liquidator. H

Cur. adv. vult.

Mar. 16. BUCKLEY, J., read the following judgment: In this case the applicant S. Leboff, Ltd., appeals against a partial rejection by the liquidator of Footman Bower & Co., Ltd. (whom I will call "the company") of a proof by the applicant in the winding-up of the company. I

The applicant carries on business as a timber merchant. The company's business was that of a cabinet maker. For many years the applicant supplied goods to the company for the purposes of its business. The account between the two companies was kept as a current account. The applicant's sales ledger contained an account in the name of the company in which the company was debited as goods were supplied from time to time with the price of the goods.

* The relevant provisions of s. 23 (4) are set out at p. 163, letter G, post.

- A The company from time to time made payments to the applicant on account generally and credit was given in the sales ledger for these payments as they were made. The payments were made in sums of £50 or multiples of £50 and clearly were not made in respect of any one or more particular debit or debits. The bought ledger of the company contains a corresponding account in the name of the applicant. The account was operated and kept in this way until Aug. 11,
- B 1953, when a receiver and manager of the company's business was appointed by a secured creditor. The receiver continued the business and continued to trade with the applicant. The receiver, however, paid as he went, at first by a separate payment in respect of each delivery of goods and later by a monthly payment of the precise amount owing for goods delivered to him during the month. On Mar. 23, 1959, an order was made for the compulsory liquidation
- C of the company. The applicant lodged a proof in the winding-up for a sum of £595 9s. 10d. "to balance of account". That was the sum which was owing by the company to the applicant immediately before the appointment of the receiver. The liquidator has admitted this proof in the sum of £80 2s. 9d. and rejected the balance of £515 7s. 1d. on the ground that this part of the debt had become statute-barred.
- D On Mar. 23, 1953, six years before the date of the winding-up order, the balance owing by the company to the applicant was £815 7s. 1d. Applying the rule in *Devaynes v. Noble, Clayton's Case* (1) to the account, this balance was all in respect of goods delivered since Jan. 1, 1952. Between Mar. 23, 1953, and the appointment of the receiver on Aug. 11, 1953, goods were supplied by the applicant to the company of a value of £80 2s. 9d. During the same period the
- E company made six payments each of £50, the last of which was made on July 10, 1953.

The liquidator contends that under the rule in *Clayton's Case* (1) these six payments, amounting to £300, must be treated as appropriated to the earliest debts which were outstanding on the account when such payments were respectively made; that is to say to debits which arose before Mar. 23, 1953, and were

F comprised in the balance of £815 7s. 1d. which I have mentioned. This would leave £515 7s. 1d. of that balance outstanding, which is the part of the proof which the liquidator has rejected.

- The applicant contends that the payments made by the company within six years before the winding-up order were made in respect generally of the balance for the time being owing on the account, and that time runs under the Limitation
- G Act, 1939, from the date of the last of those payments in respect of the whole of the balance remaining due on the account at that date.

The Limitation Act, 1939, s. 23 (4), is in the following terms:

- "Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment . . ."
- H

Then there is a proviso which I need not read.

- Ought the £50 paid on July 10, 1953, to be taken for the purposes of this section as paid in respect of the balance then outstanding on the account, or in
- I respect of those particular debits in the account to which it would be treated as appropriated under the rule in *Clayton's Case* (1)?

Where a debtor owes a creditor two or more separate and distinct debts the rule as to appropriation of payments is that the debtor, when he makes a payment, has the primary right to say in respect of which debt it is made. If he does not exercise that right, then the creditor may appropriate the payment to any of the debts as he chooses. An appropriation by the debtor need not be

(1) (1816), 1 Mer. 572.

in express terms, but must be communicated to the creditor or be capable of being inferred. Where some of the debts are at the date of payment statute-barred and others are not, it is to be inferred in the absence of evidence to the contrary that the payment is appropriated by the debtor to those not barred (*Nash v. Hodgson* (2))—but LORD CRANWORTH, L.C., said (3):

“What may be the effect where there is a single debt consisting of several items some of which are barred, and some not, may be doubtful.”

I think that he there had in mind the kind of case with which I have to deal, except that in the present case no part of the balance outstanding at July 10, 1953, was then statute-barred.

Where there are distinct debts some of which are statute-barred and some are not, and the debtor makes a payment in such circumstances that the creditor can appropriate it as he chooses, he may appropriate it to a statute-barred debt but this, under the law before the Limitation Act, 1939, did not revive his remedies in respect of any unsatisfied balance of that statute-barred debt because no promise on the part of the debtor to pay that balance could be inferred from the circumstances (*Mills v. Fowkes* (4)). Before that Act there was no statutory provision that in the case of a simple contract debt part payment should stop time running under the Limitation Act, 1623. For a payment to have this effect it was necessary that it should amount to an acknowledgment of the debt and import a new promise to pay the outstanding balance. The mere act of the creditor appropriating a payment to a statute-barred debt could not have this effect, for such an acknowledgment and promise could only come from the debtor. Since the enactment of the Limitation Act, 1939, the position has been different, for s. 23 (4) now contains a statutory provision applicable to simple contract debts whereby any payment in respect of a debt will make time start to run afresh in respect of that debt. There is no longer need to establish a new promise to pay. In my judgment, however, one must still look at the act and intention of the debtor to see whether the payment is made in respect of the particular debt. Payment in s. 23 (4) is dealt with in close conjunction with acknowledgment. Just as an acknowledgment can only acquire that character by the act of the debtor or his agent, so also, I think, a payment, for the purposes of s. 23 (4), can only acquire the characteristic of being made “in respect of” the debt by the act of the debtor or his agent. Consequently, in my judgment, appropriation by a creditor of a sum received from the debtor towards satisfaction of a particular debt, be it statute-barred or not, cannot make such appropriation a “payment in respect thereof” within the meaning of s. 23 (4).

In the present case no part of the balance outstanding on July 10, 1953, was then statute-barred, and according to the evidence the payments made by the company were made “generally on account”, although on account of what is left to be inferred.

None of the cases to which I have so far referred related to a current account. In *Clayton's Case* (5) SIR WILLIAM GRANT, M.R., was in fact dealing with a current account between banker and customer, but the rule known as “the rule in *Clayton's Case* (5)” applies to any current account and is, in my judgment, applicable to the present case. Consequently, in accordance with that rule, the various credits are prima facie to be treated as applied in the order in which the debits and credits are set against each other in the account, each new credit being treated as discharging the earliest outstanding debit. This method of analysing the account may be of great importance for the purpose of ascertaining various incidental matters affecting the debt; for instance, to what extent it is secured or guaranteed, where the security or guarantee extends to some only of the items in the account, or to what extent a former partner in a debtor firm is liable where there has been a change of the firm during the period covered by the

(2) (1855), 6 De G. M. & G. 474.

(4) (1839), 5 Bing. N.C. 455,

(3) (1855), 6 De G. M. & G. at p. 482.

(5) (1816), 1 Mer. 572.

A account. It may also be of importance in ascertaining how far the balance in the account is contributed to by statute-barred items. It does not, however, in my view, affect the true nature of the debt itself. In the case of a current account, where the debtor-creditor relationship of the parties is recorded in one entire account into which all liabilities and payments are carried in order of date as a course of dealing extending over a considerable period, the true nature of the
B debtor's liability is, in my judgment, a single and undivided debt for the amount of the balance due on the account for the time being without regard to the several items which as a matter of history contribute to that balance. This was, I think, SIR WILLIAM GRANT'S view of the matter, for in *Clayton's Case* (6), he said:

C “But this is the case of a banking account, where all the sums paid in form one blended fund, the parts of which have no longer any distinct existence. Neither banker nor customer ever thinks of saying, this draft is to be placed to the account of the £500 paid in on Monday, and this other to the account of the £500 paid in on Tuesday. There is a fund of £1,000 to draw upon, and that is enough. In such a case, there is no room for any other appropriation than that which arises from the order in which the receipts and
D payments take place, and are carried into the account. Presumably, it is the sum first paid in, that is first drawn out. It is the first item on the debit side of the account, that is discharged, or reduced, by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Upon that principle, all accounts current are settled, and particularly cash accounts.”

E It was also, I think, the view of LORD CRANWORTH, L.C., when, in the passage I have cited from *Nash v. Hodgson* (7), he referred to a single debt consisting of several items. In the present case, the debits for goods supplied correspond to the sums paid in to which SIR WILLIAM GRANT, M.R., referred and, in my judgment, they constitute one blended obligation the parts of which have no
F longer any distinct existence. The rule in *Clayton's Case* (8) merely provides a method of discovering how far the debtor is behindhand in discharging his obligation which accrued piecemeal over a period of time, and which elements of that obligation remain in operation.

When, as in the present case, there is an account running between the parties which to the knowledge of both parties is of that kind and kept in that way, then, if the debtor makes a payment “generally on account” it appears to me that
G he must be taken to be making it on account generally of whatever is owing on the balance of the account. A payment “on account” imports an acknowledgment of a liability for a larger sum (see *Friend v. Young* (9), per STIRLING, J.). When a payment is merely stated to be “on account” without the liability on account of which it is made being specified, one must first inquire what liabilities
H on the part of the payer to the recipient exist. If, on inquiry, it is found that the only liability is in respect of a balance due on current account, the natural conclusion to reach is, in my judgment, that the payment is made on account of that balance generally, not on account of any particular items contributing to that balance. Where, as may well have been the case as regards payments by the company to the applicant, a payment would, in accordance with the rule in
I *Clayton's Case* (8), be taken to discharge, say, three items on the debit side of the account entirely, and a fourth in part, it appears to me that it would be an abuse of language to describe the payment as made “on account” of those particular items. It would be still more fanciful, if at the date of payment the oldest outstanding debits were statute-barred. If (which has not yet, so far as I know, been decided) the inference that the debtor intended to appropriate the payment to non-statute-barred items to the exclusion of statute-barred items,

(6) (1816), 1 Mer. at p. 608.

(7) (1855), 6 De G.M. & G. at p. 482.

(8) (1816), 1 Mer. 572.

(9) 1897] 2 Ch. at p. 436.

is applicable in the case of a current account (the point left open by LORD A CRANWORTH, L.C., in *Nash v. Hodgson* (10)) an analysis of the account would be required before the particular item or items on account of which the debtor is to be supposed to have made the payment could be identified. If, on the other hand, that inference would not arise, it would follow that the debtor would be supposed to have made the payment on account of statute-barred items. Either position would, in my opinion, be very artificial. The much more acceptable B view seems to me to be that by making a payment generally on account the debtor makes it on account of the whole of his indebtedness, that is to say, on account of the balance outstanding and due at the date of payment.

Moreover, if, where the rule in *Clayton's Case* (11) applies, either party is to be taken to have made an appropriation of the payment to any particular item or items, it must, I think, normally be the creditor who is taken to have done C so; see *Re Sherry, London & County Banking Co. v. Terry* (12), per the EARL OF SELBORNE, L.C., and *Deeley v. Lloyds Bank, Ltd.* (13), per LORD SHAW OF DUNFERMLINE. As I have already said, an appropriation by the creditor could not, in my judgment, make the payment one which was "in respect of" the particular item or items to which it is so appropriated for the purpose of s. 23 (4) of the Limitation Act, 1939. D

Before 1939, it was established that where a debtor made a part payment on account of an unascertained balance owing by him to the payee in such circumstances that the payment amounted to an acknowledgment on the part of the debtor of an account pending between himself and the payee on which a balance in excess of the amount of the payment would prove to be payable, a promise to pay the balance when ascertained ought to be inferred (*Friend v. Young* (14); E *Walker v. Butler* (15); and see *Banner v. Berridge* (16), per KAY, J.) Since the enactment of the Limitation Act, 1939, such a payment, in my judgment, constitutes a payment "in respect of" the balance for the purposes of s. 23 (4) of that Act.

I reach the conclusion that in the present case the payment made by the company on July 10, 1953, (and indeed each of the other five payments made after Mar. 23, 1953), was made on account generally of the balance outstanding F at the date of payment on the account current between the company and the applicant and was a payment "in respect of" that balance for the purposes of s. 23 (4). Consequently, in my judgment, on the occasion of each of the payments, time started to run afresh in respect of the balance then left outstanding. Accordingly I think the liquidator was mistaken in rejecting any part of the applicant's G proof. I will reverse his partial rejection of the proof and direct that it be admitted in full.

Order accordingly.

Solicitors: *Matthew Trackman, Lifton & Cunningham* (for the applicant);
M. L. Spector (for the liquidator).

[Reported by JENIFER SANDELL, Barrister-at-Law.]

(10) (1855), 6 De G.M. & G. 474.

(12) (1884), 25 Ch.D. at p. 702.

(14) [1897] 2 Ch. 421.

(11) (1816), 1 Mer. 572.

(13) [1912] A.C. at p. 783.

(15) (1856), 6 E. & B. 506,

(16) (1881), 18 Ch.D. at p. 274.

A OSTIME (INSPECTOR OF TAXES) v. DUPLE MOTOR
BODIES, LTD.
INLAND REVENUE COMMISSIONERS v. DUPLE MOTOR
BODIES, LTD.

[HOUSE OF LORDS (Viscount Simonds, Lord Reid, Lord Tucker, Lord Hodson and Lord Guest), February 27, 28, March 28, 1961.]

Income Tax—Profits—Computation of profits—Accountancy method—Valuation of work in progress—“Direct cost” or “on-cost” method—Motor vehicle body building company.

Profits Tax—Computation of profits—Accountancy method—Valuation of work in progress.

C In the computation of the profits, for purposes of income tax and the profits tax, of a company producing motor vehicle bodies to order, work in progress had been consistently valued by the company and its predecessor since 1924 by the “direct cost” method, and that method had been accepted by the Inland Revenue. By that method, the value of the work in progress comprised the direct cost of the materials and labour used in the work. For the year of assessment 1951-52, the Inland Revenue claimed that the “on-cost” method of assessing the work in progress should be employed. Under the “on-cost” method, the value included a proportion of the indirect expenditure, viz., business overheads. In the year of assessment 1951-52, the application of the “direct cost” method would result in the value of the work in progress being £2,000 less at the end of the year than at the beginning. The employment of the “on-cost” method would result in the value being £14,000 more at the end of the year than at the beginning. This increase of £14,000 was due to the fact that a higher proportion of the overheads were attributed to work in progress at the end of the year than at the beginning owing to a slackening of business during the year and consequential increased costs of production. There had been no other change of circumstances. It was found that different accountants would apply different recognised variations of the “on-cost” method, that what items of overheads were to be included was not settled (the selection being arbitrary) and that either method was accepted by accountants as producing a true figure of profit. On the question whether the “direct cost” or the “on-cost” method should be applied in valuing the work in progress,

G **Held:** in determining what, in the circumstances of a particular business, was the figure which fairly represented the cost of the work in progress, the method to be employed must be applied consistently; in the present case, the “direct cost” method had been applied since 1924 and the Crown had not discharged the burden of showing good reason that the method should be changed to the “on-cost” method, and, moreover, by attributing expenditure to work in progress and thus excluding it from allowance in relation to the proceeds of goods sold in the tax year, the “on-cost” method departed from the principle established under s. 137 of the Income Tax Act, 1952, and, accordingly, the “direct cost” method should be applied in the present case.

I Decision of the COURT OF APPEAL, sub nom. *Duple Motor Bodies, Ltd. v. Inland Revenue Comrs., Duple Motor Bodies, Ltd. v. Ostime (Inspector of Taxes)* ([1960] 2 All E.R. 110) affirmed.

[As to valuation of stock-in-trade in the computation of profits for income tax purposes, see 20 HALSBURY'S LAWS (3rd Edn.) 145, 146, paras. 254-256; and for cases on the subject, see 28 DIGEST (Repl.) 71-75, 268-286.]

Cases referred to:

Minister of Internal Revenue v. Anaconda American Brass, Ltd., [1956] 1 All E.R. 20; [1956] A.C. 85; [1956] 2 W.L.R. 31; 3rd Digest Supp.

- Naval Colliery Co., Ltd. v. Inland Revenue Comrs., Glamorgan Coal Co., Ltd. v. Inland Revenue Comrs.*, (1928), 12 Tax Cas. 1017; 138 L.T. 593; 28 Digest (Repl.) 420, 1858.
- Patrick v. Broadstone Mills, Ltd.*, [1954] 1 All E.R. 163; 35 Tax Cas. 44; [1954] 1 W.L.R. 158; 28 Digest (Repl.) 74, 281.
- Vallambrosa Rubber Co., Ltd. v. Farmer (Surveyor of Taxes)*, 1910 S.C. 519; 5 Tax Cas. 529; 28 Digest (Repl.) 105, 281.
- Whimster & Co. v. Inland Revenue Comrs.*, 1926 S.C. 20; 12 Tax Cas. 813; 28 Digest (Repl.) 424, 944.

Appeals.

Appeals by the Crown from an order of the Court of Appeal (LORD EVERSHERD, M.R., PEARCE and HARMAN, L.JJ.), dated Mar. 18, 1960, and reported sub nom. *Duple Motor Bodies, Ltd. v. Inland Revenue Comrs., Duple Motor Bodies, Ltd. v. Ostone (Inspector of Taxes)*, [1960] 2 All E.R. 110, affirming an order of VAISEY, J., dated July 3, 1959, on Cases Stated by the Special Commissioners of Income Tax, the taxpayer company having appealed to the Special Commissioners against assessments to income tax under Case I of Sch. D for 1951-52, 1952-1953 and 1953-54 in the sums of £250,000, £200,000 and £1,000, respectively. The facts are set out in the opinion of VISCOUNT SIMONDS.

F. N. Bucher, Q.C., and *A. S. Orr* for the Crown.

R. E. Borneman, Q.C., and *C. N. Beattie* for the respondent company.

Their Lordships took time for consideration.

Mar. 28. The following opinions were read.

VISCOUNT SIMONDS: My Lords, these appeals cannot, in my opinion, be sustained. They relate to assessments made on the respondent company to income tax under Case I of Sch. D to the Income Tax Act, 1952, for the years of assessment 1951-52, 1952-53 and 1953-54, and to profits tax for the chargeable accounting periods between Apr. 1, 1950, and Mar. 31, 1952. The same questions arise in regard to all these assessments, and it will be sufficient to take a single example, viz., the assessment to income tax for the year of assessment 1951-52. In that year, the respondent company were assessed to income tax in respect of their trade of motor body builders in the sum of £250,000. They appealed to the Commissioners for the Special Purposes of the Income Tax Acts who upheld the assessment but stated a Case for the opinion of the court. The Case came before VAISEY, J., who reversed the determination of the commissioners. His decision was affirmed by the Court of Appeal.

The question at issue between the parties was as to the correct method of ascertaining the cost of work in progress in order to determine the full amount of the profits or gains of the respondent company's trade, and I will state at once the question as formulated in the Case Stated. It was:

"whether, on the evidence and in view of our findings . . . our decision that the 'on-cost' method should be applied in arriving at the cost of work in progress for the purpose of computing the company's Case I profits was erroneous in law."

This question was followed by another, which, in the view that I take, does not arise. If it did arise, I do not think that there are materials which enable your Lordships to answer it.

My Lords, it must be apparent that, before your Lordships can answer the question whether it was erroneous in law to apply the "on-cost" method for the purpose indicated, you must be told precisely what the "on-cost" method is. I doubt whether, at the end of two days' discussion, it is possible to form any clearer idea of it than that it is at least something different from the "direct cost" method about which there is no less difficulty of definition. It was significant that learned counsel, after arguing strenuously in favour of the "on-cost" method, invited your Lordships to assist the Crown by saying in what that method

A consisted. In these circumstances, I would, myself, be content to dismiss this appeal on the single ground that the Case Stated does not formulate a question which the court can properly answer. I will, however, state certain further facts and make some observations on them in deference to the arguments that we have heard. The respondent company was incorporated in July, 1946, and took over the business of a company which had been incorporated in 1919. Its business is that of building to order bodies for different types of road vehicles, mostly motor coaches. As the business is almost entirely that of building bodies to order, very few finished bodies are included in work in progress at the end of an accounting period. The business is seasonal, the busy season ending about the end of June. The turnover of the business was over £1,000,000 per annum in the years 1948 to 1954. On these facts, the question arises how, for tax purposes (income tax or excess profits tax), the cost of work in progress consisting of motor bodies is to be ascertained.

I have referred to the two methods, "direct cost" and "on-cost", and note that the respondent company and its predecessor had, since 1924, been assessed on the former method until the assessments were made which are now in dispute. As these words are labels invented by accountants to describe two different methods, I will try to explain them, with the proviso that no explanation is precise or satisfactory. Before doing so, it is proper to say—it is, indeed, implicit in what I have said—that it is common ground that some value must be attributed to work in progress, and that, in ascertaining that value, two considerations must be borne in mind, first, that the ordinary principles of commercial accounting must, as far as practicable, be observed and, secondly, that the law relating to income tax must not be violated: see *Whimster & Co. v. Inland Revenue Comrs.* (1): that is to say, by one means or another the full amount of the profits or gains of the trade must be determined. It is, perhaps, easier to say what the "direct cost" method means than what the "on-cost" method means. By that I mean that there appears to be less vagueness in the definition of that method. In the instant case, it seems that the respondent company has included nothing more in "work in progress" than wages and material directly attributable to that work. But that is by no means the end of the matter. For the respondent company in the course of the case has conceded that other items of expenditure might well be included. "Direct cost", therefore, remains an imprecise term. The question of "on-cost" method presents far greater difficulties. Let me cite some passages from the Case Stated.

"There are several different ways of applying the 'on-cost' method. Indirect expenditure is quite commonly divided by cost accountants into headings of:—(a) factory expenses; (b) office expenses; (c) selling expenses; (d) despatch and financial expenses. It is a common, but not universal, method of applying the 'on-cost' method to include in the cost of work in progress a proportion of either all the factory expenses or of some only of them, and to exclude the other headings of indirect expenditure. If the 'on-cost' method is applied, different accountants may apply different recognised variations of this method; and, whatever recognised variation of this method is applied, the accountancy profession as a whole would not condemn any particular recognised variation as being unsound. Furthermore, we find that there is considerable scope for difference of opinion as to how a recognised variation of the 'on-cost' method should be applied to the facts of each particular case."

My Lords, what a prelude is this to asking the court whether the decision of the commissioners that the "on-cost" method should be applied in arriving at the cost of work in progress in the present case was erroneous in law! I could understand it better if the question were whether the "direct cost" method could properly be applied. But it would not be much better.

The consideration of this problem undoubtedly presents something of a dilemma. The practice of accountants, though it were general or even universal, could not by itself determine the amount of profits and gains of a trade for tax purposes: see, e.g., *Minister of National Revenue v. Anaconda American Brass, Ltd.* (2). On the other hand, it was the basis of Lord President CLYDE's decision in *Whimster's case* (3) that the ordinary principles of commercial accounting require that, in the profit and loss account of a manufacturer's business, the values of the stock-in-trade at the beginning and end of the period covered by the account should be entered at cost or market price whichever is the lower, although there is nothing about this in the taxing statutes. It is for this reason that stock-in-trade (and work in progress also, though nothing is said of this in *Whimster's case* (3)) is brought into account. If this is so, regard must be paid to accountancy principles also in ascertaining what that cost is, subject always to the condition that taxing statutes must not be violated. As to this let me cite some further passages from the Case Stated.

"Both methods are recognised by the accountancy profession as correct accountancy . . . Professional accountancy opinion is rarely static on questions of this kind: we find that up to fairly recently the weight of accountancy opinion was in favour of the 'on-cost' method, but that now the trend in the profession is slightly away from this method. On the evidence adduced before us we find—and this naturally has caused us difficulty—that the accountancy profession as a whole is satisfied that either method will produce a true figure of profit for income tax purposes."

The final sentence is, perhaps, open to criticism, but I take it to mean that either method shows the full amount of the profits and gains of the trade, and I see no impossibility in this when I remember how elaborate and artificial are the methods of accountancy. The important thing is that the method which is in fact adopted should not violate the taxing statute. Different results may be reached by different methods, neither of which does so.

My Lords, a first principle of tax law is that the taxpayer, in ascertaining his profit, is entitled to debit his expenditure in the year of assessment unless it is excluded by s. 137 of the Income Tax Act, 1952. And this is so although the whole of that expenditure may not bear fruit in that year: see, for instance, *Vallambrosa Rubber Co., Ltd. v. Farmer (Surveyor of Taxes)* (4). In other words, it is no ground for refusing a deduction in one year that the expense may be recoverable in another. Put in yet another way, the Crown is not entitled to anticipate a profit which may or may not be made, as it might do if too high a value were put on stock-in-trade or work in progress. This principle must be harmonised with another, which I have already mentioned, viz., that at any rate some value must be placed on these things. That is recognised by the so-called "direct cost" method even if it is confined to the cost of labour and material. But the danger of putting too high a value on stock-in-trade is also recognised, for, whatever method is adopted, the trader is, by any theory of accountancy, allowed to value it at cost or market value, which I take to mean market value at the end of the accounting period. This is of greater significance in the case of work in progress than of stock-in-trade. Counsel for the Crown admitted that the market value of an unfinished motor body made to order might be negligible, but that, nevertheless, that value might be taken. Of this the respondent company may yet, I suppose, take advantage. They could not be blamed for doing so if the so-called "on-cost" theory is pressed to a manifestly unfair conclusion.

My Lords, I think that, in this dilemma, the prevailing consideration must be that the taxpayer should not be put to any risk of being charged with a higher

(2) [1956] 1 All E.R. at p. 25; [1956] A.C. at p. 102.

(3) 12 Tax Cas. 813; 1926 S.C. 20.

(4) 5 Tax Cas. 529.

- A amount of profit than can be determined with reasonable certainty. He may concede that stock-in-trade and work in progress must, for tax purposes, be regarded as a receipt. On that, professional accountants appear to be universally agreed, though it might not be at once obvious to the layman. But this concession should not be pressed beyond the point at which the profession is widely, if not universally, agreed, and I should, therefore, if I had to choose (which I have not)
- B between two vaguely defined methods, choose the "direct cost" method as the less likely to violate the taxing statute. I should be supported in this choice by the reflection that, if the cost is put at too low a figure, the error will be made good to the advantage of the Crown in the following year.

- Another consideration that weighs with me is this. I recognise the force of the contention that, if the cost of work in progress cannot be ascertained with
- C accuracy, at least the attempt should be made to be as accurate as possible. But against this I put at least two powerful considerations. The first is that it is undesirable to indulge in what is no better than guess-work, though it may be described as an intelligent estimate, and it appeared to me that a large part of the suggested apportionment of overheads to stock-in-trade and work in progress was the wildest guess-work. It may be from the commercial point of view a desirable
- D practice. But it is a very different thing to impose it on a trader whether he wants it or not. It is not only unreliable for the purpose of ascertaining the year's profit. It is also an elaborate and costly practice if carried to its logical conclusion. And I see no reason why, once embarked on, it should not be carried to its logical conclusion. There appears to me to be no distinction, except, perhaps, of convenience, between the many varieties of cost which the exponents of
- E one "on-cost" system or another advocate. A second and more powerful reason, which the case under appeal illustrates, is that an attempt to get as nearly as possible an accurate estimate of cost may, if it means the consistent application of a theory of costing, lead to what, from the taxing point of view, is an absurd conclusion. That is not too strong a word. For here, as was well pointed out by the Master of the Rolls (LORD EVERSHERD) and PEARCE, L.J. (5), the value of the
- F work in progress at the end of the relevant year was £2,000 less than at its beginning if the "direct cost" method were adopted, whereas, according to the "on-cost" method, it was not £2,000 less but £14,000 more. This difference is due to little else than the fact that the overheads had to be distributed among a smaller number of articles so that each of them bore a greater proportion of such costs. An idle and unprofitable year thus increases for tax purposes the value of
- G the work that has been or is in course of being done. Counsel for the Crown did not shrink from this conclusion, and accepted my suggestion that if, owing to a prolonged strike, little work was produced, the weight of all the overheads would have to be thrown on that little. The only course then open to the trader would be to take market value as the test. This, I have pointed out, is an invitation that may be accepted.

- H My Lords, in my opinion this is fundamentally wrong. Stock-in-trade and work in progress are brought into account because, fictitiously but as a matter of plain common sense, they are treated as a receipt of the year's trading. The words "receipt" and "realised profit" were often on counsel's lips in regard to them. My Lords, I would say, nevertheless, that it is something remote indeed from common sense to say that, for taxing or any other purpose, an inflated value is
- I to be given to stock-in-trade or work in progress because a slump in trade has reduced the articles between which overhead costs can be apportioned. The asset regarded as a receipt is not more valuable nor is a greater profit realised.

For the reasons that I have given, I reject the so-called "on-cost" method as a method which can be imposed on the taxpayer. If in any particular case there is, in the opinion of the Crown, some item of expenditure beyond wages and cost of material which ought for tax purposes to be attributed to stock-in-trade or work

in progress and there is a dispute about it, that can be settled in the ordinary way. But I will add, in order to show how impossible it is to lay down any universal or even general rule, that it may be equally open to the taxpayer in special circumstances to show that something less than the cost of material and wages should be taken as the value of work in progress or stock-in-trade. A

I would dismiss these appeals with costs.

LORD REID: My Lords, the respondent company build bodies for motor vehicles; generally, these are motor coach bodies built to order for individual purchasers. This case arises out of assessments to income tax in respect of that trade for the years 1951-52, 1952-53, and 1953-54. At the end of each accounting period the respondent company had in their possession a number of unfinished bodies on which work was proceeding and which are referred to as work in progress. Admittedly sums representing work in progress at the beginning and end of each period must be taken into account in computing the profits of the period for income tax purposes. The question at issue in this appeal is the principle by reference to which sums representing work in progress must be determined. In the Case Stated by the Special Commissioners, it is said: B C

"2. The questions for our determination were:—(i) whether, in arriving at the cost of work in progress for the purpose of computing the profits of the company for income tax purposes, the cost of direct materials and labour only ('Direct Cost') should be taken into account or whether there should be added to the direct cost a proportion of indirect expenditure ('On-Cost'); and (ii) if 'on-cost' was to be taken into account what items of indirect expenditure fell to be included therein. It was common ground that there was no question of market value of work in progress as it could not be regarded as saleable in its unfinished state. D

"5. We were asked in the first instance to decide as a broad matter of principle whether the 'direct cost' method or the 'on-cost' method was to be applied in ascertaining the cost of work in progress for the purposes of computing the Case I profits; and on this basis we were asked to consider the accounts for the year to March, 1951, as an example." E F

The findings in the Case Stated may be more easily understood if I first set out what I believe to be the background of this matter. It appears that, at one time, it was common to take no account of stock-in-trade or work in progress for income tax purposes; but long ago it became customary to take account of stock-in-trade, and for a simple reason. If the amount of stock-in-trade has increased materially during the year, then, in effect, sums which would have gone to swell the year's profits are represented at the end of the year by tangible assets, the extra stock-in-trade which they have been spent to buy; and similar reasoning will apply if the amount of stock-in-trade has decreased. So to omit stock-in-trade would give a false result. It then follows that some account must be taken of work in progress. Suppose that the manufacture of an article was completed near the end of an accounting period. If completed the day before that date, the article, if not already sold, has become stock-in-trade; if completed the day after that date it was still work in progress on that date. It could hardly be right to take that article into account in the former case but not in the latter. I do not know when it became customary to take into account work in progress, but it appears that that has been customary for many years, and it is not disputed that, at least in all ordinary cases, that must now be done. Then the question is what figure should be taken to represent the stock-in-trade. If it consists of articles bought for re-sale, the answer is obvious—the price the taxpayer paid for them or their cost to him. If market value were taken, that would generally include an element of profit, and it is a cardinal principle that profit shall not be taxed until realised; if the market value fell before the article was sold the profit might never be realised. But an exception seems to have been recognised G H I

A for a very long time; if market value has already fallen before the date of valuation, so that, at that date, the market value of the article is less than it cost the taxpayer, then the taxpayer can bring the article in at market value, and in this way anticipate the loss which he will probably incur when he comes to sell it. That is no doubt good conservative accountancy, but it is quite illogical. The fact that it has always been recognised as legitimate is only one instance going to show that these matters cannot be settled by any hard and fast rule or strictly logical principle.

The earliest authority dealing with this matter on general lines appears to be *Whimster & Co. v. Inland Revenue Comrs.* (6). The opinion of Lord President CLYDE has always been followed, and LORD SANDS' opinion is also instructive. It is not disputed that the principles there expressed apply both to stock-in-trade and work in progress. But there was no discussion there as to the meaning of "cost", and that is the problem that now confronts your Lordships. Broadly speaking, the "direct cost" method only takes account of money spent solely for the purpose of or in connexion with the manufacture of the particular goods, whereas the "on-cost" method treats as an additional part of their cost proportions of various overhead expenses or of money spent in connexion with the manufacture of those goods and also of others. The main elements in direct cost are labour and materials, though there may be others and the method can be applied with a large degree of accuracy, but, as will appear in a moment, there is great uncertainty attaching to the "on-cost" method.

The findings of the Special Commissioners with regard to these methods are long and elaborate, and I shall try to present them fairly in summarised form. Both methods are recognised by the accountancy profession as correct accountancy. Professional opinion is rarely static on such questions. The "on-cost" method is used for most taxpayers (it is not said whether any of them object to this). There are several different ways of applying the "on-cost" method; different accountants apply different recognised variations of it. Whatever recognised variation is applied, the accountancy profession as a whole would not condemn it. And within any particular recognised variation there is considerable scope for difference of opinion in its application to the facts of a particular case. The commissioners quote from a booklet issued by the Institute of Chartered Accountants in England and Wales:

"107. No particular basis of valuation is suitable for all types of business but, whatever the basis adopted, it should be applied consistently . . ."

G The respondent company have used the "direct cost" method since 1924.

There is one finding of the commissioners which rather puzzles me. "The accountancy profession as a whole is satisfied that either method will produce a true figure of profit for income tax purposes". This cannot mean that, taking a particular business in a single year, either method will produce a true figure; the methods will produce very different figures of profit and both cannot be true figures of profit for the same year. It may mean that, applied consistently over a period of years, both methods will for the whole period produce the same aggregate profit, and that appears to be approximately true. Or it may mean that one or other method will produce a true figure depending on the nature of the business and that seems to accord with the "Recommendations" of the Institute. Normally a court attaches great weight to the view of the accountancy profession, though the court must always have the last word. But here the findings which I have summarised show that that assistance is not available on the issue which your Lordships have been invited to consider. The commissioners state that they were asked to decide between these methods as a broad matter of principle, and your Lordships were also invited to take that course. But I find that very difficult; if the accountancy profession cannot do that, I do not see how I can. The most I can do is to try to bring common sense to bear on the elements of the

problem involved in this case on the assumption, which I am entitled to make, that common sense is the same for lawyers as for accountants. A

The Crown first submitted an argument which, if sound, would carry it a long way, indeed it would carry it further than it wanted to go. It was based on an assumption that expenditure shown in a profit and loss account can all be divided into manufacturing and selling expenditure, and that the manufacturing expenditure can and should be attributed entirely to goods manufactured or partly manufactured during the year of account. If that were so, it might follow that you should allocate that expenditure between all those goods; if you refuse to allocate any of it to that part of the goods still unsold (stock-in-trade) or still unfinished (work in progress), you overload the goods already sold with more than their share and so reach a final figure less than the true profit. But the assumption is wrong. It has long been established that you are entitled to include in expenditure for the year all business expenses in that year not excluded by the old r. 3, now s. 137 of the Income Tax Act, 1952, whether or not they can be attributed to the production of goods in that year. It matters not that certain expenditure may have proved abortive, or may have been spent solely with a view to production and profit in some future year and have no relation at all to production during the year of account. This was settled as long ago as 1910 in *Vallambrosa Rubber Co., Ltd. v. Farmer (Surveyor of Taxes)* (7), a decision often followed and never questioned. Expenditure which it is permissible to include in the account is the whole general expenditure during the period, and it can only be said to have been spent to earn the profits of that year in the sense that it was all spent during that year to keep the business going and that during that year the business yielded the profit shown in the account. So the question is not what expenditure it is proper to leave in the account as attributable to goods sold during the year, but what expenditure it is proper in effect to exclude from the account by setting against it a figure representing stock-in-trade and work in progress. You must justify what you seek to exclude in this way as being properly attributable to and properly represented by those articles. B C D E

I said that the Crown's argument would carry it further than it wants to go. It appears from the Case Stated that expenditure is commonly divided by cost accountants into factory expenses, office expenses, selling expenses, and despatch and financial expenses. The Special Commissioners held that only factory overheads should be taken into account, and the Crown supports their decision. I can see reasons why, in principle, selling and despatch expenses should be excluded. But why exclude office and financial expenses? Some part at least of these may well have been closely associated with production. The commissioners do not give any reason for including factory overheads and excluding the rest and, indeed, they say that they do not feel able to define the term "factory overheads". I am not surprised. I can see that, if you are going beyond direct cost, there may be good practical reasons for drawing a line somewhere—going beyond it may be laborious and lead to insignificant results. The line may be drawn differently for practical reasons in different cases. But it would be impossible to say as a matter of principle that factory overheads must be brought in and others left out, and quite impossible to say so as a practical criterion if we do not even know how to define factory overheads. One can imagine many cases which would not fit any hard and fast rule or general principle. Suppose a new model is to be brought out which it is hoped to sell in large numbers over a period of years. Much preliminary work must be done before production starts, some of which might be "factory overheads". For costing purposes, I suppose that would be regarded as attributable to the new articles. But it is not so easy for income tax purposes. To begin with, preliminary work done in a previous year cannot be attributed to work in progress at the end of the next year. It went into the previous year's account and that is an end of it. And whether done in a F G H I

- A previous year or in the same year, it was done partly with a view to producing articles already in course of manufacture at the end of the year, and partly with a view to producing an unknown number of similar articles in future years. How much of it is to be attributed to the work in progress? As a practical matter, some solution would no doubt be found. On principle the question seems insoluble.
- B It appears to me that we must begin at the other end and simply ask what, in all the circumstances of a particular business, is a figure which fairly represents the cost of stock-in-trade and work in progress. One thing clearly emerges as approved by the accountancy profession—whatever method is followed it must be applied consistently. I accept that. So the real question is what method best fits the circumstances of a particular business. And, if a method has been
- C applied consistently in the past, then it seems to follow that it should not be changed unless there is good reason for the change sufficient to outweigh any difficulties in the transitional year. In cases where the “on-cost” method has been consistently followed in the past, there may or may not be good reason for changing now. There might, perhaps, be good reason for a change in a particular case in the other direction. But I can find nothing in the Case to
- D justify such a change in the present case. That is not to say that every item in these accounts is in its proper place. It emerged that the cost of power used in making the unfinished bodies ought to have been but was not included in the cost of work in progress, and there may be other particular items in the same position. But I find nothing in the Case to support the commissioners’ decision to bring in whatever may be included in “factory overheads”. I am confirmed
- E in this opinion by a consideration which greatly influenced the Court of Appeal. One of the findings in the Case is:

“7 (g) One result of the ‘on-cost’ method is that the cost of work in progress varies with the rate of production. If a factory is not working at full capacity, the cost of work in progress computed by this method is higher than if the factory is working at full capacity. On the ‘direct cost’ method the cost of work in progress is not affected by the rate of production.”

- F That means that, for a year in which trade is slack, the profits for income tax are inflated by the “on-cost” method because an unusually large proportion of factory overheads is attributed to work in progress at the end of the year, and its “cost” is, therefore, greater than it would have been if the factory had been
- G busy. In costing for some purposes this may well be right, but it seems difficult to justify for income tax purposes. In many cases it must clearly be wrong if the whole year is taken as a unit. Suppose that the factory was losing money in the early part of the year, but was busy in the latter part when the work in progress at the end of the year was in production. It could not be right to say that the “cost” of that work in progress should be increased because of some-
- H thing that had ceased to have any influence before that work started. I would not go so far as to say that this consideration condemns the “on-cost” method in every case. No doubt all these methods have their weak points. But this does, to my mind, make it more than ever necessary to find good reason for adopting the “on-cost” method in any particular case.

- I One answer for the Crown was: Well, if the taxpayer does not like this inflated “cost” he can always elect for market value under the rule, cost or market value whichever is the lower. I am not satisfied that “market value” in its ordinary sense can be applied to work in progress. The rule, cost or market value, is not a substantive rule of law; it is a means of enabling the taxpayer to anticipate a loss by bringing expected loss into account. The taxpayer must be able somehow to do that in relation to work in progress, but it may be that some modification of the rule will have to be applied if the taxpayer can show that he has probably already incurred a loss in connexion with his work in progress. In any case, this is not, to my mind, an adequate answer to the difficulty.

The question stated in the Case is whether the commissioners' decision that an "on-cost" method should be applied in this case is erroneous in law. I would answer that question in the affirmative on the ground that the facts and findings set out in the Case do not justify requiring the respondent company to change from their present practice of using the "direct cost" method. I am, therefore, of opinion that these appeals should be dismissed. A

LORD TUCKER: My Lords, I agree that these appeals should be dismissed for the reasons stated in the opinion of my noble and learned friend, LORD REID. B

LORD HODSON: My Lords, I also agree that these appeals should be dismissed for the reasons stated in the opinion of my noble and learned friend, LORD REID. C

LORD GUEST: My Lords, the contest between two different methods of costing for the purposes of income tax can seldom be resolved in the abstract by the courts. It is only when these methods are applied to the facts of a given case that the courts can give a satisfactory decision. But one essential factor which must be known is what is involved in each of these different methods. D
The Special Commissioners in the present case, on the invitation of the parties, attempted to decide as a question of principle between the "direct cost" method and the "on-cost" method in relation to work in progress. They favoured the "on-cost" method. They then proceeded to decide what items of expenditure were involved in the "on-cost" method. This was, to my mind, the wrong approach to the question and putting the proverbial cart before the horse. E
They ought first to have decided what items of expenditure were included in the "on-cost" method and then to have approached the problem whether this method was the proper method of costing work in progress in the respondent company's factory. The Court of Appeal declined to treat the matter as one of principle and, for my part, I think that they were quite right to decline to do so. F
The Court of Appeal, however, while affirming the decision of VAISEY, J., did not approve of his ground of judgment, and again I think that the Court of Appeal were right. VAISEY, J., considered that, as the directors of the respondent company had elected to adopt the "direct cost" system in the preparation of the company's accounts and as both the "direct cost" and the "on-cost" method were recognised by the accountancy profession as correct accountancy, the "direct cost" method was the proper method to apply. It can never rest G
with the taxpayer to decide on what principle his income is to be assessed for tax purposes. The directors' decision can never be decisive of the matter for income tax purposes (see *Patrick v. Broadstone Mills, Ltd.* (8)). The assessment, in addition to being consistent with normal accounting practice, must be made according to the provisions of the Income Tax Acts. The Court of Appeal held that, on the facts and figures, the "on-cost" method produced an unfair H
result and the "direct cost" method was the right one to apply. In these circumstances, the burden is on the Crown to show that the "direct cost" method is not in accordance with the rules of the Income Tax Act and, as we were informed that the Crown has, for a period of about fifty years, accepted the "direct cost" method and as this is the first case in which they have sought to set up the "on-cost" method as opposed to the "direct cost" method, this I
burden is a heavy one.

The proper approach to the matter was given by Lord President CLYDE in *Whimster & Co. v. Inland Revenue Comrs.* (9):

"In computing the balance of profits and gains for the purposes of income tax, or for the purposes of excess profits duty, two general and

(8) [1954] 1 All E.R. 163; 35 Tax Cas. 44

(9) 12 Tax Cas. at p. 823; 1926 S.C. at p. 25.

A fundamental commonplaces have always to be kept in mind. In the first place, the profits of any particular year or accounting period must be taken to consist of the difference between the receipts from the trade or business during such year or accounting period and the expenditure laid out to earn those receipts. In the second place, the account of profit and loss to be made up for the purpose of ascertaining that difference must be framed consistently with the ordinary principles of commercial accounting, so far as applicable, and in conformity with the rules of the Income Tax Act, or of that Act as modified by the provisions and schedules of the Acts regulating excess profits duty, as the case may be. For example, the ordinary principles of commercial accounting require that in the profit and loss account of a merchant's or manufacturer's business the values of the stock-in-trade at the beginning and at the end of the period covered by the account should be entered at cost or market price, whichever is the lower; although there is nothing about this in the taxing statutes."

This statement of the law has in many subsequent cases been approved, and was in particular approved in *Minister of National Revenue v. Anaconda American Brass, Ltd.* (10). The question is, therefore, whether the "direct cost" method is inconsistent with the ordinary principles of commercial accounting or is not in conformity with the rules of the Income Tax Acts.

The "direct cost" method only takes account of wages and materials in ascertaining the cost of work in progress. The "on-cost" method seeks to add to the figure arrived at by the "direct cost" method something in name of what may be compendiously called "overhead expenses". The principle on which the Crown contend for the "on-cost" method was stated by counsel as follows:

"Where expenditure in the year includes expenditure on goods not sold during the year, this expenditure must be eliminated in order to get the true manufacturing cost of the goods sold during the year. The expenditure so to be eliminated is the total of all expenses which are incurred for the purpose of producing unsold goods and which would be factors in consideration of the market value of unsold goods."

This statement makes it clear that the Crown are not so much interested in altering the method of costing work in progress as making an alteration in the deductible expenses in the company's accounts. It is at once obvious that, by adding a sum in name of overhead expenses to the cost of work in progress, the Crown are pro tanto reducing the expenditure which would otherwise appear on the debit side of the accounts. The principle contended for is no justification, in my view, for adopting the "on-cost" method in relation to work in progress. No other justification in principle was put forward for the "on-cost" method. Moreover, the "on-cost" method, in my view, offends against the rules contained in s. 137 of the Income Tax Act, 1952, whereby the deductible expenses include all expenses wholly and exclusively laid out for the purposes of the trade. The adoption of the "on-cost" method involves the recharging of the taxpayer by the disallowance of items of expenditure which are otherwise deductible under s. 137. It is a familiar principle of income tax law that the expense lies where it falls, that is, in the year in which it was incurred (see *Vallambrosa Rubber Co., Ltd. v. Farmer (Surveyor of Taxes)* (11), per Lord President DUNEDIN). By a circuitous method, the Crown are attempting to disallow an expense which is otherwise deductible under s. 137. It is no justification, in my opinion, for allocating various items of expenditure contained in the accounts and relating them to the cost of work in progress on the plea that the expenditure is indirectly referable to the production of the work in progress. In *Naval Colliery Co., Ltd. v. Inland Revenue Comrs.* (12), ROWLATT, J., said:

(10) [1956] 1 All E.R. 20; [1956] A.C. 85.

(11) 5 Tax Cas. at p. 534.

(12) 12 Tax Cas. at p. 1027.

"Now, one starts, of course, with the principle that has often been laid down in many other cases—it was cited from *Whimster's* case (13), a Scotch case—that the profits for income tax purposes are the receipts of the business less the expenditure incurred in earning those receipts. It is quite true and accurate to say, as Mr. Maugham says, that receipts and expenditure require a little explanation. Receipts include debts due and they also include, at any rate in the case of a trader, goods in stock. Expenditure includes debts payable; and expenditure incurred in repairs, the running expenses of a business and so on, cannot be allocated directly to corresponding items of receipts, and it cannot be restricted in its allowance in some way corresponding, or in an endeavour to make it correspond, to the actual receipts during the particular year. If running repairs are made, if lubricants are bought, of course no inquiry is instituted as to whether those repairs were partly owing to wear and tear that earned profits in the preceding year or whether they will not help to make profits in the following year and so on. The way it is looked at, and must be looked at, is this, that that sort of expenditure is expenditure incurred on the running of the business as a whole in each year, and the income is the income of the business as a whole for the year, without trying to trace items of expenditure as earning particular items of profit."

It is the expenditure of running the business as a whole in each year which is to be looked at, not the expenditure related to any particular item of profit. If, of course, any expenditure can be directly related to work in progress, then this would fall to be added to the cost on the "direct cost" method. But no such question arises in this case.

In considering whether the "on-cost" method is a proper method, I am influenced by a reflection of some of the absurd results which would follow from the adoption of this system. If the overhead expenses are to be allocated to the work in progress, it will follow that, if trade is slack during any given year, a greater proportion of the overheads will be allocated to the work in progress and, as the cost of the work in progress is to appear as an item of profit, this will swell the profits of the business. So this absurd result will follow that, when trade is slack, the trader's profit on the goods sold will be low as his expenses are high, but his profit in respect of work in progress will be increased. I cannot think that a method which leads to these absurd results is in accordance with the principles of income tax law or, I may add, with common sense.

I turn now to the "direct cost" method which is limited to the cost of labour and materials. Have the Crown shown that this method is either inconsistent with the ordinary principles of commercial accounting or not in conformity with the rules of the Income Tax Acts? The commissioners have found as a fact that the "direct cost" method is recognised by the accountancy profession as correct accountancy and that it will produce a true figure of profit for income tax purposes. This method, therefore, satisfies LORD CLYDE's first test. It is said that this method, like the "on-cost" method, offends against the principles enshrined in s. 137 of the Income Tax Act, 1952. But, according to the decision in *Whimster* (13), the cost of the work in progress must be ascertained, if it is lower than the market value. Work in progress is a receipt of the business as a result of work done during the year. The "direct cost" method ascertains the amount which the production of work in progress has actually cost. It does not, in my view, offend against LORD CLYDE's second test. The Crown have failed, in my opinion, to show that the "on-cost" method is of universal application. The commissioners say that the accountancy profession is divided on the question which is the proper method. The Crown have also failed to show that, in order to conform with the rules of income tax law, the "on-cost" method must be employed. Their appeal must, therefore, fail.

A On what is the proper method of costing to adopt in this case I need say no more than this, that, on the facts and figures, the respondent company's profits have, in my opinion, been correctly assessed by the application of the "direct cost" method.

I would dismiss these appeals.

Appeals dismissed.

B Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Wilkinsons* (for the respondent company).

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

C TSAKIROGLOU & CO., LTD. v. NOBLEE & THORL G.m.b.H.

[HOUSE OF LORDS (Viscount Simonds, Lord Reid, Lord Radcliffe, Lord Hodson and Lord Guest), February 15, 16, 20, 21, March 28, 1961.]

Sale of Goods—C.i.f. contract—Frustration—Performance possible by route which was not customary—Closing of Suez Canal.

D *Arbitration—Case Stated—Facts found in Special Case—Frustration—Sale of goods—Normal shipping route via Suez—Finding in Case that shipping by route via Cape of Good Hope would not render contract commercially or fundamentally different—Whether appeal tribunal can review finding.*

E By a contract dated Oct. 4, 1956, incorporating form No. 38 of the Incorporated Oil Seed Association's contract forms, the appellants agreed to sell to the respondents three hundred tons of Sudanese groundnuts c.i.f. Hamburg, shipment during November/December, 1956. By cl. 6 of the contract: "In case of prohibition of import or export, blockade or war, epidemic or strike, and in all cases of force majeure preventing the shipment within the time fixed, or the delivery, the period allowed for shipment or delivery shall be extended by not exceeding two months. After that, if the case of force majeure be still operating, the contract shall be cancelled."

F The contract did not expressly provide by what route the groundnuts should be shipped. The only suitable port for the shipment of groundnuts was Port Sudan, and, at the date of the contract, the usual and normal route for the shipment of Sudanese groundnuts from Port Sudan to Hamburg was via the Suez Canal. Sufficient groundnuts were held at Port Sudan to the

G appellants' order to fulfil the contract, and space was booked on ships for them. Following the military operations against Egypt by British and French armed forces, the Suez Canal was blocked to shipping on Nov. 2, 1956, and it remained blocked until April, 1957, but the appellants could have transported the groundnuts via the Cape of Good Hope during November/December, 1956. The appellants did not ship any groundnuts

H and their claim that they were entitled to consider the contract as cancelled was referred to arbitration. It was found that there was no implied term in the contract that shipment should be via the Suez Canal, and that the performance of the contract by shipping the goods on a vessel routed via the Cape of Good Hope was not commercially or fundamentally different from its being performed by shipping them on a vessel routed via the Suez Canal.

I **Held:** (i) a term that the groundnuts were to be shipped via the Suez Canal would not be implied (see p. 183, letter C, p. 185, letter H, p. 189, letter B, p. 192, letter B, and p. 196, letter B, post).

Re L. Sutro & Co. and Heilbut, Symons & Co. ([1917] 2 K.B. 348) doubted.

(ii) the customary or usual route via the Suez Canal being closed, the appellants were bound (by the Sale of Goods Act, 1893, s. 32 (2)) to ship the groundnuts by a reasonable and practicable route and, though the appellants might be put to greater expense by shipping the groundnuts via the Cape of Good Hope, that did not render the contract fundamentally

or radically different, and there was not, therefore, frustration of the contract (see p. 184, letter H, p. 187, letter A, p. 189, letter G, p. 193, letter B, and p. 195, letter I, post).

Carapanayoti & Co., Ltd. v. E. T. Green, Ltd. ([1958] 3 All E.R. 115) overruled.

(iii) the appellants could not rely on cl. 6 of the contract, since the word "shipment" meant the bringing of goods to the port of shipping and loading them on board a ship prepared to carry them to their contractual destination (see p. 182, letter G, p. 187, letter A, p. 190, letter I, p. 193, letter H, and p. 196, letter H, post).

Dictum of BAILHACHE, J., in *Re Comptoir Commercial Anversois and Power, Son & Co.* ([1920] 1 K.B. at p. 878) approved.

(iv) the finding that the performance of the contract by shipping the goods via the Cape of Good Hope was "not commercially or fundamentally different" from its being performed by shipping via the Suez Canal did not preclude the court from forming its own judgment whether the contract had been frustrated as that involved a question of law (see p. 185, letter D, p. 187, letter D, p. 189, letter H, p. 193, letter G, and p. 196, letter F, post).

Decision of the COURT OF APPEAL ([1960] 2 All E.R. 160) affirmed.

[As to shipment of goods under a c.i.f. contract, see 29 HALSBURY'S LAWS 2nd Edn.) 214, para. 286.

As to the frustration of a contract, see 8 HALSBURY'S LAWS (3rd Edn.) 185, para. 320; and for cases thereon, see 12 DIGEST (Repl.) 459, 460, 3425-3429.]

Cases referred to:

Biddell Brothers v. E. Clemens Horst Co., [1911] 1 K.B. 214; *revsd.* C.A., [1911] 1 K.B. 934; 80 L.J.K.B. 584; 104 L.T. 577; 12 Asp. M.L.C. 1; *revsd. on other grounds*, [1912] A.C. 18; 17 Digest (Repl.) 42, 503.

British Movietone News, Ltd. v. London and District Cinemas, Ltd., [1951] 2 All E.R. 617; [1952] A.C. 166; 3rd Digest Supp.

Carapanayoti & Co., Ltd. v. E. T. Green, Ltd., [1958] 3 All E.R. 115; [1959] 1 Q.B. 131; [1958] 3 W.L.R. 390; 3rd Digest Supp.

Comptoir Commercial Anversois and Power, Son & Co., Re, [1920] 1 K.B. 868; 89 L.J.K.B. 849; 122 L.T. 567; 12 Digest (Repl.) 449, 3389.

Constantine (Joseph) S.S. Line, Ltd. v. Imperial Smelting Corp'n., Ltd., [1941] 2 All E.R. 165; [1942] A.C. 154; 110 L.J.K.B. 433; 165 L.T. 27; 12 Digest (Repl.) 436, 3333.

Davis Contractors, Ltd. v. Fareham U.D.C., [1956] 2 All E.R. 145; [1956] A.C. 696; [1956] 3 W.L.R. 37; 3rd Digest Supp.

Evans, Sons & Co. v. Cunard Steamship Co., Ltd., (1902), 18 T.L.R. 374; 41 Digest 486, 3175.

Fairclough Dodd & Jones, Ltd. v. J. H. Vantol, Ltd., [1956] 3 All E.R. 921; [1957] 1 W.L.R. 136; 3rd Digest Supp.

Gaon (Albert D.) & Co. v. Société Interprofessionnelle des Oleagineux Fluides Alimentaires, [1959] 2 All E.R. 693; [1959] 3 W.L.R. 622; *affd.* C.A., [1960] 2 All E.R. 160; [1960] 2 Q.B. 318; [1960] 2 W.L.R. 886; 3rd Digest Supp.

Jackson v. Union Marine Insurance Co., Ltd., (1874), L.R. 10 C.P. 125; 44 L.J.C.P. 27; 31 L.T. 789; 2 Asp. M.L.C. 435; 12 Digest (Repl.) 438, 3339.

Johnson v. Taylor Bros. & Co., Ltd., [1920] A.C. 144; 89 L.J.K.B. 227; 122 L.T. 130; 39 Digest 660, 2515.

Larrinaga & Co. v. Société Franco-Américaine des Phosphates de Medulla, (1922), 28 Com. Cas. 1; *affd.* H.L., (1923), 92 L.J.K.B. 455; 129 L.T. 65; 16 Asp. M.L.C. 133; 29 Com. Cas. 1; 41 Digest 304, 1665.

Reardon Smith Lines, Ltd. v. Black Sea & Baltic General Insurance Co., Ltd., The Indian City, [1939] 3 All E.R. 444; [1939] A.C. 562; 108 L.J.K.B. 692; 161 L.T. 79; Digest Supp.

- A *Sanders v. Maclean*, (1883), 11 Q.B.D. 327; 52 L.J.Q.B. 481; 49 L.T. 462; 5 Asp. M.L.C. 160; 41 Digest 395, 2373.
Société Franco Tunisienne d'Armement v. Sidermar S.P.A., [1960] 2 All E.R. 529; [1960] 3 W.L.R. 701.
Sutro (L.) & Co. and Heilbut, Symons & Co., Re, [1917] 2 K.B. 348; 86 L.J.K.B. 1226; 116 L.T. 545; 14 Asp. M.L.C. 34; 17 Digest (Repl.) 45, 543.

B Appeal.

Appeal by sellers of groundnuts, Tsakiroglou & Co., Ltd., from an order of the Court of Appeal (SELLERS, ORMEROD and HARMAN, L.JJ.), dated Mar. 28, 1960, and reported [1960] 2 All E.R. 160, affirming (on different grounds) an order of DIPLOCK, J., dated Dec. 9, 1958, and reported [1959] 1 All E.R. 45, on an award in the form of a Special Case stated pursuant to s. 21 (1) (b) of the Arbitration Act, 1950, by the Board of Appeal of the Incorporated Oil Seed Association. The facts are set out in the opinion of VISCOUNT SIMONDS.

Eustace Roskill, Q.C., and *R. A. MacCrindle* for the appellants, the sellers.
A. A. Mocatta, Q.C., and *J. F. Donaldson* for the respondents, the buyers.

Their Lordships took time for consideration.

D Mar. 28. The following opinions were read.

VISCOUNT SIMONDS: My Lords, on Apr. 21, 1958, the Board of Appeal of the Incorporated Oil Seed Association made an award by which they upheld the award of an umpire in an arbitration between the appellants and the respondents, awarding the latter the sum of £5,625 against the former as damages for breach of contract. On Case Stated, DIPLOCK, J., upheld the award. His decision was affirmed by the Court of Appeal. The matter now comes before this House. Not for the first time, I venture to point out that the two first stages in proceedings which will ultimately be resolved in the highest court could conveniently be omitted.

The contract, for breach of which damages were awarded to the respondents, was made on Oct. 4, 1956. It incorporated the terms of contract form No. 38 of the Incorporated Oil Seed Association and, by it, the appellants agreed to sell to the respondents three hundred tons of Sudanese groundnuts at £50 per one thousand kilos including bags c.i.f. Hamburg, shipment during November/December, 1956. No goods were shipped by the appellants in fulfilment of this contract in the circumstances stated in the Special Case which I summarise.

All groundnuts exported from the Sudan to Europe are shipped from Port Sudan, which is the only suitable port. At the date of the contract (Oct. 4, 1956), the usual and normal route for the shipment of Sudanese groundnuts from Port Sudan to Hamburg was via the Suez Canal. Both parties then contemplated that shipment would be made by that route. It would have been unusual and rare for any substantial parcel of Sudanese groundnuts from Port Sudan to Europe to be shipped via the Cape of Good Hope. Before the closure of the Suez Canal, the appellants acquired three hundred tons of Sudanese groundnuts in shell which were held to their order in warehouses at Port Sudan as from Nov. 1, 1956. They also, before the closure, booked space for three hundred tons of nuts in one or other of four vessels scheduled to call at Port Sudan between Nov. 10 and Dec. 26, 1956. The shipping company cancelled these bookings on Nov. 4, 1956. British and French armed forces began military operations against Egypt on Oct. 29, 1956. The Suez Canal was blocked on Nov. 2, and remained closed for effective purposes until at least Apr. 9, 1957. But the appellants could have transported the goods from Port Sudan to Hamburg via the Cape of Good Hope during November and December, 1956. The distance from Port Sudan to Hamburg via the Suez Canal is about 4,386, and via the Cape about 11,137, miles. The freight ruling at the time of the contract for the shipment of groundnuts from Port Sudan to Hamburg via the Canal was about £7 10s. per ton. After the closure of the canal, the Port Sudan United Kingdom Conference imposed

the following surcharges for goods supplied on vessels proceeding via the Cape, viz., as from Nov. 10, 1956, twenty-five per cent., and as from Dec. 13, 1956, one hundred per cent. The market price of Sudanese nuts in shell shipped from Port Sudan c.i.f. Hamburg was £68 15s. per ton between Jan. 1 and 15, 1957. As has been already said, the appellants did not ship any nuts. They claimed that they were entitled to consider the contract as cancelled, and to this view they adhered. The contract provided, by cl. 6, that:

"In case of prohibition of import or export, blockade or war, epidemic or strike, and in all cases of force majeure preventing the shipment within the time fixed, or the delivery, the period allowed for shipment or delivery shall be extended by not exceeding two months. After that, if the case of force majeure be still operating, the contract shall be cancelled."

The award was in these terms:

"So far as it is a question of fact we find and as far as it is a question of law we hold: (i) There were hostilities but not war in Egypt at the material time. (ii) Neither war nor force majeure prevented shipment of the contract goods during the contract period if the word 'shipment' means placing the goods on board a vessel destined for the port of Hamburg. (iii) If the word 'shipment' includes not only the placing of the contract goods on board a vessel but also their transportation to the contract destination then shipment via the Suez Canal was prevented during the contract period of shipment by reason of force majeure but shipment via the Cape was not so prevented. (iv) It was not an implied term of the contract that shipment or transportation should be made via the Suez Canal. (v) The contract was not frustrated by the closure of the Suez Canal. (vi) The performance of the contract by shipping the goods on a vessel routed via the Cape of Good Hope was not commercially or fundamentally different from its being performed by shipping the goods on a vessel routed via the Suez Canal."

The first three of these findings relate to the claim of the appellants that the exceptions clause (cl. 6 of the contract) absolved them from performance of the contract. I will deal with this at once and shortly. Similar words to those in cl. 6 fell to be construed in *Re Comptoir Commercial Anversois and Power, Son & Co.* (1). BAILHACHE, J., said (2):

"Now, if I give to the word 'shipment' the widest meaning of which it is capable, it cannot mean more than bringing the goods to the shipping port and then loading them on board a ship prepared to carry them to their contractual destination."

His judgment on this point was affirmed in the Court of Appeal (3). It has never been questioned, and I see no reason for questioning it. In *Fairclough Dodd & Jones, Ltd. v. J. H. Vantol, Ltd.* (4), the decision turned on the very particular words of the contract and is not in conflict with the earlier case.

I come, then, to the main issue and, as usual, I find two questions interlocked: (i) What does the contract mean? In other words, is there an implied term that the goods shall be carried by a particular route? (ii) Is the contract frustrated?

It is convenient to examine the first question first, though the answer may be inconclusive. For it appears to me that it does not automatically follow that, because one term of a contract, e.g., that the goods shall be carried by a particular route, becomes impossible of performance, the whole contract is thereby abrogated. Nor does it follow, because, as a matter of construction, a term cannot be implied, that the contract may not be frustrated by events. In the instant case, for example, the impossibility of the route via Suez, if that were assumed to be the implied contractual obligation, would not necessarily spell the frustration

(1) [1920] 1 K.B. 868.

(3) [1920] 1 K.B. at p. 892.

(2) [1920] 1 K.B. at p. 878.

(4) [1956] 3 All E.R. 921.

- A of the contract. It is put in the forefront of the appellants' case that the contract was a contract for the shipment of goods via Suez. This contention can only prevail if a term is implied, for the contract does not say so. To say that that is, nevertheless, its meaning is to say in other words that the term must be implied. For this I see no ground. It has been rejected by the learned trial judge and each of the members of the Court of Appeal, and in two other cases, *Carapanayoti & Co., Ltd. v. E. T. Green, Ltd.* (5) and *Albert D. Gaon & Co. v. Société Interprofessionnelle des Oleagineux Fluides Alimentaires* (6), where the same question arose, it was rejected by McNAIR, J., and ASHWORTH, J., respectively. A variant of this contention was that there should be read into the contract by implication the words "by the usual and customary route" and that, as the only usual and customary route at the date of the contract was via Suez, the contractual obligation was to carry the goods via Suez. Though this contention has been viewed somewhat differently, I see as little ground for the implication. In this, I agree with HARMAN, L.J., for it seems to me that there are precisely the same grounds for rejecting the one as the other. Both of them assume that sellers and buyers alike intended and would have agreed that, if the route via Suez became impossible, the goods should not be shipped at all. Inasmuch as the buyers presumably wanted the goods and might well have re-sold them, the assumption appears wholly unjustified. Freight charges may go up or down. If the parties do not specifically protect themselves against change, the loss must lie where it falls.

- For the general proposition that, in a c.i.f. contract, the obligation, in the absence of express terms, is to follow the usual or customary route, there is a significant absence of authority. Some reliance was placed on *Re L. Sutro & Co. and Heilbut, Symons & Co.* (7). But the facts and the question arising on them were widely different from those in the present case. The decision was that, since the contract clearly contemplated carriage by sea from the loading port to the ultimate port of discharge, it could not be performed by carriage partly by sea and partly by rail, though the arbitrators had found that that method of transport had become a usage in the trade. It is possible that, if the decision was reviewed in this House, it might not stand; it is unnecessary now to determine that question. For, as I have said, the decisive fact there was that the actual route was different in kind from the contractual route. Apart from this authority, the appellants relied on a passage in KENNEDY ON C.I.F. CONTRACTS (2nd Edn.), p. 39: "In the absence of express terms in the contract the customary or usual route must be followed". I cannot accept this general proposition without some qualification. In particular, since it is in any case clear that it is not the date of the contract but the time of performance that determines what is customary, the proposition must be qualified by adding to it some such words as "unless at the time of performance there is no customary or usual route". If these words are implied, the question arises: "What then?" The answer must depend on the circumstances of each case. This leads me directly to s. 32 (2) of the Sale of Goods Act, 1893, which provides that:

"Unless otherwise authorised by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case . . ."

- I If there is no customary route, that route must be chosen which is reasonable. If there is only one route, that must be taken if it is practicable: see *Evans, Sons & Co. v. Cunard Steamship Co., Ltd.* (8) per WILLS, J.

I turn now to what was the main argument for the appellants, that the contract was frustrated by the closure of the canal from Nov. 2, 1956, till April, 1957.

(5) [1958] 3 All E.R. 115; [1959] 1 Q.B. 131.

(6) [1959] 2 All E.R. 693; [1960] 2 Q.B. 318.

(7) [1917] 2 K.B. 348; 14 Asp. M.L.C. 34.

(8) (1902), 18 T.L.R. at p. 375.

Were it not for the decision of McNAIR, J., in *Green's* case (9), I should not have thought this contention arguable, and I must say with the greatest respect to that learned judge that I cannot think he has given full weight to the decisions old and new of this House on the doctrine of frustration. He correctly held on the authority of *Reardon Smith Lines, Ltd. v. Black Sea & Baltic General Insurance Co., Ltd.*, *The Indian City* (10), that (11)

"where a contract expressly, or by necessary implication, provides that performance, or a particular part of the performance, is to be carried out in a customary manner, the performance must be carried out in a manner which is customary at the time when the performance is called for."

But he concluded that the continued availability of the Suez route was a fundamental assumption at the time when the contract was made, and that to impose on the sellers the obligation to ship by an emergency route via the Cape would be to impose on them a fundamentally different obligation, which neither party could, at the time when the contract was made, have dreamed that the sellers would be required to perform. Your Lordships will observe how similar this line of argument is to that which supports the implication of a term that the route should be via Suez and no other. I can see no justification for it. We are concerned with a c.i.f. contract for the sale of goods, not a contract of affreightment, though part of the sellers' obligation will be to procure a contract of affreightment. There is no evidence that the buyer attached any importance to the route. He was content that the nuts should be shipped at any date in November or December. There was no evidence and, I suppose, could not be that the nuts would deteriorate as the result of a longer voyage and a double crossing of the Equator, nor any evidence that the market was seasonable. In a word, there was no evidence that the buyer cared by what route or, within reasonable limits, when, the nuts arrived. What, then, of the seller? I recall the well-known passage in the speech of LORD ATKINSON in *Johnson v. Taylor Bros. & Co., Ltd.* (12), where he states the obligations of the vendor of goods under a c.i.f. contract, and asks which of these obligations is (to use McNAIR, J.'s word) "fundamentally" altered by a change of route. Clearly the contract of affreightment will be different and so may be the terms of insurance. In both these respects, the seller may be put to greater cost; his profit may be reduced or even disappear. But it hardly needs reasserting that an increase of expense is not a ground of frustration: see *Larrinaga & Co. v. Société Franco-Américaine des Phosphates de Medulla* (13).

Nothing else remains to justify the view that the nature of the contract was "fundamentally" altered. That is the word used by VISCOUNT SIMON in *British Movietonews, Ltd. v. London and District Cinemas, Ltd.* (14), and by my noble and learned friend, LORD REID, in *Davis Contractors, Ltd. v. Fareham U.D.C.* (15). In the latter case, my noble and learned friend, LORD RADCLIFFE, used (16) the expression "radically different", and I think that the two expressions mean the same thing, as, perhaps, do other adverbs which have been used in this context. Whatever expression is used, I venture to say what I have said myself before and others more authoritatively have said before me, that the doctrine of frustration must be applied within very narrow limits. In my opinion, this case falls far short of satisfying the necessary conditions. Reluctant as I am to differ from a judge so experienced in commercial law as McNAIR, J., I am glad to find that my view is shared by ASHWORTH, J., and all the members of the Court of Appeal.

(9) [1958] 3 All E.R. 115; [1959] 1 Q.B. 131.

(10) [1939] 3 All E.R. 444; [1939] A.C. 562.

(11) [1958] 3 All E.R. at p. 119; [1959] 1 Q.B. at p. 145.

(12) [1920] A.C. at pp. 155, 156.

(13) (1922), 28 Com. Cas. 1; *aff'd.* H.L., (1923), 29 Com. Cas. 1; 16 Asp. M.L.C. 133.

(14) [1951] 2 All E.R. at p. 625; [1952] A.C. at p. 185.

(15) [1956] 2 All E.R. at p. 155; [1956] A.C. at p. 723.

(16) [1956] 2 All E.R. at p. 160; [1956] A.C. at p. 729.

A On this part of the case, I have not thought it necessary to deal with the decision of PEARSON, J., in *Société Franco Tunisienne d'Armement v. Sidermar S.P.A.* (17). There the question was whether a charterparty was frustrated by the blocking of the Suez Canal. The learned judge held that it was, but was at pains to point out that the position was very different in a contract for the sale of goods. On that point, I agree with him and need not discuss the matter further.

B I come finally to a question which has given me some trouble. I refer to the sixth finding in the Special Case which I have already fully set out. It will be remembered that the vital words were "not commercially or fundamentally different". DIPLOCK, J., regarding this as a finding of fact, thought that the case was thereby concluded. I cannot regard this as a correct decision. It is a question of law whether a contract has been frustrated, and it is commonly said that frustration occurs when conditions arise which are fundamentally different from those contemplated by the parties. But it does not follow from the use by the arbitrator of the word "fundamentally" in describing the difference between the actual and the contemplated conditions that the court is precluded from forming its own judgment whether or not a contract has been frustrated. It is of great value to the court to know that lay arbitrators with special knowledge do or do not regard the new circumstances as so different from those contemplated that they think "fundamental" an appropriate word to use. But the value is evidential only. It has not the sanctity of a finding of fact. I do not say that an arbitrator should be debarred from the use of the word "fundamental" or "radical" or any other word which he thinks apt to give emphasis to his view. But, if he does so, he must not be taken indirectly to determine the question of law which the court must decide.

In my opinion, the appeal should be dismissed with costs.

LORD REID: My Lords, the appellants agreed to sell to the respondents three hundred tons of Sudan groundnuts at £50 per ton c.i.f. Hamburg. Admittedly the groundnuts had to be shipped from Port Sudan. The usual and normal route at the date of the contract was via Suez Canal. Shipment was to be November/December, 1956, but, on Nov. 2, 1956, the canal was closed to traffic and it was not reopened until the following April. It is stated in the Special Case that "the [appellants] could have transported the goods from Port Sudan to Hamburg via the Cape during November or December, 1956". The freight via Suez would have been about £7 10s. per ton. The freight via the Cape was increased by stages. It was £15 per ton after Dec. 13. I shall assume in favour of the appellants that the proper comparison is between £7 10s. and £15 per ton. The appellants refused to ship the goods via the Cape and, on Feb. 9, the respondents gave notice of their intention to buy in against the appellants. The question now is whether, by reason of the closing of the Suez route, the contract had been ended by frustration.

The appellants' first argument was that it was an implied term of the contract that shipment should be via Suez. It is found in the Case that both parties contemplated that shipment would be by that route, but I find nothing in the contract or in the Case to indicate that they intended to make this a term of the contract, or that any such term should be implied; they left the matter to the ordinary rules of law. Admittedly, the ordinary rule is that a shipper must ship by the usual and customary route, or, if there is no such route, then by a practicable and reasonable route. But the appellants' next contention was that this means the usual and customary route at the date of the contract, while the respondents maintain that the rule refers to the time of performance. There appears to be no decided case about this and, perhaps, that is not surprising because the point cannot often arise. Apart from the opinion of McNAIR, J.,

in *Carapanayoti & Co., Ltd. v. E. T. Green, Ltd.* (18) and of the Court of Appeal in this case which are against the appellants, there are a few expressions of opinion on this matter, but I shall not examine them as the precise point may not have been in the minds of their authors, and I am doing no injustice to the appellants because, on the whole, these opinions favour the respondents' contention. Regarding the question as an open one, I would ask which is the more reasonable interpretation of the rule. A

If the appellants are right, the question whether the contract is ended does not depend on the extent to which the parties or their rights and obligations are affected by the substitution of the new route for the old. If the new route made necessary by the closing of the old is substantially different, the contract would be at an end, however slight the effect of the change might be on the parties. That appears to me to be quite unreasonable; in effect, it means writing the old route into the contract, although the parties have chosen not to say anything about the matter. On the other hand, if the rule is to ascertain the route at the time of performance, then the question whether the seller is still bound to ship the goods by the new route does depend on the circumstances as they affect him and the buyer; whether or not they are such as to infer frustration of the contract. That appears to me much more just and reasonable and, in my opinion, that should be held to be the proper interpretation of the rule. B C D

I turn, then, to consider the position after the canal was closed, and to compare the rights and obligations of the parties thereafter, if the contract still bound them, with what their rights and obligations would have been if the canal had remained open. As regards the sellers, the appellants, the only difference to which I find reference in the Case—and, indeed, the only difference suggested in argument—was that they would have had to pay £15 per ton freight instead of £7 10s. They had no concern with the nature of the voyage. In other circumstances, that might have affected the buyers, and it is necessary to consider the position of both parties because frustration operates without being invoked by either party and, if the market price of groundnuts had fallen instead of rising, it might have been the buyers who alleged frustration. There might be cases where damage to the goods was a likely result of the longer voyage which twice crossed the Equator, or, perhaps, the buyer could be prejudiced by the fact that the normal duration of the voyage via Suez was about three weeks, whereas the normal duration via the Cape was about seven weeks. But there is no suggestion in the Case that the longer voyage could damage the groundnuts or that the delay could have caused loss to these buyers of which they could complain. Counsel for the appellants rightly did not argue that this increase in the freight payable by the appellants was sufficient to frustrate the contract, and I need not, therefore, consider what the result might be if the increase had reached an astronomical figure. The route by the Cape was certainly practicable. There could be, on the findings in the Case, no objection to it by the buyers, and the only objection to it from the point of view of the sellers was that it cost them more. And it was not excluded by the contract. Where, then, is there any basis for frustration? It appears to me that the only possible way of reaching a conclusion that this contract was frustrated would be to concentrate on the altered nature of the voyage. I have no means of judging whether, looking at the matter from the point of view of a ship whose route from Port Sudan was altered from via Suez to via the Cape, the difference would be so radical as to involve frustration, and I express no opinion about that. As I understood the argument, it was based on the assumption that the voyage was the manner of performing the sellers' obligations and that, therefore, its nature was material. I do not think so. What the sellers had to do was simply to find a ship proceeding by what was a practicable and now a reasonable route—if, perhaps, not yet a usual route—to pay the freight and obtain a proper bill of lading, and to furnish E F G H I

A the necessary documents to the buyer. That was their manner of performing their obligations, and, for the reasons which I have given, I think that such changes in these matters as were made necessary fell far short of justifying a finding of frustration. I agree that the appellants cannot rely on the provisions of cl. 6 of the contract regarding prevention of shipment. I, therefore, agree that this appeal should be dismissed.

B I should, perhaps, add a few words about the finding in the Case that performance by shipping via the Cape of Good Hope was "not commercially or fundamentally different" from performance by shipping via Suez. This cannot be intended to mean that it was neither different commercially nor different fundamentally. Plainly, there is a commercial difference between paying £7 10s. and paying £15 per ton freight. It must mean that performance was
C not fundamentally different in a commercial sense. But all commercial contracts ought to be interpreted in light of commercial considerations. I cannot imagine a commercial case where it would be proper to hold that performance is fundamentally different in a legal, though not in a commercial, sense. Which-
D ever way one takes it, the ultimate question is whether the new method of performance is fundamentally different, and that is a question of law. The commercial importance of the various differences involved in the change of route—delay, risk to the goods, cost, etc.—is fact on which specific findings by arbitrators are entirely appropriate. But the inference to be drawn on a consideration of all the relevant factors must, in my view, be a matter of law—was there or was there not frustration?

E LORD RADCLIFFE: My Lords, I think that the outcome of this appeal depends on a short point. The real issue, as I see it, is to determine how to define the obligation of the appellants, the vendors, under the sale contract of Oct. 4, 1956, so far as it related to shipment of the goods sold and the provision of shipping documents. Once it is settled what that definition should be, there is not much difficulty in seeing what are the legal consequences that should
F follow, having regard to the facts found for us by the Special Case.

This is a sale of goods on c.i.f. terms. Such a sale involves a variety of obligations, both those written out in the contract itself and those supplied by implication of law for the business efficacy of the transaction. The only sector of these obligations that is relevant for the purpose of this case is the vendor's duty "to procure a contract of affreightment, under which the goods will be delivered at
G the destination contemplated by the contract" (see *Biddell Brothers v. E. Clemens Horst Co.* (19), per HAMILTON, J.). Even within this sector, however, there are gaps which the law has to fill in; for instance, what form of contract of affreightment will meet the needs of the transaction, and what route or routes are permissible for the carrying vessel selected? In the present case, nothing
H turns on the form of the bill of lading, which is not in evidence; everything turns on the question of route. The written contract makes no condition about this, its only stipulation being that shipment is to be from a West African port, by which we are asked to assume that the parties in fact meant Port Sudan. So the voyage was to begin at Port Sudan and to end at Hamburg. The primary duty under this part of the contract was to despatch the groundnuts by sea from one port to the destination of the other. At the date when the contract
I was entered into, the usual and normal route for the shipment of Sudanese groundnuts from Port Sudan to Hamburg was via the Suez Canal. It would be unusual and rare for any substantial parcel of Sudanese groundnuts from Port Sudan to Europe to be shipped via the Cape at any time when the Suez Canal was open. The Suez Canal was blocked on Nov. 2, 1956, and remained blocked until April, 1957. Nevertheless, during the months of November/December, 1956, the period in which the vendors had to ship under the contract, it was

feasible for them to transport the goods via the Cape of Good Hope. It would have involved a voyage of some 11,137 miles as against 4,386 miles by way of Suez, and it would have meant a rise in freight rate of twenty-five per cent. (and, in the last two weeks of December, one hundred per cent.) above that ruling when the sale contract was made. These differences did not, however, in the opinion of the Board of Appeal of the Incorporated Oil Seed Association who state the Case, render transport by the Cape route commercially or fundamentally different from transport by way of the Suez Canal.

Now, in these circumstances, were the appellants under obligation to procure a bill of lading for the transport of the goods by the Cape route, the Suez Canal not being available? That depends on how their obligation is defined. It is said on their behalf that the duty of shipment is a duty to ship by the "customary or usual route", a route which can be ascertained as that followed by settled and established practice (see KENNEDY ON C.I.F. CONTRACTS (2nd Edn.), p. 39). Failing express provision on the point by the terms of the contract, that is, in my opinion, a correct general statement of what the law would imply; but I do not accept the further proposition which the appellants' argument requires, namely that, given the existence of such a route at the date of the contract, the whole of the vendor's obligation with regard to shipment is contained in this phrase, "the customary or usual route". Putting aside exceptional cases in which there never has become established any customary route at all from one port to the other, we have to consider the case in which, while there has been a customary route at or before the date of the sale, that route is not available at the time when the vendor is ready to ship. The appellants say that, since the whole obligation consists in shipping by the customary or usual route, the contract would, in that event, become unenforceable, either because its terms had become impossible of performance or because it was avoided by frustration. In this context, the two alternatives would amount to the same thing. I think, however, that the vendor's obligation has to be determined in the light of matters as they stand at the date of shipment, and it may be proper for him to take a course in these circumstances which it would not have been proper for him to take at the date of the contract.

In my opinion, there is no magic in the introduction of the formula "customary or usual route" to describe the term implied by law. It is only appropriate because it is in ordinary circumstances the test of what it is reasonable to impose on the vendor in order to round out the imperfect form of the contract into something which, as mercantile men, the parties may be presumed to have intended. The corpus of commercial law has been built up largely by this process of supplying from the common usage of the trade what is the unexpressed intention of the parties. It is necessary first to ascertain what is the commercial nature or purpose of the adventure that is the subject of the contract; that ascertained, it has next to be asked what, within this scope, are the essential terms which, so far as not expressed, must be implied in order to make the contract efficacious as a business instrument. The natural way to answer this question is to find out what is the usual thing in the same line of business. Various adjectives or phrases are employed to describe the point of reference. I can quote the following from judicial decisions:—recognised, current, customary, accustomed, usual, ordinary, proper, common, in accordance with custom or practice or usage, a matter of commercial notoriety; and, of course, reasonable. I put "reasonable" last, because I think that the other phrases are at bottom merely instances of what it is reasonable to imply having regard to the nature and purpose of the contract. The basic proposition is, therefore, that laid down by BRETT, M.R., in *Sanders v. Maclean* (20): "The stipulations which are inferred in mercantile contracts are always that the party will do what is mercantilely reasonable". Applying that proposition to the present case, I do not

A think that it is enough for the appellants to point out that the usual and customary route for the transport of groundnuts from Port Sudan to Hamburg was via the Suez Canal and that, at the date of the sale contract, both parties contemplated that shipment would be by that route. This contract was a sale of goods which involved despatching the goods from Port Sudan to Hamburg; but, of course, the transport was not the whole but only one of the incidents of the contract, in which particular incident neither vendors nor buyers were directly implicated. There was nothing to prevent the vendors from despatching the goods as contracted, unless they were impliedly bound as a term of the contract to use no other route than that of the Suez Canal. I do not see why that term should be implied; and, if it is not implied, the true question seems to me to be, since shipment was due to be made by some route during November/December, whether it was a reasonable action for a mercantile man to perform his contract by putting the goods on board a ship going round the Cape of Good Hope and obtaining a bill of lading on this basis. A man may habitually leave his house by the front door to keep his appointments; but, if the front door is stuck, he would hardly be excused for not leaving by the back. The question, therefore, is what is the reasonable mercantile method of performing the contract at a time when the Suez Canal is closed, not at a time when it is open. To such a question the test of "the usual and customary route" is *ex hypothesi* inapplicable.

On the facts found by the Special Case, I think that the answer is inevitable. The voyage would be a much longer one in terms of miles; but length reflects itself in such matters as time of arrival, condition of goods, increase of freight rates. A change of route may, moreover, augment the sheer hazard of the transport. There is nothing in the circumstances of the commercial adventure represented by the appellants' contract which suggests that these changes would have been material. Time was plainly elastic. Not only did the vendors have the option of choosing any date within a two-month period for shipment, but also there was a wide margin within which there might be variations of the speed capacity of the carrying vessel or vessels selected. There was no stipulated date for arrival at Hamburg. Nothing appears to suggest that the Cape voyage would be prejudicial to the condition of the goods or would involve special packing or stowing, nor does there seem to have been any seasonal market to be considered. With all these facts before them, as well as the measure of freight surcharge that would fall to the vendors' account, the Board of Appeal made their finding that performance by shipping on the Cape route was not "commercially or fundamentally different" from shipping via the Suez Canal. We have no material which would make it possible for us to differ from that conclusion.

It has been a matter of debate whether this finding ought to be treated as a finding of fact, by which a court would be bound, or as a holding of law, which, as such, would be open to review. It was treated as the first by the learned trial judge; it was treated more as the second by the Court of Appeal whose view of it was, I think, that, while of the utmost relevance for the determination of the final issue of the case, it did not bind the court so as to dictate what it should decide. So far as the distinction can be made between law and fact, I agree with the Court of Appeal. I regard it as a mixed question of fact and law whether transport via the Cape of Good Hope was so materially different from transport via the Suez Canal that it was not within the range of the *c.i.f.* contract or, alternatively, was so radically different that it left that contract frustrated. The ultimate conclusion is a conclusion of law, but, in a case of this sort, that conclusion is almost completely determined by what is ascertained as to mercantile usage and the understanding of mercantile men.

I do not believe that in this, as in many other branches of commercial law, it is possible to analyse very precisely where law begins and fact ends. That is because in this field legal obligations and legal rights are largely founded on

usage and practice, which, themselves, are established as matters of fact. Many A things which are now regarded as settled principles of law originated in nothing more than common mercantile practice, and the existence and terms of this practice have been vouched sometimes by questions put to and answered by special juries, sometimes by the findings and views of commercial arbitrators and sometimes by the bare statements of the judges, founded on their experience B at the Bar or on the Bench. It would be difficult, for instance, to separate the judgments on commercial law delivered by three such masters as LORD ESHER, SCRUTTON, L.J., and LORD SUMNER from their personal acquaintance with mercantile usages and their translation of the one into the terms of the other. I do not think, therefore, that it is right to be very analytical in distinguishing between questions of law and questions of fact in matters of this kind. Since LORD MANSFIELD'S day, commercial law has been ascertained by a co-operative C exchange between judge and jury, and, now that arbitrators have taken the place of juries, I do not think that we can start all over again with an absolute distinction between the respective spheres of judge and arbitrator. Generally speaking, I do not think that a finding in the form which we have here can ever be conclusive on the legal issue. When all necessary facts have been found, it remains a question of law for the court what, on the true construction of the D contract, are the obligations imposed or whether, having regard to the terms of the contract and the surrounding circumstances, any particular term is to be implied. But, when the implication of terms depends essentially on what is customary or usual or accepted practice, it is inevitable that the findings of fact, whatever they may be, go virtually the whole way towards determining the legal result. E

The finding in this case is, perhaps, unusual in that it does not speak for any usage or practice of trade—*ex hypothesi*, there was no established usage once the Suez Canal was blocked—but rather for the view of mercantile men as to the significance of adopting the alternative route. It is a summary way of stating that a voyage by that route would not involve any elements of difference that would be regarded as material by persons familiar with the trade. It would be F contrary to common sense that a court, which cannot uninstructed assess the commercial significance of, say, a surcharge of £7 10s. per ton for freight in a c.i.f. contract of this kind, should not pay careful attention to such a view from such a source; just as it would be, I think, contrary to principle that a court should regard a view so expressed as finally conclusive of the legal issue. I must add that I do not think that such a finding is altogether satisfactory for G the purposes of a Special Case. It is, in essence, a summary of the commercial significance of several separate aspects of the Cape route as contrasted with the Suez Canal route, and it is embarrassing for a court which has to answer the question raised by the Case to have before it only the summary and not the arbitrators' findings on the individual aspects which make up the conclusion. I can see that, if this form came into general use, a court might feel obliged to H send back the Case containing it for further and more explicit findings. It would have been better if the Special Case had identified the several aspects of difference, length, time, cost, risk, etc., which, as it is, the court is left to infer, and had made with regard to them, both separately and together, the finding that was clearly intended that they were not significant from the mercantile point of view. I

I agree with the opinion already expressed by my noble and learned friends who have preceded me that the exception clause, cl. 6 of the contract, does not apply. I would dismiss the appeal.

LORD HODSON: My Lords, the appellants have put in the forefront of their argument that it is an implied term of every c.i.f. contract, including the contract under consideration, that the goods shall be carried by the (or if more than one a) customary route. In this connexion, it is contended that the

A relevant moment of time for determining whether a route is customary is the time when the contract is concluded. The first part of the proposition has been accepted by DIPLOCK, J., and by the majority of the Court of Appeal, while the second part was rejected, it being held in both courts that the seller's obligation, under a contract such as this, is to ship by a route usual and customary at the time of performance. If the whole of the proposition were accepted, it would be equivalent in this contract to adding by implication the words "via Suez". For the reasons already given, such implication is unnecessary and should be rejected. HARMAN, L.J., in the Court of Appeal did not accept either limb of the proposition and did not see the necessity of implying any such words as "by the usual and customary route". He pointed out (21) that the seller's duty was to ship the goods from Port Sudan to the named port by a ship leaving within the given period.

It is true that, as the Case finds: "At the date when the contract was made both parties contemplated that shipment would be made by the Suez Canal". This, however, is a contract of sale not of carriage and, unless there is some special rule applicable to c.i.f. contracts, the duty of the seller is defined by s. 32 of the Sale of Goods Act, 1893, which provides—

"(1) Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is prima facie deemed to be a delivery of the goods to the buyer.

"(2) Unless otherwise authorised by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages."

Applying the provisions of that section to this case, the seller is bound to ship by a reasonable route having regard to the nature of the goods and the other circumstances of the case. It might be, as HARMAN, L.J., pointed out (21), that it was essential for the buyer to receive the goods within a given time, and that this could only be done by sending them via Suez; moreover, the goods might be of a nature which would not stand a route crossing the Equator twice. Unless persuaded by authority that this line of reasoning is wrong, I find it convincing, for the Sale of Goods Act in effect codifies the relevant law.

The appellants rely on a passage to be found in KENNEDY ON C.I.F. CONTRACTS (2nd Edn.), p. 39: "In the absence of express terms in the contract the customary or usual route must be followed". This passage is not supported by any authority save that it was, I think, assumed to be correct by SCRUTTON, L.J., in *Re L. Sutro & Co. and Heilbut, Symons & Co.* (22). The actual decision in that case is not of assistance. The majority of the Court of Appeal held that, in a contract made in 1916 for the sale of rubber to be shipped from the East to New York, a tender of goods which had been transmitted by rail from the western sea board of the United States to New York was not a good tender and the buyers were not bound to accept the same. SCRUTTON, L.J., who dissented, was of opinion that the tender was good, and the route taken by the rubber was at the time a usual route and not excluded by the terms of the contract from the means of performance open to the vendor. He did, however, use these words (23):

"Where there is a contract to carry from A to B if the exact route or method of carriage is not specified in the contract, the carriage must be by one of the usual routes and methods of carriage, at the option of the carrier."

(21) [1960] 2 All E.R. at p. 170; [1960] 2 Q.B. at p. 369.

(22) [1917] 2 K.B. 348; 14 Asp. M.L.C. 34.

(23) [1917] 2 K.B. at p. 362; 14 Asp. M.L.C. at p. 38.

This language is, I think, appropriate to a contract of affreightment, but it is true that that sentence was used in a case where a c.i.f. contract was under consideration and is for that reason relied on as an authoritative dictum contained as it is in the judgment of a master of the law whose words carry great weight not least in matters appertaining to commercial transactions. Notwithstanding the fact that the procuring of a contract of affreightment is part of the obligation of the buyer under a c.i.f. contract, I am not persuaded that the proposition contended for by the appellants is sound, and I am of the same opinion as *HARMAN, L.J.* (24), that it is not necessary to imply in this contract the words "by the usual and customary route". On any view it would seem that the passage in *KENNEDY ON C.I.F. CONTRACTS* requires some qualification for, if an event happened which prevented a particular route being used so that a slightly longer journey, perhaps outside permissible deviation, was necessary, then, other routes being available, the seller could surely not say he was free from his contract.

If I have stated the obligations of the buyers correctly, one then looks to see what the position was after the closure of the Suez Canal rendered shipment impossible by what would have been the normal route but for the closure. The contract was dated Oct. 4, 1956, and provided for the sale of three hundred tons of groundnuts at a price of £50 per one thousand kilos c.i.f. Hamburg. Shipment November/December, 1956. On Nov. 2, 1956, the canal was blocked, and transportation by that route became impossible until April, 1957. Thus, virtually the whole of the shipment period remained open to the sellers. The freight ruling at the time of the contract for shipment of groundnuts for Port Sudan to Hamburg via the Suez Canal was £7 10s. per ton. After the closure, the freight rates were increased by surcharges for goods proceeding by the Cape of Good Hope, viz., as from Nov. 10, 1956, twenty-five per cent., and as from Dec. 13, 1956, one hundred per cent. The distance from Port Sudan to Hamburg via the Suez Canal is approximately 4,386 miles, and the distance from Port Sudan to Hamburg via the Cape of Good Hope is approximately 11,137 miles. On Jan. 15, 1957, the buyers bought in a quantity of groundnuts against the sellers at a price of £68 10s. per one thousand kilos, the market price at this time being £68 15s. per ton. Nothing was proved or found as to the nature of the goods or other circumstances which would render the route round the Cape unreasonable or impracticable, and this route was at all times available. Unless shipment by the Cape route was so onerous to the sellers as to make the performance of the contract fundamentally different in kind from any performance they had promised, the contract of Oct. 4, 1956, remained binding between the parties.

The material date is the date of performance when the seller chooses to ship the goods by a ship of his choice which may be fast or slow and, during the shipment period, it follows from the findings in the award that the Cape route was the only reasonable and practicable route. The freight was higher than that involved in the Suez route but, even when increased by one hundred per cent., still remained only a proportion of the purchase price of the groundnuts, even though a significant proportion. Freight rates go up and down, and it is exceedingly difficult in a commercial contract to escape from its terms on the ground of frustration by the increased expense involved when the time of performance is reached as compared with that contemplated when the contract is made. Indeed, the appellants did not rest their frustration argument on the increase of freight, realising the difficulty of maintaining such a submission unless the increase were astronomical, but maintained that "the long haul round the Cape" was so fundamentally different from what had earlier been the usual route that the c.i.f. contract which included the obligation to procure a contract of affreightment had been frustrated by the closure of the canal. I see no ground as a matter of law on the true construction of this contract and the facts found in the Special

A Case on which frustration can stand. VISCOUNT MAUGHAM pointed out in *Joseph Constantine S.S. Line, Ltd. v. Imperial Smelting Corp., Ltd.* (25):

“The doctrine of frustration is only a special case of the discharge of contract by an impossibility of performance arising after the contract was made.”

B On the construction of the contract which appears to me to be correct having regard in particular to the dates for shipment extending over the period November/December, 1956, there is no room, in my judgment, for any application of the doctrine to this case.

I would add that I cannot agree with DIPLOCK, J., that the question in this case is answered simply by reference to the finding of mixed law and fact numbered (vi) in the Special Case where the arbitrators found, in so far as it is a question of fact, and held, in so far as it is a question of law, that

“The performance of the contract by shipping the goods on a vessel routed via the Cape of Good Hope was not commercially or fundamentally different from its being performed by shipping the goods on a vessel routed via the Suez Canal.”

D This does not purport to be a finding of fact only although it is true, I think, that a finding of fact can properly be extracted from it, namely, that nothing had been proved such as, for example, some characteristic of the goods which would have rendered the performance commercially different in kind. This finding of fact is relevant, being a conclusion by commercial men who will know what relevance is permissible although, ultimately, the question whether or not there has been frustration is a question of law. The ingredients of frustration are the facts, and those facts are for the arbitrators whether they are facts found directly or by inference. For example, in *Jackson v. Union Marine Insurance Co., Ltd.* (26), the question left by BRETT, J., to the jury was:

“... whether the time necessary for getting the ship off and repairing her so as to be a cargo-carrying ship, was so long as ... to put an end in a commercial sense to the commercial speculation entered upon by the ship-owner and the charterers”?

This question was characterised in the Court of Exchequer Chamber by BRAMWELL, B., as one which could not have been left in better terms although it might be paraphrased or amplified. I only comment that the actual question there related to delay which is one of the relevant factors in reaching a conclusion as to frustration. It does not seem to me to involve that a finding of fact made by arbitrators in such general language as that contained in cl. (vi) of this award is conclusive as a matter of law in determining whether or not the contract has been frustrated. If such were the case, the same set of facts could be decided by arbitrators either way in successive cases without the court having power to intervene.

H There remains only for consideration the exception clause (No. 6). Since it was at all times possible for the appellants to effect shipment of the goods at Port Sudan on a vessel which would carry them to Hamburg, this clause does not avail the appellants: see the judgment of BAILHACHE, J., in *Re Comptoir Commercial Anversois and Power, Son & Co.* (27), confirmed in the Court of Appeal.

I would dismiss the appeal.

LORD GUEST: My Lords, the relevant facts in this appeal are: (i) By contract of sale dated Oct. 4, 1956, the respondents contracted with the appellants for the purchase of three hundred tons Sudanese groundnuts at £50 per one thousand kilos c.i.f. from Port Sudan to Hamburg, shipment November/December, 1956. (ii) The usual and normal route from Port Sudan to Hamburg was, at the

(25) [1941] 2 All E.R. at p. 174; [1942] A.C. at p. 168.

(26) See (1874), L.R. 10 C.P. at p. 126; 2 Asp. M.L.C. at pp. 436, 444.

(27) [1920] 1 K.B. 868.

date when the contract was made, via the Suez Canal the distance being approximately 4,386 miles. (iii) The Suez Canal was blocked on Nov. 2, 1956, and remained blocked until Apr. 9, 1957. (iv) An alternative route from Port Sudan to Hamburg via the Cape of Good Hope was available throughout November and December, 1956, the distance being approximately 11,137 miles, and the appellants could have transported the goods from Port Sudan to Hamburg during this period. The appellants never shipped any goods or tendered any documents and, in answer to a claim of damages by the respondents, contended that the contract had been frustrated by the closure of the Suez Canal. A
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I may first dispose of a preliminary argument by the appellants. Counsel for the appellants argued that the obligation of the sellers was to procure a contract of affreightment for the buyer whereby the goods will be conveyed to the contractual destination by the usual and customary route to be ascertained when the contract was made. Authority for this proposition was said to be found in *KENNEDY ON C.I.F. CONTRACTS* (2nd Edn.), p. 39, where it is stated: "In the absence of express terms in the contract the customary or usual route must be followed". I will assume for the purposes of this argument that this is a correct statement of the law. Counsel's argument further proceeded that, if it was a breach of the contract for the sellers to provide a contract of affreightment other than by the usual and customary route, then the closure of that route must result in frustration of the contract. "How can a route", he said, "which was in breach of the contract one day, be obligatory next day?" This is not, to my mind, a true dilemma. The fallacy of this argument, in my opinion, is to confuse a breach of contract for which damages may be due with the circumstances under which frustration of the contract occurs. It by no means follows that, assuming the sellers would have been in breach of contract to ship via the Cape of Good Hope, the sellers would be entitled to avoid the contract because the Suez Canal route was not available. This would depend on whether shipment via the Cape was a radically different thing from shipment via the Suez Canal. C
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The juridical basis of the doctrine of frustration was recently examined by this House in *Davis Contractors, Ltd. v. Fareham U.D.C.* (28), and it is unnecessary to deal with the earlier cases on the subject. Whether frustration is regarded as depending on the addition to the contract of an implied term or as depending on the construction of the contract as it stands does not appear to me to matter in the circumstances of the present case. LORD REID in the *Davis* case (29) approached the matter on the basis that frustration only occurred where a fundamentally different situation had arisen which the contract had not contemplated. LORD RADCLIFFE (30) put the matter thus: F
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"So, perhaps, it would be simpler to say at the outset that frustration occurs whenever the law recognises that, without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do." H

The contract under consideration is a c.i.f. contract. Under such a contract, the seller has to procure a contract of affreightment under which the goods will be delivered at the destination contemplated (*Johnson v. Taylor Bros. & Co., Ltd.* (31), per LORD ATKINSON). All that is contained in the contract is "Shipment from Port Sudan as per bill or bills of lading dated or to be dated November/December, 1956". No route is given or provided for. The sellers' obligation is governed by s. 32 (2) of the Sale of Goods Act, 1893, whereby they have to make such contract with the carrier on behalf of the buyer as may be reasonable having I

(28) [1956] 2 All E.R. 145; [1956] A.C. 696.

(29) [1956] 2 All E.R. at p. 155; [1956] A.C. at p. 723.

(30) [1956] 2 All E.R. at p. 160; [1956] A.C. at pp. 728, 729.

(31) [1920] A.C. at p. 156.

A regard to the nature of the goods and the other circumstances of the case. They must, therefore, procure a reasonable contract of affreightment. The appellants contended that the sellers' obligation was to procure a contract of affreightment which they can tender to the buyer whereunder the goods will be conveyed by the usual and customary route to the contractual destination, and that the usual and customary route must be ascertained at the date when the contract was made. The argument further proceeded that, when this contract was entered into, the usual and customary route was via the Suez Canal and that, as that route had been closed by the time shipment fell to be made, the contract had been frustrated. The first and critical matter to ascertain is the date when the sellers' obligation in regard to the contract of affreightment is to be judged. Under the present contract, the sellers' obligation was shipment by a bill of lading to be dated November/December, 1956. They could, therefore, fulfil their contractual obligation by shipping at any date up to Dec. 31. By the date when performance was called for, the Suez Canal was closed and the only available route was by the Cape of Good Hope. In my opinion, the sellers' obligation is to be determined by the circumstances prevailing at the date when they choose to ship the goods, and not when the contract was made. No authority was quoted by the appellants for the contention that the *tempus inspicendum* was the date of the contract. It is also, in my view, contrary to common sense and the terms of this contract. In regard to the question whether the usual or customary route must be followed, reliance was placed on an obiter dictum of SCRUTTON, L.J., in *Re L. Sutro & Co. and Heilbut, Symons & Co.* (32):

E "Where there is a contract to carry from A to B if the exact route or method of carriage is not specified in the contract, the carriage must be by one of the usual routes and methods of carriage, at the option of the carrier. If the other party wishes to exclude some usual route or method of carriage, he can do so by inserting such a term into the contract, but in the absence of such a term the option of selecting a usual method of performance is with the person who has to perform."

F The first part of the quotation is clearly dealing with a contract of affreightment where the carrier has the option of selecting a usual route. In the second part of the quotation, I am not clear whether the learned lord justice is dealing with a c.i.f. contract or a contract of affreightment. I am not at all satisfied that this dictum, together with the quotation from KENNEDY ON C.I.F. CONTRACTS (2nd Edn.), p. 39, previously referred to, is justification for implying into every c.i.f. contract an obligation on the seller to obtain a contract of affreightment by the usual and customary route. As HARMAN, L.J., in the Court of Appeal said (33): "Why it should be necessary to imply such words as 'by the usual and customary route', I do not see". In my opinion, all that the seller has to do is to procure a reasonable contract of affreightment. In judging whether it was a reasonable contract of affreightment, the question whether the route given is the usual or customary route may be of importance for consideration with all other relevant circumstances. Whether or not such a term is implied in the present case, at the time when performance was called for there was no usual or customary route because the Suez Canal was closed, and the only practicable route was via the Cape of Good Hope. The sellers could have fulfilled their obligation by a bill of lading via the Cape. There was, accordingly, no frustration because there was no change of circumstances to justify the application of the doctrine.

I The cases dealing with contracts of affreightment are, in my view, not helpful because in such contracts very different considerations apply from those in a contract of sale. In a c.i.f. contract, the seller does not have to deliver the goods. He only has to ship them at the port indicated with a contract of

(32) [1917] 2 K.B. at p. 362.

(33) [1960] 2 All E.R. at p. 170; [1960] 2 Q.B. at p. 369.

affreightment to the port of destination. An example of the frustration of a contract of affreightment is *Société Franco Tunisienne d'Armement v. Sidermar S.P.A.* (34), where PEARSON, J., held that a charterparty was frustrated by the blocking of the Suez Canal on the ground that it was a term of the contract (express or implied) that the vessel was to go by the Suez Canal, and he was able to hold that the route via the Cape was so different that it was a fundamentally different voyage. There are no circumstances in the present case to justify the implication of a term that the route should be via the Suez Canal. The only case in which a c.i.f. contract has been held to be frustrated by closure of the Suez Canal is *Carapanayoti & Co., Ltd. v. E. T. Green, Ltd.* (35), decided by McNAIR, J. The circumstances were almost precisely similar to the present. The learned judge held that the nature and extent of the seller's obligation in relation to the route was to be ascertained at the time of performance. He then proceeded, however, to find that the contract was frustrated, because to impose on the sellers an obligation to ship via the Cape was to impose on them a fundamentally different obligation from that which they undertook when the contract was made. The learned judge, I think, fell into the error which he had previously corrected in the seller's argument by treating the date of the contract as the date when the seller's obligation had to be ascertained. If the critical date is the time when performance is called for, there cannot be frustration.

It remains to consider the ground on which DIPLOCK, J., held that the appellants failed. He considered that what had been described as the "special finding" of the Board of Appeal—

"(vi) The performance of the contract by shipping the goods on a vessel routed via the Cape of Good Hope was not commercially or fundamentally different from its being performed by shipping the goods on a vessel routed via the Suez Canal",

was a conclusion of fact with which he could not interfere and that he was, accordingly, bound by that finding to hold that there was no frustration. In my opinion, the learned judge misinterpreted the finding. These findings are prefaced by the statement: "So far as it is a question of fact we find and as far as it is a question of law we hold:—" Finding (vi), in my view, is clearly a finding in law and, if I had thought that there were no facts to justify this finding, I should, for my part, not have hesitated to disregard it. But as a finding of fact it is, as SELLERS, L.J., said (36), of the utmost relevance in a case of frustration, although it is not, in my opinion, conclusive.

The appellants' final argument was based on cl. 6 of the contract which is in the following terms:

"In case of prohibition of import or export, blockade or war, epidemic or strike, and in all cases of force majeure preventing the shipment within the time fixed, or the delivery, the period allowed for shipment or delivery shall be extended by not exceeding two months. After that, if the case of force majeure be still operating, the contract shall be cancelled."

It was contended that shipment was prevented by the closure of the Suez Canal and that, as the cause operated beyond two months, the contract was cancelled. In my opinion, "shipment" in the context means bringing the goods to the port of shipment and "prevention" means either physical or legal prevention (*Re Comptoir Commercial Anversois and Power, Son & Co.* (37)). In no circumstances can it be said that shipment was prevented by the closure of the Suez Canal.

I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Richards, Butler & Co.* (for the appellants, the sellers); *Bernard Samuel Berrick & Co.* (for the respondents, the buyers).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

(34) [1960] 2 All E.R. 529.

(35) [1958] 3 All E.R. 115; [1959] 1 Q.B. 131.

(36) [1960] 2 All E.R. at p. 166; [1960] 2 Q.B. at p. 364. (37) [1920] 1 K.B. 868.

A A. D. WIMBUSH & SON, LTD. v. FRANMILLS PROPERTIES,
LTD. AND OTHERS.

[CHANCERY DIVISION (Plowman, J.), February 14, 15, 1961.]

B Landlord and Tenant—New tenancy—Business premises—Opposition by
“landlord”—Intention to occupy premises for own business—Change
of landlord between date of notice terminating tenancy and hearing of appli-
cation for new tenancy—Whether landlord opposing application entitled to
rely on notice served by previous landlord—Landlord and Tenant Act, 1954
(2 & 3 Eliz. 2 c. 56), s. 30 (1) (g).

C F., the landlord of business premises, served a notice dated July 1, 1958,
under s. 25 of the Landlord and Tenant Act, 1954, terminating the tenants’
tenancy on June 30, 1959, this notice being in the prescribed form* and
stating that the landlords would oppose an application for a new tenancy,
the ground of opposition being that provided by s. 30 (1) (g), viz., that on
the termination of the current tenancy “the landlord intends to occupy
the holding for the purposes . . . of a business to be carried on by [him]
therein”. The tenants forthwith notified F. that they were not willing
D to give up possession, and in October, 1958, they applied to the court for a
new tenancy under s. 24 (1). On June 24, 1959, the application not having
yet been determined, M. became the landlord. It was not in dispute that
M. had the intention required by s. 30 (1) (g), but the question arose whether
M. was entitled to rely on the notice and on the ground of opposition stated
E therein, since, though M. was the landlord at the hearing, he was not the
landlord at the date when the notice was given.

Held: (i) M. was entitled to rely on the notice because—

F (a) on the true construction of the notice the reference to the landlord
in the statement of the ground of opposition referred to whomsoever was
the opposing landlord at the hearing of the application for a new tenancy,
and

(b) section 30 (1) (g) required on its true construction that the person who
at the date of the hearing was the landlord should have the intent specified
in para. (g).

G Dicta of JENKINS, L.J., in *Piper v. Muggleton* ([1956] 2 All E.R. at p. 253),
and of SIR RAYMOND EVERSHED, M.R., in *X.L. Fisheries, Ltd. v. Leeds Corpn.*
([1955] 2 All E.R. at p. 878) applied.

(ii) accordingly the court was precluded by s. 31 (1) of the Act of 1954 from
granting a new tenancy.

[As to the meaning of “landlord” in the Landlord and Tenant Act, 1954,
Part 2, see 23 HALSBURY’S LAWS (3rd Edn.) 888, para. 1710.

H For the Landlord and Tenant Act, 1954, s. 25, s. 30 (1) and s. 31 (1), see
34 HALSBURY’S STATUTES (2nd Edn.) 410, 414, 416.]

Cases referred to:

Betty’s Cafés, Ltd. v. Phillips Furnishing Stores, Ltd., [1958] 1 All E.R. 607;
[1959] A.C. 20; [1958] 2 W.L.R. 513; 3rd Digest Supp.

Biles v. Caesar, [1957] 1 All E.R. 151; [1957] 1 W.L.R. 156; 3rd Digest
Supp.

I *Bolton’s (House Furnishers), Ltd. v. Oppenheim*, [1959] 3 All E.R. 90; [1959]
1 W.L.R. 913; 3rd Digest Supp.

*High Road (No. 88), Kilburn, Re, Meakers, Ltd. v. D.A.W. Consolidated
Properties, Ltd.*, [1959] 1 All E.R. 527; [1959] 1 W.L.R. 279; 3rd Digest
Supp.

Piper v. Muggleton, [1956] 2 All E.R. 249; [1956] 2 Q.B. 569; [1956] 2 W.L.R.
1093; 3rd Digest Supp.

* Form 7 prescribed by the Landlord and Tenant (Notices) Regulations, 1957.

Upsons, Ltd. v. E. Robins, Ltd., [1955] 3 All E.R. 348; [1956] 1 Q.B. 131; A [1955] 3 W.L.R. 584; 3rd Digest Supp.

X.L. Fisheries, Ltd. v. Leeds Corpn., [1955] 2 All E.R. 875; [1955] 2 Q.B. 636; 119 J.P. 519; [1955] 3 W.L.R. 393; 3rd Digest Supp.

Adjourned Summons.

The applicants, A. D. Wimbush & Son, Ltd., who were the tenants of business premises comprising ground floor shop No. 2 and the basement thereto at Trinity House, Trinity Street, Coventry, applied under Part 2 of the Landlord and Tenant Act, 1954, for the grant of a new tenancy for seven years from June 24, 1959. The application was made in Coventry County Court on Oct. 6, 1958, the first respondents, Franmills Properties, Ltd., being the sole respondents thereto. The proceedings were transferred to the Chancery Division of the High Court and subsequently the Trustees of the Charity of Sir William White and Mills & Mills, Ltd. were added as second and third respondents, respectively. By an order of PENNYCUICK, J., dated June 29, 1960, all proceedings against the first respondents were stayed, except as to costs.

On July 25, 1938, Francis Joseph Mills granted to the applicants a lease of the premises (which comprised one of five shops on the ground floor at Trinity House) for a term of fourteen years from June 24, 1938, at a rent of £300 a year, with an option to take a further lease for a further term of seven years at a rent of £400. The applicants exercised the option and, by a lease dated Dec. 18, 1951, were granted a further lease for a term of seven years from June 24, 1952, at the increased rent. By a lease dated Feb. 20, 1952, Mr. Mills demised the whole of Trinity House to the first respondents for a term of twenty-one years from Dec. 25, 1951, subject to and with the benefit of the existing leases, which included the lease and further lease granted to the applicants. By an underlease dated May 19, 1953, the first respondents demised the premises of which the applicants were the tenants to the third respondents for a term of thirteen years and a hundred and eighty-three days from June 24, 1959, the date on which the applicants' further lease was to expire. On July 2, 1958, the first respondents served on the applicants a notice, dated July 1, 1958, under s. 25 of the Landlord and Tenant Act, 1954, terminating the applicants' tenancy on June 30, 1959, and stating that they would oppose an application to the court under Part 2 of the Act for the grant of a new tenancy on the ground specified in s. 30 (1) (g) of the Act. On July 3, 1958, the applicants gave notice to the first respondents that they would not be willing to give up possession of the premises, and on Oct. 6, 1958, they commenced these proceedings in the county court. On Dec. 31, 1958, the first respondents assigned their lease of Trinity House to the second respondents, who were already the freeholders of the premises.

The application for the grant of a new tenancy to the applicants was opposed by the third respondents, who became the applicants' immediate landlords on June 24, 1959, the ground of their opposition being the ground specified in s. 30 (1) (g) of the Act of 1954. The applicants contended that the third respondents were not entitled to oppose the application as they were not the applicants' landlords at the time when the notice terminating the tenancy was given.

R. E. Megarry, Q.C., and *G. A. Grove* for the applicants.

L. A. Blundell, Q.C., and *J. T. Plume* for the respondents.

PLOWMAN, J.: This is an application under Part 2 of the Landlord and Tenant Act, 1954, for a new tenancy by A. D. Wimbush & Son, Ltd., who have been tenants of shop premises known as No. 2, Trinity House, Trinity Street, Coventry, for over twenty years. At those premises they carry on business as confectioners. They first became tenants under a lease dated July 25, 1938, whereby the premises were demised to them for a term of fourteen years from June 24, 1938, and they were given an option to take a further lease for a further

A term of seven years. That option was exercised, and, by a lease dated Dec. 18, 1951, they were granted a further term of seven years from June 24, 1952. That would have expired on June 24, 1959, but for the fact that it has been continued by virtue of the provisions of the Landlord and Tenant Act, 1954.

From 1938 until 1952 the applicants' landlord was a Mr. F. J. Mills, but on Feb. 20, 1952, he granted a lease of the premises for a term of twenty-one years, from Dec. 25, 1951, to Franmills Properties, Ltd. (the first respondents to the present application), who thereupon became the applicants' landlords. That state of affairs continued until Dec. 31, 1958, when the first respondents assigned their lease to the freeholders, the trustees of Sir Thomas White's Charity, who are the second respondents to the present application. That lease thereupon merged in the freehold reversion and the trustees of the charity became the applicants' landlords. In 1953, however, on May 19, the first respondents had granted to Mills & Mills, Ltd., who are the third respondents, an underlease for a term of approximately thirteen and a half years to commence on June 24, 1959, which was the day on which the applicants' seven-year lease was due to expire, and since June 24, 1959, the third respondents have been the applicants' landlords.

On July 2, 1958, the first respondents served on the applicants a notice, dated July 1, 1958, to determine the applicants' tenancy on June 30, 1959, that is to say, six days after it would have expired by effluxion of time but for the provisions of the Landlord and Tenant Act, 1954. That notice was served under the provisions of s. 25 of the Act and its validity as a notice is not in question; I will refer to its terms later. Section 25 (6) of the Act reads:

"A notice under this section shall not have effect unless it states whether the landlord would oppose an application to the court under this Part of this Act for the grant of a new tenancy and, if so, also states on which of the grounds mentioned in s. 30 of this Act he would do so."

In a letter dated July 3, 1958 (i.e., the day after the notice was served on them), the applicants answered the notice by saying that they would not be willing to give up possession on June 30, 1959. On Oct. 6, 1958, they applied to Coventry County Court, under s. 24 of the Act, for a new tenancy and those proceedings have since been removed into this court. In their application for a new tenancy the applicants propose a new lease for a term of seven years from the expiration of their then present lease at a rent of £1,100 per annum and on the terms and conditions, apart from rent, contained or incorporated in the existing lease. Although, under s. 33 of the Act, I would have jurisdiction, if I concluded that this was a case in which I was bound to grant a new lease, to grant one for a term not exceeding fourteen years, counsel for the applicants does not seek to resile from what is stated in the application as to the length of term which the court is asked to grant.

The effective opposition to this application comes from the third respondents, who became the applicants' landlords for the purposes of the Act on June 24, 1959. Although the first respondents were the applicants' landlords until the end of 1958, they are no longer interested, because at the end of that year they assigned their interest to the second respondents. In any event, they went into voluntary liquidation early in 1959 and by an order dated June 29, 1960, PENNYCUICK, J., directed that all further proceedings in this matter should be stayed against them, except for the purposes of obtaining directions as to their costs. The second respondents are not really interested, because even if I ordered a new lease for the seven years for which the applicants ask in their application, such a lease would expire before the third respondents' underlease fell in, so that the order which I am asked to make would not affect the interests of the second respondents.

I must now deal with the merits of the application, and the first question to consider is whether, under the Act, the applicants are entitled to a new lease. Section 29 (1) of the Act is in these terms:

"Subject to the provisions of this Act, on an application under s. 24 (1) of this Act for a new tenancy the court shall make an order for the grant of a tenancy comprising such property, at such rent and on such other terms, as are hereinafter provided."

Therefore, subject to the provisions of the Act, which I take to be a reference to s. 30 and s. 31, I am bound to order a new tenancy. However, I must refer to s. 30 and s. 31, and first I shall read s. 31 (1):

"If the landlord opposes an application under s. 24 (1) of this Act on grounds on which he is entitled to oppose it in accordance with the last foregoing section and establishes any of those grounds to the satisfaction of the court, the court shall not make an order for the grant of a new tenancy."

Counsel for the respondents submits that I cannot make an order in favour of the applicants, because, so he says, the landlords oppose on grounds on which they are entitled to oppose under s. 30, and they have established those grounds.

The relevant part of s. 30 is sub-s. (1) (g). Section 30 (1) provides:

"The grounds on which a landlord may oppose an application under s. 24 (1) of this Act are such of the following grounds as may be stated in the landlord's notice under s. 25 of this Act or, as the case may be, under s. 26 (6) thereof, that is to say . . . (g) subject as hereinafter provided, that on the termination of the current tenancy the landlord intends to occupy the holding for the purposes, or partly for the purposes, of a business to be carried on by him therein, or as his residence."

I am not concerned with the part of para. (g) which states "subject as hereinafter provided", because that relates to a case where the landlord has owned his interest for less than five years, and the present case is not such a case. The relevant part of para. (g) is in terms which I will read again:

". . . that on the termination of the current tenancy the landlord intends to occupy the holding for the purposes . . . of a business to be carried on by him therein . . ."

It is not disputed that, if the third respondents, as the applicants' present landlords, are entitled to oppose this application on that ground, then the ground has in fact been established by the evidence of their managing director, Mr. Avery, and I am satisfied (as s. 31 (1) requires me to be) that, if that is a ground on which the landlords can rely, it has been established.

The real contest in this case is whether the third respondents are entitled to set up para. (g) of s. 30 (1) at all. Here I must go back to the notice, dated July 1, 1958, which was given by the first respondents under s. 25 of the Act. It is addressed to the applicants and is in the following terms:

"1. I, Franmills Properties, Ltd. of 33 Trinity Street in the city of Coventry, landlord (Note 7) [shop No. 2, Trinity House, Trinity Street, Coventry] hereby give you notice terminating your tenancy on June 30, 1959 . . ."

"2. You are required within two months after receiving this notice to notify me in writing whether or not you will be willing to give up possession of the premises on that date . . ."

"3. I would oppose an application to the court . . . under Part 2 of the Act for the grant of a new tenancy on the ground (Note 4) that on the termination of the current tenancy the landlord intends to occupy the holding for the purposes, or partly for the purposes, of a business to be carried on by it therein."

"4. This notice is given under the provisions of s. 25 of the Landlord and Tenant Act, 1954."

"Your attention is called to the notes overleaf."

Among the notes overleaf is Note 7, which reads:

A "The term 'landlord' in this notice does not necessarily mean the landlord to whom the rent is paid; it means the person who is the landlord for the purposes of Part 2 of the Act."

That note must apply just as much to the occasion in para. 3 of the notice where the word "landlord" is used as it does to the occasion in para. 1 where attention is specifically drawn to note 7 on the back; that is to say, when, in para. 3, the

B giver of the notice says:

"I would oppose an application to the court . . . under Part 2 of the Act for the grant of a new tenancy on the ground that on the termination of the current tenancy the landlord intends to occupy . . ."

C Note 7 sounds a cautionary note in pointing out that the word "landlord" in that context does not necessarily mean the landlord to whom the applicants are at that moment paying the rent. Counsel for the respondents also points out that, if the word "landlord" were being used in para. 3 in a sense which confined it exclusively to the first respondents, one would have expected not to find the word "landlord" there at all, but to have found repetition of the word "I" with which the paragraph commenced.

D Counsel for the applicants points out that the landlord giving the notice was the first respondents. He submits that the notice means, on its fair construction, that the first respondents intended to occupy the holding for the purposes of a business to be carried on by them and that, on its fair construction, the notice cannot really refer to the third respondents, of whom, in fact, at that date the applicants had never heard as landlords. They knew of the third respondents' existence, because they were carrying on business in adjoining premises, but I think that it is fair to say that at that time the applicants had never heard of the third respondents as landlords. Counsel for the applicants submits that in those circumstances the third respondents are not entitled to rely on this notice for the purposes of s. 30 of the Act.

E I think that I ought to state these additional facts which are relevant to the question of this notice. It was accompanied by a letter written by the first respondents' solicitor and addressed to the applicants' secretary. It was headed, F "Shop No. 2, Trinity House, Coventry" and was in these terms:

G "You will recollect that my clients, [the first respondents], were in communication with you during May, 1957, with regard to the grant of a new lease of the above property and that they were unable to grant a new tenancy on the expiry of your lease. As your lease expires on June 24, 1959, it is necessary for [the first respondents] to serve notice to terminate their tenancy under the Landlord and Tenant Act, 1954. Accordingly I am enclosing herewith the statutory notice and shall be much obliged if you will kindly acknowledge receipt. You will observe that by virtue of para. 2 of this notice it is incumbent upon you to notify [the first respondents] H within two months whether or not you are willing to give up possession of the premises on June 30, 1959."

The correspondence in May, 1957, which is referred to in the first paragraph of the letter which I have just read, included a letter dated May 14, 1957, written by the first respondents to the applicants and stating in the second paragraph:

I "We regret to advise you that the board of this company is unable to consider the grant of a new lease to you as the property was let some years ago from a date coinciding with the end of your lease to another tenant."

Counsel for the respondents says that, by following this trail, the applicants could have deduced that the landlord referred to in para. 3 of the notice terminating the tenancy was someone other than the first respondents. I think that it obviously would have been much better if the letter which accompanied the notice had stated plainly that the "landlord" referred to in para. 3 of the notice was not intended to be the first respondents but was the third respondents.

It would have been quite easy to have done that and it would have saved a lot of trouble; but I cannot agree that the word "landlord" in para. 3 of the notice necessarily means the first respondents. In my judgment, the reference in that paragraph to the landlord must be taken to be a reference to the landlord who is entitled to defeat the applicants' claim to a new tenancy by establishing that he intends to occupy the premises for the purposes of his own business, and that can only be the person who is landlord, within the definition contained in s. 44 of the Act, at the date of the hearing, because that is the date at which the question of the intention is relevant, as was established by the decision of the House of Lords in *Betty's Cafés, Ltd. v. Phillips Furnishing Stores, Ltd.* (1). I think that the fair construction of para. 3 of the notice, in the light of the Act, is that it refers to the landlord who will be taking this point at the relevant time in opposition to the applicants' claim for a new lease.

However, counsel for the respondents went further than that. He said that, even if counsel for the applicants were right on the question of construction—even if the reference to "the landlord" in para. 3 of the notice was in truth a reference to the first respondents—it still did not matter. The submission of counsel for the respondents, as I understand it, is this. The third respondents are admittedly the landlords today. It is not in dispute that they intend to occupy the premises for the purposes of their own business. Such an intention falls within para. (g) of s. 30 (1) of the Act, and the ground which is specified in that paragraph is the ground which is specified in the notice terminating the tenancy under s. 25. Therefore, counsel submits, s. 31 (1) of the Act applies, and I am precluded from making any order in favour of the applicants. Counsel says—and with this submission I must agree—that s. 30 does not require that the landlord who served the notice should have any such intention as is referred to in para. (g): what it requires is that the landlord opposing the application should have the relevant intention. Counsel submits, and I accept this argument, that it is sufficient that the notice given under s. 25 should contain a sufficient reference to para. (g) of s. 30 (1).

I was referred to certain cases on what is meant by a sufficient reference to para. (g): *Biles v. Caesar* (2) and *Bolton's (House Furnishers), Ltd. v. Oppenheim* (3). I do not think that I need refer to those cases because if, as in my opinion is the case, the question is whether the notice of July 1, 1958, refers sufficiently to para. (g) as being the ground on which the landlord who opposes the application will oppose it, it seems to me that the answer to that is clearly "Yes", particularly as para. (g) is in terms set out (4) in the notes at the back of the notice and what is stated on the front follows the form of the note on the back.

Counsel for the respondents referred me to *X.L. Fisheries, Ltd. v. Leeds Corpn.* (5), which, in my judgment, supports the view which I have taken. It is true, as counsel for the applicants pointed out, that the question which arose in that case is not precisely the same as the question which arises in the present case. The question there was not whether, if I may put it in this way, landlord No. 2 could take advantage of a notice under s. 25 served by landlord No. 1, but it was a question whether landlord No. 2 could serve his own notice, landlord No. 1 not having served a notice. But PARKER, L.J., in an interlocutory observation, said this (6):

"If the landlord sets the machinery in motion by giving notice under s. 25 (6), he has to anticipate the grounds on which he will rely in objecting to an application, and if there is after that a change of landlord within the two months' period, the new landlord will merely inherit the grounds stated by his predecessor in title, since no provision is made for amendment."

(1) [1958] 1 All E.R. 607; [1959] A.C. 20.

(2) [1957] 1 All E.R. 151.

(3) [1959] 3 All E.R. 90.

(4) All the grounds specified in s. 30 (1) of the Act are set out in note 4, at the back of the notice.

(5) [1955] 2 All E.R. 875; [1955] 2 Q.B. 636.

(6) [1955] 2 Q.B. at p. 640.

A Counsel for the applicants, quite rightly, pointed out that that was an interlocutory observation, but he also very fairly called attention to the fact that the observation had the approval of the Court of Appeal in *Piper v. Muggleton* (7), because JENKINS, L.J., who delivered the judgment of the court, said (8):

B “The incoming ‘landlord’ must, we think, be bound by the acts or omissions of his predecessor while answering that description (see the remark of PARKER, L.J., in *X.L. Fisheries, Ltd. v. Leeds Corpn.* (9)), and that may well preclude any effective opposition on his part, save as regards the terms of the new tenancy.”

The approval which JENKINS, L.J., thus gave was approval of the observation of PARKER, L.J., which I have just read.

C In *X.L. Fisheries, Ltd. v. Leeds Corpn.* (10), SIR RAYMOND EVERSHED, M.R., after referring to s. 24 to s. 30 of the Act of 1954, said:

D “Do those sections contemplate or require that the landlord, throughout the whole period after the machinery of the Act has been set in motion, should be the same person, whether an individual person or a persona ficta? I think for my part that the answer to that question is inevitably in the negative. I can find nothing in the sections or the language used therein which would require the continuity throughout of the same person as landlord; and, indeed, it would be a strange thing if the Act did so require, because, though Parliament may do many things, it cannot insist that a particular person shall live a particular length of time. It is, in other words, I think quite plain that when the landlord comes to put in his notice of opposition, it is sufficient if at the time he puts it in he is in fact the landlord. It is, therefore, sufficient if he, having acquired the premises or the reversion since the date of the request, is able to say when he puts in his notice of opposition before the two months’ period expires that he is the landlord and (to take the example that I chose from s. 30) that on the termination of the current tenancy he intends to reconstruct.”

F In my judgment, first, the notice terminating the tenancy, fairly construed, means that it is the person who, as landlord, will be opposing the tenant’s application for a new lease who will take the point which is contained in para. (g) of s. 30 (1) of the Act and, secondly, I think that counsel for the respondents is right in submitting that in any case, provided that the notice which the then landlord gives under s. 25 states, as the ground of opposition which is to be made to the tenant’s application, the ground stated in para. (g), then the person who at the date of the hearing is the landlord and who is opposing the application on the same ground can properly pray in aid the notice which has been given by a predecessor as landlord. It follows from that that I am precluded (whatever I might otherwise have done) by s. 31 (1) from granting the applicants a new lease, but I have been asked to consider what length of term I should have granted them if I had been bound to grant them a new lease. I have been asked to do this in case my decision on the earlier point should be held to be wrong. Taking into account all the circumstances of this case, as I am bound to do under s. 33 of the Act—the circumstances which are set out in the evidence, the submissions made by counsel, the cases to which I have been referred, such as *Upsons, Ltd. v. E. Robins, Ltd.* (11), the observations of LORD MORTON OF HENRYTON in *Betty’s Cafés, Ltd. v. Phillips Furnishing Stores, Ltd.* (12), and the decision of WYNN-PARRY, J., in *Re No. 88, High Road, Kilburn, Meakers, Ltd. v. D.A.W. Consolidated Properties, Ltd.* (13)—I should have granted the applicants, if I had been

(7) [1956] 2 All E.R. 249; [1956] 2 Q.B. 569.

(8) [1956] 2 All E.R. at p. 253; [1956] 2 Q.B. at p. 578.

(9) [1955] 2 Q.B. at p. 640.

(10) [1955] 2 All E.R. at p. 878; [1955] 2 Q.B. at p. 646.

(11) [1955] 3 All E.R. 348; [1956] 1 Q.B. 131.

(12) [1958] 1 All E.R. at p. 619; [1959] A.C. at p. 45. (13) [1959] 1 All E.R. 527.

bound to grant them a new tenancy, a tenancy starting with the end of the current tenancy and expiring on June 24, 1962, that is to say, three years after the end of the seven-year term granted to them by the second of their two leases. A

Order accordingly.

Solicitors: *Stafford Clark & Co.*, agents for *Oakley & Co.*, Birmingham (for the applicants); *Sharpe, Pritchard & Co.*, agents for *Newsome & Co.*, Coventry (for the respondents). B

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

MOY v. MOY AND WHITE. C

[COURT OF APPEAL (Holroyd Pearce, Harman and Davies, L.JJ.), February 17, 1961.]

Divorce—Settlement of wife's property—Adultery of wife—Child of marriage primary beneficiary—Provisions appropriate to be in settlement—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 24 (1). D

A husband, who had been granted a decree of divorce on the ground of his wife's adultery, applied for an order under s. 24 (1)* of the Matrimonial Causes Act, 1950, that a settlement should be made of a part of the wife's property for the benefit of the child of the marriage. The wife possessed about £32,000. Her contribution to the household while the parties lived together was about £150 annually. The husband's average income was about £1,000 a year and he had a small capital expectation on his father's death. The wife had re-married and now had another child. E

Held: settlement of £8,000 (i.e., a quarter) of the wife's property would be ordered to be made for the primary benefit of the child of the marriage as follows—

(a) the trust property should be transferred to or vested in independent trustees; F

(b) during the child's infancy, the income of the settled fund should be held on discretionary trust for the benefit of the child and of the husband, and any income not applied under the discretionary trust should be accumulated;

(c) on the child attaining the age of twenty-one until the end of his twenty-fifth year, the income should be held on discretionary trust for the benefit of the child and of the wife; G

(d) the settlement should provide that until the child should attain the age of twenty-five, he should be the primary object of the discretionary trust;

(e) on the child attaining the age of twenty-five, the income should be paid to the wife during her life, with remainder to the child absolutely; H

(f) throughout the period of the trust, the trustees should have a power of advancement over the whole fund in the child's favour; and

(g) in the event of the child dying during the wife's lifetime without leaving a widow or issue, the capital should revert to the wife.

Appeal dismissed.

[As to a settlement of the property of a divorced wife, see 12 HALSBURY'S LAWS (3rd Edn.) 441-443, paras. 992-997. I

For the Matrimonial Causes Act, 1950, s. 24 (1), see 29 HALSBURY'S STATUTES (2nd Edn.) 411.]

Cases referred to:

March v. March and Palumbo, (1867), L.R. 1 P. & D. 440; 36 L.J.P. & M. 65; 16 L.T. 366; 27 Digest (Repl.) 641, 6032.

* The relevant terms of s. 24 (1) are printed at p. 205, letter G, post.

A *Matheson v. Matheson*, [1935] All E.R. Rep. 414; [1935] P. 171; 104 L.J.P. 59; 153 L.T. 299; 27 Digest (Repl.) 652, 6139.

Appeal.

This was an appeal by the wife, pursuant to leave granted by the learned judge, from an order made by WRANGHAM, J., in chambers, on July 27, 1960, granting an application by the husband, the successful petitioner in divorce proceedings, for an order under s. 24 (1) of the Matrimonial Causes Act, 1950, for the settlement of part of the wife's property for the benefit of the child of the marriage.

The facts are stated in the judgment of HOLROYD PEARCE, L.J.

Peter Rawlinson, Q.C., and *W. R. K. Merrylees* for the wife.

James Stirling, Q.C., and *A. B. Hollis* for the husband.

C **HOLROYD PEARCE, L.J.:** This is a wife's appeal from an order made by WRANGHAM, J., on an application by the petitioning husband under s. 24 (1) of the Matrimonial Causes Act, 1950, that the wife be ordered to settle certain property for the benefit of the child of the marriage. The marriage was in 1951. The child, Michael, was born in 1955. The marriage broke up in 1958. In November, 1959, the husband obtained a decree nisi on the ground of the wife's adultery with the co-respondent. Custody of the child was given to the husband, but care and control were given to the wife. The decree absolute was expedited so that the wife might marry the co-respondent before a child was born in January, 1960. The husband made this application in January, 1960, and shortly afterwards the wife applied for maintenance for Michael. In making his report with regard to this application, the learned registrar recommended an order on the husband of £100 per annum maintenance for the child.

E The husband is a stock-jobber in his father's firm. His income was between £200 and £300 a year to begin with. In 1960 it rose to £3,000. The registrar found that the average figure was £1,000 a year, but thought that the husband would do better in the future. He had a small capital expectation on his father's death. The wife had inherited £25,000 from her father, and £2,000 from her mother. She now possesses about £32,000. The husband bought the matrimonial home for the sum of £6,400, of which £4,000 was lent by the wife free of interest. That £4,000 has now been repaid by the husband to the wife. During the time that the parties lived together the wife's money was not being used to any large extent, and she was contributing only about £150 per annum to the home.

G Section 24 (1) of the Act of 1950 provides that, where the court pronounces a decree of divorce and the guilty wife is entitled to property either in possession or reversion, the court may

"... order such settlement as it thinks reasonable to be made of the property, or any part thereof, for the benefit of the innocent party, and of the children of the marriage or either or any of them."

H The principles under which this power is used are set out in *March v. March and Palumbo* (1). In that case it may be noted that, inter alia, money was settled on the child absolutely. It was there stated (and accepted in subsequent cases) that the object of the court was to try to ascertain and make good the pecuniary damage caused by the wife's adultery: the court will look at the probable pecuniary position which the husband, the wife and the issue of the marriage would have enjoyed if the marriage had not been dissolved. It was said in *Matheson v. Matheson* (2) that this power of the court is not intended to be used as any punishment of the wife or of the co-respondent through the wife.

The registrar's recommendation was in these terms:

"I therefore submit that the wife be ordered to transfer to independent

(1) (1866), L.R. 1 P. & D. at p. 442, per LORD PENZANCE; *affd. by the full court*, (1867), L.R. 1 P. & D. 444.

(2) [1935] All E.R. Rep. at p. 416; [1935] P. at p. 175, per BUCKNILL, J.

trustees the sum of £8,000 or equivalent securities, in order that such trustees may operate a discretionary trust for the period of the life of Michael, or for a lesser period to be controlled by a discretionary vesting date; the trusts to provide for applying the income during the years in which Michael is receiving full time education for the maintenance and education of Michael and/or for the benefit of the husband, and on conclusion of the period of education, for the benefit of Michael and/or the wife but with power to the trustees in their absolute discretion during this latter period to apply a portion or the whole of the capital for establishing Michael in business or otherwise advancing him in life, and with an overriding final power to vest the whole fund in Michael absolutely at a date to be determined by them; in the event of the death of Michael under age the fund to be transferred to the wife, otherwise for Michael and his heirs absolutely."

The learned judge adopted the registrar's report, but with some slight variations. He said this:

"I confirm the registrar's report but direct that the parties' alternative interests in the income shall be deleted and that the trustees shall have power to apply capital as well as income to education and that surplus income shall be added to capital."

For the wife it is argued that it is wrong to take so much of her fortune for the child, and to deprive her of it permanently. It is urged that it would always be possible for the court to make an order on the wife compelling her to contribute to the maintenance of the child, and that, therefore, the suggested settlement is unnecessary. Further, it is said that the wife contributed only about £150 per annum to the household while she was living with the husband, and, therefore, that is the limit of the loss which the household has sustained by her adultery. The learned judge dealt with those matters. He said, rightly in my view, that it was a fallacy to say that the loss to the household was only £150 per annum, and added:

"The fact that recourse had not been had to the wife's income before the breakdown of the marriage by no means shows that recourse would not have been had to it if necessary for the education of the child."

In my view, the learned judge looked at this matter correctly. The child is the primary person for consideration in the matter before us. It is intended that Michael shall go to Stowe School and the university, which will involve considerable expense. He suffered a grievous loss when his home was broken up. In so far as that is a spiritual loss, it cannot be compensated. But he was deprived also of the material benefit of a home in which his two parents were living together, one of them with a substantial fortune, which would make them both able and anxious to give him a good education.

The wife has now married again and has another child; and if she has other children she will naturally feel less inclined to spend money on the education of Michael. The husband may marry again and have other children. He and his new wife may well not feel so generously disposed towards Michael as he now feels. The learned judge's order will ensure that there is money for Michael's education. As a result, so far as it is necessary for the husband to contribute, he will feel bound to do so; and, if he does not, I have no doubt that the wife will take steps (in view of her financial contribution) to see that he plays his part.

There are, however, some matters of machinery which cause difficulty. The learned judge struck out the alternative interests which were put in by the registrar—that of the husband before the period of education ceases, and that of the wife thereafter. If the child is to be the sole object of discretion, he can, as HARMAN, L.J., pointed out, on attaining the age of twenty-one, as the sole beneficiary, insist on the trustees paying him the capital at once. That is

- A undesirable, and it is not, I think, what was intended by the learned judge. Moreover, again as HARMAN, L.J., pointed out, if the child dies intestate when he is over twenty-one years of age, the money in the settlement would go to the husband. In my judgment, that is not fair or desirable, and I doubt if it was the intention of the learned judge. Furthermore, there being no power to accumulate, the interest on the money before the child starts the expensive
- B part of his education would go to the husband under the suggested settlement, and not to the child for whom the benefit is really intended. The learned registrar probably, I think, put in the two alternative beneficiaries of the trustees' discretion with the deliberate intention that the interest of the wife after the period of education ceases would prevent the child's right to demand the capital, while the interest of the husband during the educational period might save the
- C wife from liability to tax on the settlement. In my view, the husband, as recommended by the registrar, should be added as a discretionary recipient during the child's infancy, and the wife thereafter. Instead of the conclusion of full-time education, I would substitute the child's attainment of the age of twenty-one as the termination of the first part of the trust. The husband, therefore, will be an alternative recipient of the income up to the child attaining
- D the age of twenty-one, and the wife thereafter until the end of his twenty-fifth year. After he reaches the age of twenty-five, the income should be paid to the wife for her life with remainder to the child absolutely; but the trustees during the whole period of the trust should have a power of advancement of the whole in the child's favour. If the child dies during the wife's lifetime without leaving a widow or issue, then, in my view, the capital should revert to the wife. As
- E HARMAN, L.J., suggested, there should be inserted in the trust a provision that, until Michael attains the age of twenty-five, he should be the primary object of the trust. With those amendments to the settlement, I would confirm the learned judge's order.

- F HARMAN, L.J.: I would make one addition to what my Lord has said (with which in general I am prepared to concur), namely, that so much of the income during the infancy of the child as is not applied on the discretionary trust should be under a trust to accumulate. The husband will be left as an object of discretion; the trustees will not be bound to pay him anything. I have no doubt that, in fact, the proper thing to do will be to accumulate any income which is not spent on the child until he is twenty-one. There can be no
- G accumulation after he attains the age of twenty-one, and after that date there would be no detriment in paying it to the wife, because a settlement made on an adult child is not classed as one's own income. Therefore, the husband can be taken out as an object of discretion at that date, and the wife can be put in. With that slight addition (in which, I think, HOLROYD PEARCE, L.J., concurs), I am in agreement with his judgment.

DAVIES, L.J.: I also agree.

Appeal dismissed.

Solicitors: *Lewis & Dick*, agents for *Dobson & Sutcliffe*, Chichester (for the wife); *Berryman*s (for the husband).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

Re BRITISH BOTTLE ASSOCIATION'S AGREEMENT.

[RESTRICTIVE PRACTICES COURT (Russell, J., Megaw, J., Sir Stanford Cooper and Mr. C. C. W. Havell), January 23, 24, 25, 26, 27, 30, 31, February 1, 2, 3, 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, March 24, 1961.]

Restrictive Trade Practices—Reference—British Bottle Association—Minimum price scheme—Apprehended “price war”—Ancillary restriction involving exemption from liability to purchasers for injury from goods sold—Whether removal of restrictions would deny public as purchasers substantial benefit—Whether purchasers of filled bottles or only wholesalers or purchasers of bottles for filling were included in that public—Restrictive Trade Practices Act, 1956 (4 & 5 Eliz. 2 c. 68), s. 21 (1) (b).

The members of the British Bottle Association produced and supplied approximately eighty per cent. of the glass bottles produced and supplied within the United Kingdom. The export trade of empty glass bottles was relatively very small, and, with one exception, for many years the import into the United Kingdom of empty glass bottles had been insignificant. For a considerable time past, the total productive capacity of the industry had been fully employed. The agreement between the members of the Association was primarily for the purpose of fixing minimum prices for the sale by manufacturers of glass bottles manufactured by members. Although the prices were minimum prices, in the vast majority of cases members did not quote above the minimum prices. Two price lists were maintained by the Association, one relating to standard bottles, i.e., types which were in general use and not manufactured solely to the requirements of a particular customer, and the other relating to special bottles (constituting about thirty per cent. of the total production of glass bottles), i.e., bottles which were made specially to the requirements of a particular customer. Prices in the standard list were varied by the decision of the Association in general meeting, which had before it a recommendation from an investigation committee; in fact an increase of price had never been agreed against the advice of the independent chairman, though members were not bound to accept his advice. Prices in the special list might be varied from time to time by agreement between those members interested. Since October, 1955, there had been only two general increases in prices and there had been none, despite increasing costs, for more than three and a half years. An ancillary restriction, contained in the Association's conditions of sale, provided for the inclusion of contractual exemption of the manufacturer from liability for claims by the purchaser for injury or damage and for indemnity by the purchaser against third party's claims.

The Registrar of Restrictive Trading Agreements referred the restrictions to the court under s. 20 (1) and s. 20 (2) (a) of the Restrictive Trade Practices Act, 1956*.

The court found (a) that the industry had undoubtedly made substantial advances in technical efficiency, though there were considerable limitations on competition between members in quality and service; (b) that the

* Section 20, so far as relevant provides: “(1) The court shall have jurisdiction, on application made in accordance with this section in respect of any agreement of which particulars are for the time being registered under this Part of this Act, to declare whether or not any restrictions by virtue of which this Part of this Act applies to the agreement (other than restrictions in respect of matters described in paras. (b) to (d) of s. 8 (8) of this Act) are contrary to the public interest.

“(2) An application to the court under the foregoing subsection may be made—(a) in any case, by the registrar; . . .

“(3) Where any such restrictions are found by the court to be contrary to the public interest, the agreement shall be void in respect of those restrictions; and . . . the court may . . . make such order as appears to the court to be proper for restraining all or any of the persons party to the agreement . . . (a) from giving effect to . . . the agreement in respect of those restrictions; . . .”

A profit level in the industry was not unreasonable, and that the price-fixing policy pursued by the Association had been reasonably and fairly carried out, and (c) that demand for glass bottles was increasing and would continue to increase.

B Underlying most of the contentions by which the Association sought to support the restrictions under s. 21 (1) (b)* of the Act, was the premise that if the restrictions were removed a price war would result. Character-
istics of the industry on which the Association relied in this connexion were that it was a continuous process industry, in which furnaces must be kept in continuous operation if they were to be worked economically, so that
C manufacturers were particularly vulnerable to lack of balance between orders and production capacity; that there were a few large buyers of bottles, and many small buyers, so that the large buyers might bring pressure to bear to reduce prices; that, apart from a small proportion of wholesalers, buyers from the manufacturers were "fillers" of bottles, whose modern plant made accuracy in dimensions of bottles essential to the smooth working of the plant, so that a reduction in quality (e.g., by reason of reduction of
D manufacturers' inspection as a measure of economy in a price war) of bottles produced might be greatly to the detriment of the purchasers; and, moreover, that these purchasers relied on the storage of large stocks of new bottles by the manufacturers to enable the purchasers to obtain certain and quick deliveries and economise themselves on storage space. The court found that close co-operation was required and existed between manu-
facturers and purchasers with a view to meeting the latter's needs.

E The Association sought to support the restrictions under s. 21 (1) (b)* of the Act, contending that the following specific and substantial benefits and advantages to the purchasers of glass bottles would be likely to be lost if the price restrictions were abrogated: (i) the prices of glass bottles would be no longer uniform and would fluctuate sharply; (ii) at times of low demand, or in the course of the foreseen severe price competition,
F it would be impossible to maintain and improve the quality of glass bottles and the quality would deteriorate; (iii) the existing close co-operation of the members in research, design and similar matters, and the resulting improvement in quality and in reduction of price would disappear or be gravely lessened; (iv) members would no longer produce for stock at times of seasonal low demand; (v) the severe competition for the orders of the large
G buyers would result in such buyers paying unreasonably low prices and, consequently, all other buyers would pay higher prices than if the restrictions were to continue; (vi) purchasers of glass bottles would no longer obtain prompt delivery at short notice; and (vii) the "price war" would ultimately result in something in the nature of a monopoly in the hands of those manufacturers who survived, and the monopoly conditions would
H result in higher prices.

I **Held:** (i) in relation to this industry those purchasers who bought bottles for resale or for filling constituted the "public as purchasers" referred to in s. 21 (1) (b) of the Restrictive Trade Practices Act, 1956, though, if there had been any proved detriment to purchasers of filled bottles arising out of the restrictions, consideration of that detriment would not have been excluded (see p. 224, letter A, post).

Re Black Bolt and Nut Asscn. of Great Britain's Agreement ([1960] 3 All

* Section 21 (1), so far as relevant, provides: "For the purposes of any proceedings before the court under the last foregoing section, a restriction accepted in pursuance of any agreement shall be deemed to be contrary to the public interest unless the court is satisfied of any one or more of the following circumstances, that is to say—... (b) that the removal of the restriction would deny to the public as purchasers, consumers or users of any goods other specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them as such, whether by virtue of the restriction itself or of any arrangements or operations resulting therefrom;..."

E.R. 122) and *Re Wholesale Confectioners' Alliance of Great Britain and Northern Ireland's Agreement* ([1961] 1 All E.R. 116) considered.

(ii) the restrictions were deemed by s. 21 (1) of the Act of 1956 to be, and were declared to be, contrary to the public interest, because—

(a) the Association had not established, on a balance of probabilities, that, in conditions where production capacity was substantially fully employed and of rising demand, removal of the restrictions would lead to prices being forced down to uneconomic levels or to manufacturers being compelled to risk loss of custom by deterioration of quality and service (see p. 229, letters C and D, and p. 230, letter F, post).

(b) there were no special circumstances which warranted the conclusion that price stabilisation conferred a peculiar benefit sufficiently great to outweigh the loss of a free market (see p. 230, letter E, post).

Re Yarn Spinners' Agreement ([1959] 1 All E.R. at p. 317) applied.

(c) the diminution in co-operation between members in research, design and similar matters that would probably follow the introduction of price competition would not be such as to constitute the loss of a specific and substantial benefit or advantage to purchasers (see p. 230, letter I, to p. 231, letter A, post).

(d) the court was not satisfied that removal of the restrictions would lead to any change in the pattern of the industry whereby purchasers, not themselves carrying large stocks, could obtain prompt delivery of bottles, as required (see p. 231, letter I, post).

(e) purchasers of bottles must be regarded, for the purposes of s. 21 (1) (b), as a single category, and, accordingly, even if the removal of the restrictions should result in some disadvantage to small purchasers owing to the greater bargaining power of large buyers, that would not be the loss of a specific and substantial benefit to purchasers as a whole; moreover, the probability of such consequence was not established (see p. 231, letter F, post).

(f) it was not likely that price competition would be such that a monopoly would be created and, even if some manufacturers were driven out of business, price competition would continue between others so that the price level would probably not be higher than would be the case if the price restrictions were to continue (see p. 232, letters A and B, post).

(iii) the ancillary restriction for exemption from liability on claims of purchasers for injury or damage incurred or caused in connexion with bottles sold was contrary to the public interest and would have been so even if the main price restrictions had been valid (see p. 232, letter I, post).

[For the Restrictive Trade Practices Act, 1956, s. 21, see 36 HALSBURY'S STATUTES (2nd Edn.) 954.]

Cases referred to:

Black Bolt and Nut Asscn. of Great Britain's Agreement, Re, [1960] 3 All E.R. 122; L.R. 2 R.P. 50; [1960] 1 W.L.R. 884.

Scottish Asscn. of Master Bakers' Agreement, Re, Re Wholesale and Retail Bakers of Scotland Asscn.'s Agreement, [1959] 3 All E.R. 98; L.R. 1 R.P. 347; [1959] 1 W.L.R. 1094; 3rd Digest Supp.

Wholesale Confectioners' Alliance of Great Britain and Northern Ireland's Agreement, Re, [1961] 1 All E.R. 116; L.R. 2 R.P. 135; [1960] 1 W.L.R. 1417.

Yarn Spinners' Agreement, Re, [1959] 1 All E.R. 299; L.R. 1 R.P. 118; [1959] 1 W.L.R. 154; 3rd Digest Supp.

Reference.

Pursuant to the Restrictive Trade Practices Act, 1956, s. 20 (2) (a), the Registrar of Restrictive Trading Agreements referred to the Restrictive Practices Court an agreement made between the members of the British Bottle Association and contained in the Association's constitution, list of members, price lists, conditions of sale, specifications for glass containers and finishes and in resolutions

A of the Association made pursuant to the constitution. The objects of the Association were: (i) to provide an organisation which would, through the fullest co-operation and support of all members, establish and maintain fundamental commercial and technical principles within the industry; (ii) to co-operate with other organisations and in particular the Glass Manufacturers' Federation and the Association of Glass Container Manufacturers in matters affecting the interests of members; (iii) to provide means whereby the industry might put forward, as a collective body, its views to government departments and other organisations; (iv) to promote or undertake research into matters affecting the industry; (v) to take all necessary steps for the encouragement of greater efficiency, the improvement of products and means of production in the best interests of the members, their customers and their employees; (vi) to avoid uneconomic and wasteful competition, but nothing contained in the constitution was to be construed so as to prevent fair competition between members on equal terms; (vii) to encourage the establishment throughout the industry of uniform systems of costing and the interchange of information as to costing practice; (viii) to do all such other things as might be deemed incidental or conducive to the attainment of the above objects or any of them. The facts are set out in the judgment of the court. The agreement was primarily for the purpose of fixing minimum prices for the sale by manufacturers of glass bottles manufactured by members, and, in the vast majority of cases, members did not quote above the minimum prices. The nature of the price restrictions is set out at p. 215, letter G, post.

E During the hearing of the case, the court heard certain evidence in camera without a shorthand note of it being taken.

*B. J. M. MacKenna, Q.C., and W. Gumbel for the British Bottle Association.
M. J. Morris, Q.C., and J. F. Donaldson for the Registrar.*

Cur. adv. vult.

F Mar. 24. RUSSELL, J., read the following judgment of the court: The British Bottle Association, the respondents in this reference, has nineteen members; one of them is a wholly owned subsidiary of another member. The activities of the Association are concerned with the manufacture, and the sale by the manufacturers, of empty glass containers of a very wide variety of design, type, size and purpose. They include containers destined to be used as milk bottles, beer and mineral water bottles, whisky, gin and wine bottles, jam jars, G medicine bottles, bottles for perfumes and toilet preparations and glass containers for various types of footstuffs and household commodities. We refer to the containers as "bottles" or "glass bottles". The export trade—that is, the export of empty glass bottles—is relatively very small, and for many years the import into the United Kingdom of empty glass bottles has also been insignificant, with the exception, perhaps, of certain types of perfume bottles. H The agreement with which the court is concerned relates to glass bottles manufactured for the purpose of sale by the manufacturers (directly or through factors or wholesalers) to persons who thereafter fill the bottles with the appropriate contents within the United Kingdom and the Channel Islands, whether for home use or export.

I The nineteen members of the Association produce and supply approximately eighty per cent. of the glass bottles produced and supplied within the United Kingdom. The remaining twenty per cent. is produced and supplied by some thirteen other manufacturers, not members of the Association. Of the members of the Association, one member, United Glass, Ltd., is by far the largest. It and its subsidiary, Alloa Glass, Ltd., taken together, produce some thirty-seven or thirty-eight per cent. in value of the glass bottle production of all the members of the Association; that is, close to thirty per cent. of the whole of the United Kingdom production, if non-members are included. The next largest member, Rockware Glass, Ltd., accounts for some fourteen or fifteen per cent. in value

of the total production of members. The other sixteen members are smaller in varying degrees. Only three of the members confine their activities exclusively to glass bottles covered by the agreement which is before the court. The smallest manufacturer member, so far as the Association's activities are concerned, carries on other manufacture representing eighty per cent. of its total home sales; another member has outside activities representing fifty-seven per cent. The remainder are all mainly concerned with the manufacture of glass bottles, most of them to the extent of more than ninety per cent. in value of their total sales. About eighty-two per cent. in value of the production of United Glass, Ltd., and its subsidiary is represented by glass containers within the scope of the agreement. Four of the manufacturers of glass bottles who are not members of the Association are of substantial size. The largest of them has, we are told, approximately the same production, in value, as Rockware Glass, Ltd. The remaining nine non-member manufacturers have a relatively small production of glass bottles.

The agreement with which the court is concerned is primarily for the purpose of fixing minimum prices for the sale by manufacturers of glass bottles manufactured by members. Although the prices are minimum prices, we were told, and we accept, that, in the vast majority of cases, members do not quote above the minimum prices. The glass bottle manufacturers who are not members of the Association in general appear to follow the Association's prices, though they are not bound by any agreement to do so. One such manufacturer, indeed, is commonly and felicitously called "the outside member". There are some instances—how frequent or important it is not possible to judge on the material before us—in which non-members have quoted prices below the Association's minimum prices. An important feature of this industry, which it is desirable to mention at the outset, is that, for a considerable time past, the total productive capacity of the industry has been fully employed. This fact was given in evidence by the independent chairman of the Association, Mr. W. L. Barrows. Mr. Barrows, in stating this fact, gave evidence of the percentage of employment of the available bottle-making capacity of members for the four years from 1956 to 1959 inclusive. The percentages ranged from 96.82 per cent. in 1957 to 99.32 per cent. in 1956. The 1959 average figure was 97.48 per cent. These general figures for the Association were confirmed in more detail by figures in respect of the individual members. They show a continuing, steady, substantially full employment of the increasing productive capacity which has from time to time been available.

In view of the fact that the Association's case, as ultimately presented to the court, was based to a large extent on the proposition that, if the price restrictions were to be condemned by the court, there would follow as an almost inevitable consequence a "price war" within the industry, with, it was asserted, various consequential disadvantages to buyers of empty glass bottles, it is necessary to consider carefully whether such a "price war" is likely to happen if the pre-existing conditions of full employment of total productive capacity continue; and, if the answer be "no", to consider also whether, by reason of any special features of this industry or otherwise, the abrogation of the price restrictions would be likely of itself to create a serious state of lack of balance between the demand for glass bottles and the industry's capacity for manufacturing them, so as to make the outbreak of a "price war" probable, with the consequences which the Association suggest would follow. These, in the view of the court, are crucial questions in this reference.

Before considering these questions, and by way of providing the background for their consideration, it is desirable, first, to set out briefly certain matters in the history of the glass bottle industry in the United Kingdom since the first world war; secondly, to describe the nature of the price restrictions now in force; thirdly, to consider the record of the Association's members in recent years as regards technical and commercial progress and as regards profit levels computed

on turnover and capital employed; and, fourthly, to indicate certain features of the industry to which the Association particularly refer for the purpose of seeking to justify the price restrictions under the terms of s. 21 (1) (b) of the Restrictive Trade Practices Act, 1956.

The history of the industry was comprehensively set out in a document which was put before the court by the Association, the contents of which were not challenged on behalf of the Registrar. It is sufficient to refer to a few of the matters mentioned therein. It is clear that, from about 1921 to 1935, the industry went through a very bad period. Foreign competition was intense until about 1932, and it would seem that there was a considerable measure of "dumping" by foreign competitors. Prices were driven down to a level at which, at least in some lines of production, costs of manufacture were barely covered. A situation of very great excess capacity developed. By 1932, the manufacturing capacity of the five principal bottle manufacturers was being employed to the extent of only about sixty per cent. We have no reason to believe that this was unrepresentative of the industry as a whole. In 1934 it was estimated that the productive capacity of the industry was some twenty-four per cent. above current demand. The difference between those conditions and the conditions prevailing in the years since the 1939-45 war, when productive capacity and demand have been in close balance and there has been, at any rate in recent years, no excess capacity, scarcely needs to be emphasised. Indeed, it would be unnecessary to emphasise it at all were it not for the fact that certain of the witnesses who gave evidence for the Association appeared to find it difficult to realise, or to accept, that there may be a vital difference between what is likely to happen if price competition exists in conditions where there is substantially full use of manufacturing capacity, as compared with what happened when there was excess capacity in the industry ranging between twenty-four per cent. and forty per cent. In 1932 a twenty per cent. import duty was imposed on glass containers coming from non-Commonwealth countries; and in 1934 that duty was increased to twenty-five per cent. for bottles and jars. That duty has continued to the present day. Nevertheless, the industry continued to pass through difficult and stormy times, caused no doubt in part by the general economic slump then prevailing and in part by the great amount of excess capacity. As is stated in the history which was placed before us:

"The erection of tariff protection could, however, have no direct action on the internal position where the complaint of excessive capacity was matched by a most uncertain sales market."

In 1928 an abortive attempt had been made to obtain agreement among five of the larger manufacturers as to the prices for jam jars, a type of container in respect of which the price had been forced to a specially low level. In 1934 a further attempt began to be made to obtain agreement on prices, and, possibly, the establishment of quotas for manufacturers. This attempt ran into difficulties, particularly because Distillers Co., Ltd., which was the parent company of four glass bottle manufacturers, and some Yorkshire manufacturers were unwilling to participate. In 1936, however, a restricted scheme of price agreement was accepted by a number of the manufacturers. By 1938, the difficulty as to Distillers Co., Ltd. had been resolved, as a result of the purchase by United Glass, Ltd. of the bottle-making subsidiaries of Distillers Co., Ltd., and a number of bottle manufacturers in Yorkshire had decided to join in the working of the scheme. Thus, in 1938 an association, then known as Glass Container Associates, later to become the British Bottle Association, was formally constituted under an independent chairman.

On the taking over of the bottle production of the subsidiaries of Distillers Co., Ltd., certain special arrangements were made between Distillers and United Glass, Ltd., whereby the minimum prices to be fixed by the Association should not be applicable to the sale of glass bottles by United Glass, Ltd. to Distillers Co.,

Ltd. This arrangement was disclosed to, and accepted by, the other members. A
Four other members of the Association also have special arrangements with
particular purchasers of glass bottles, whereby the members in question are free
to sell to these purchasers without observing the Association's minimum prices.
In certain instances, these arrangements are in respect of purchasers who have
shareholding, or other direct or indirect financial, interests in the manufacturer B
in question; in other instances, the preferred purchasers are customers of
long-standing of such manufacturers. During the hearing, it appeared that the
question of these special arrangements, which apply to something like fifteen
per cent. in value of the total sales of glass bottles by Association members, might
be of importance in relation to the issues which the court has to decide, and a
considerable amount of time was, therefore, taken at the hearing in an investi- C
gation of the arrangements. In the event, however, we have come to the con-
clusion that it is not necessary for us to discuss these matters in detail in our
judgment. We are glad to be able to refrain from so doing, particularly since they
involve details which the companies concerned properly and reasonably would
wish to be treated as confidential.

When Glass Container Associates was formed, the proposal for production
quotas was eliminated, and minimum prices were agreed, generally speaking, D
on the basis of the then prevailing prices for the various types of bottles. This
was done, even though the members were satisfied that the prevailing over-all
level of prices was too low to be regarded as satisfactory. It was realised that there
were numerous anomalies, arising out of past history, between the levels of prices
for different types of bottles. It was thought, however, that these should be
rectified gradually as time went on. To some extent, this has been achieved E
over the years since 1938, though it is recognised that some anomalies still exist.
From 1935, when the Association began to exist in embryo, prices began to become
more stabilised, and the general situation in the industry improved. Various
general increases in price levels were made to meet rising costs. During the 1939-
45 war, and for some years thereafter, the industry was subject to price control.
Advances in price levels were made from time to time on production by the F
Association to the Board of Trade of evidence which satisfied the Board that the
increases were justified on the basis of higher costs. On Jan. 1, 1949, Glass Con-
tainer Associates was reconstituted under the name "British Bottle Association".
The object of the Association, according to its constitution, was no longer to
minimise competition, but "to provide for fair competition on equal terms". G
That did not include competition in price, but it is asserted on behalf of the
Association that it includes and provides for competition in quality and in service
to the industry's customers. On Apr. 1, 1953, the industry was finally freed from
price control. The present independent chairman of the Association, Mr. W. L.
Barrows, has occupied that position since November, 1946. It is a part of his
functions to receive and study periodic returns from the individual members,
showing their production costs, where available, and profit margin, and to H
prepare for the information of the members of the Association particulars, not
of the information supplied by individual members, but of the averages for the
members as a whole, including the weighted average profit margin achieved in
the manufacture and sale of glass bottles. It is also a part of his functions to
advise the Association as to the desirability and propriety of price increases.
The Association's members are not bound to accept the views of the independent I
chairman, but, in fact, they have never agreed on an increase in price against the
chairman's advice.

The Association's past practice, and intended future practice, if the court
should approve of the restrictions, has been set out in a resolution passed at a
general meeting on Oct. 7, 1960, as follows:

"Resolved that where any future variation of the established price
structure was sought, due regard should first be had, as in the past, to a

- A review of costs as disclosed in the customary reports submitted to the chairman and further that no price increases should be made unless it was clearly established by such review that the costs had increased in proportion by at least as much as the percentage increase in price requested; and Further resolved that the Association's prices be reduced whenever decreases in costs as shown by such review justify such reduction."
- B This resolution was avowedly inspired by certain aspects of the decision of this court in *Re Black Bolt and Nut Asscn. of Great Britain's Agreement* (1), but we do not think that it deserves the label of "mere window dressing" stuck on it by the Registrar. Since 1946 the Association's prices have been subject to general increases, apart from adjustments of price in relation to particular types of bottles, on ten occasions. The increases have been:
- | | | |
|---|---------------|------------------------------|
| C | 1947, January | 7½ per cent. |
| | October | 5 per cent. |
| | 1950, June | 2½ per cent. |
| | 1951, January | 5 per cent. |
| | May | 5 per cent. |
| | 1952, August | 6¼ per cent. |
| D | 1954, March | 2½ per cent. (approximately) |
| | July | 7½ per cent. |
| | 1955, October | 5 per cent. |
| | 1957, June | 7½ per cent. |

E It will thus be seen that, in more than five years since October, 1955, there have been only two general increases in prices, and there has been no general increase in price, despite increasing costs, for more than 3½ years. It was established in evidence that the present selling prices are 119 per cent. above the selling prices in force immediately prior to September, 1939. The percentage increases of costs of labour, raw materials and services involved in the manufacture of glass bottles were substantially greater. Thus, wages in the industry have increased by 270 per cent. since September, 1939, soda ash by 170 per cent., sand by two hundred per cent., coal by 345 per cent., and fuel oil by 150 per cent. It is thus apparent

F that the industry has succeeded in absorbing a considerable measure of increased costs by increased efficiency and production—primarily, we believe, by the use of new and more efficient plant and machinery.

G We turn next to consider the nature of the price restrictions now in force. The Association prescribed a minimum price for each type of bottle, and the types are extremely numerous. Two price lists are maintained by the Association. The first of these relates to so-called "standard bottles". These are bottles of types which are in general use, and not manufactured solely to the requirements of a particular customer. The second list relates to "special bottles", which, as a very rough estimate, constitute about thirty per cent. of the total production of glass bottles. These are bottles which are made specially to the requirements

H of a particular customer, who may, or may not, have a registered design for his particular bottle. Special bottles may be supplied by one manufacturer only, or they may be supplied by more than one manufacturer. That is a matter which depends on the wishes of the customer concerned. There is also a considerable number of types of bottle which are special bottles, but which do not appear in the special list. In order to prevent the special list, which is already a formidable document, from becoming too unwieldy, it has been agreed that, when a manufacturer is asked to produce a new type of special bottle, he will report the fact to the secretary of the Association, who then ascertains whether any other member is interested. If no other member is interested, the member concerned agrees the price with the customer, and that price becomes the minimum price. If other members are interested, the price is agreed after consultation between all members interested, and the price so agreed becomes the minimum price.

I

The bottle need not be included in the special list unless any member interested so desires. If it is not included in the special list, its price is nevertheless registered with the secretary and has the same status as if it were in the special list. Prices in the special list may be varied from time to time by agreement between those members who are interested. Prices in the standard list are varied by the decision of the Association in general meeting, which has before it a recommendation from an investigation committee. Normally, the variation has consisted of a percentage increase in the price of all bottles (including those in the special list); but sometimes some types of bottles are excluded from a general increase, or are dealt with separately, for special reasons such as an attempt to adjust anomalies or because of special factors affecting particular customers. In most instances, there are provisions for graduated prices; that is to say, there is a lower price for orders above a stated quantity. Thus, to take one instance, there is a lower price for beer bottles when the order is for five hundred gross and over than when the order is for less than five hundred gross. In this context, we should mention that it emerged during the hearing that, in some instances, the Association's prices provided for collective rebates; that is to say, the lower price for quantity is available to the purchaser if his total orders from all members of the Association during the period of twelve months exceed the stated quantity, even though his orders from individual members are below that quantity. This collective rebate applies to milk bottles in quantities of fifty thousand gross, one hundred thousand gross and two hundred and fifty thousand gross; and to jam jars in quantities of fifty thousand gross. There is nothing in the price lists, and nothing which has been shown to the court in the minutes of the Association, to indicate that these are collective, rather than individual, rebates for quantity. When the matter emerged in the course of the evidence, counsel for the Association said that the Association did not seek to support the collective rebate provisions; so that these would, in any event, fall to be condemned. If the remaining restrictions were to be upheld, this would, it was admitted, mean that there would be no quantity rebates for a purchaser who took these quantities of these items even though he took them from one single manufacturer.

The prices agreed by the Association are not directly based on any precise costings of individual types of bottles by all or any of the members. Many of the members have their own standard costing system; but, particularly in view of the vast number of types of bottles, the exceptional production problems and the variability of the costs from time to time, even of an individual member in relation to the same type of bottle, it is regarded by the Association as impracticable to base prices of individual types of bottle on any standard costs. With that view we agree, having regard to the particular and special circumstances of this industry. The most that can be done—and it is done within the Association to some extent—towards smoothing out anomalies between the prices of different types of bottles is that those manufacturers who are particularly concerned and experienced with particular “lines” should form sub-committees or “groups” to keep that matter under review and to make recommendations from time to time in order to try to bring prices of different “lines” into proper relation with one another. Having said that the method adopted for fixing prices is reasonably satisfactory for this Association and industry, we should add that it obviously has disadvantages, the seriousness of which it is difficult to assess. The use of the weighted average profit margin of members of the Association as the criterion for the general level of prices must obviously give rise to the possibility that the inefficient—those who have not the most modern plant or those who have not the benefit arising from optimum production runs—are being sheltered from the normal consequences of competition; and the prices paid by the purchasers for some products will reflect an element which represents a subsidy to the high cost producer, and an extra profit margin to others.

We must now consider the record of the Association's members, viewed as a collective whole, as regards technical and commercial progress in recent years

A and as regards the profit levels achieved by them. The industry has undoubtedly made substantial advances in technical efficiency. This is shown by the complete satisfaction expressed by a considerable number of purchasers of bottles who were called as witnesses; by the absence of any serious or substantial criticism of the quality supplied or the services provided; by the fact that the industry appears to have met the demands of accuracy imposed by the considerable increase in
B the mechanical speed of filling of bottles in recent years; by the way in which the industry has in many instances improved the design and reduced the weight of glass bottles (sometimes, it would seem, against a certain degree of initial customer resistance); and by the fact already mentioned that the Association's members have succeeded in absorbing a part of the rising costs of labour and materials without a fully corresponding increase in prices of bottles. Although
C it may well be that members vary in efficiency and that the less efficient lack the spur of price competition, we think it can fairly be said on the evidence before us that the industry as a whole has made good progress in technical improvement and in the introduction of new and improved plant and machinery to meet the rapidly developing requirements of the industry's customers. It is conceded that the industry is still some way behind its counterpart in the United States of
D America; but we accept that, making due allowance for the special difficulties in this country during the war and the post-war years, the glass bottle manufacturers in the United Kingdom have narrowed the gap to a not unsatisfactory degree. The development of the industry is well demonstrated by comparing the figures of production of glass bottles by members of the Association in 1939 and 1959. In 1939 the production was 10,393,000 gross of bottles; in 1959 it was
E 22,599,000 gross.

The documents and evidence, however, disclosed a less satisfactory feature of some instances in which the collective will of the members of the Association tended to obstruct developments which would have been in the interest of purchasers of glass bottles and which would in all probability have been made available to purchasers more quickly and satisfactorily by individual manu-
F facturers in the ordinary course of negotiation with customers, if individual manufacturers had not been bound by the decision of the Association. Thus, there are distinct indications that the Association has tended to deter individual manufacturers from acceding to requests from purchasers for closer margins of tolerance in the dimensions of bottles. There was an episode, for which no real justification was suggested, in which the Association decided that members
G should not supply a certain light-weight type of bottle, which had been designed as a beer bottle, to a purchaser who wished to use it as a vinegar bottle, the circumstances being that the beer bottle, in no way unsuitable as a vinegar bottle, was substantially cheaper than the bottles shown in the Association's price list as vinegar bottles. There was a considerable measure of resistance in the Association to granting permission to members to meet what we regard as the
H perfectly legitimate and reasonable requests of customers that the members should supply their own pallets for use in the transport of bottles within the customers' premises. This was ultimately agreed, but only after a good deal of hesitation and resistance from some members. These facts must be borne in mind when it is claimed, as it is claimed by the Association, that, although there is no competition in price, there is keen competition in quality and service. In
I our view, there are very considerable limitations on competition between members even in quality and service. It may be that this is an almost inevitable feature of their price-fixing arrangements.

As regards profit levels, it has for a considerable time been the aim of the Association to fix minimum prices so as to produce a weighted average profit margin, on turnover, of about ten per cent. We do not regard this profit level as being unreasonable, in so far as a weighted average profit level can be regarded as a proper criterion. In fact, the level of ten per cent. has been achieved only in six years since 1939. In 1939, which was an exceptionally good year, the level

was 14.2 per cent. In recent years the figures have been, starting in 1954, 8.9 per cent., 11.4 per cent., 9.6 per cent., 6.9 per cent., 7.5 per cent., 6.9 per cent., and in 1960 up to June 30, 8.2 per cent. If one takes the twenty-one years from 1939 to 1959, the weighted average is nine per cent., though it may be remarked that, in some of the recent years, the average was depressed by non-recurrent but serious production problems in the largest member. These average profits expressed as a percentage of capital employed, taken for the members of the Association collectively, are also not unreasonable. B

When the profit rates of individual members are considered, it appears that there is a wide range as between one member and another, suggesting that there may be material differences in production cost and efficiency between members. It must, however, be borne in mind that there are special factors in this industry, some of them resulting from what are little more than historical accidents as to the price levels of different types of glass containers, which tend to lessen the value of differing profit margins as a necessary indication of differing efficiencies. C

On the whole, we are satisfied that the price-fixing policy pursued by the Association, under the guidance of its independent chairman, has been reasonably and fairly carried out, and has not been used as a means to achieve anything approaching monopolistic extortion from its customers. Indeed, prices in certain cases yielded a low profit margin. D

The Association rely strongly on the weighted average profits achieved by the Association, not only to support their contention that the Association has acted fairly and reasonably, but also as a ground for saying that even a small reduction in the profit level, resulting from price competition between members, would be likely to produce disastrous results to the industry and hence to its customers, the purchasers of glass bottles. We are not satisfied that this latter proposition is correct. Although the weighted average profit level is not at all excessive, we do not think that any serious adverse effects on the industry would be brought about by some reduction in prices. E

It is next proper that we should consider a number of features of this industry which the Association assert to be peculiar to it or at any rate to have such an effect that, taken individually or collectively, they justify the continuance of the existing minimum price arrangements of the Association. The principal features relied on are: (i) that the glass bottle manufacturing industry is a "continuous process" industry in which optimum profit runs are important for profitable operation; (ii) that the industry is subject to recurring seasonal fluctuations; (iii) that there is a specially important and valuable practice of making bottles for stock in anticipation of customers' requirements; (iv) that the maintenance of quality and dimensions is of particular importance to customers; and (v) that there is a small number of large purchasers of empty glass bottles who are in a position to exercise very heavy pressure on manufacturers because of the size and importance of their individual orders. To a considerable extent, these suggested special features are inter-related one with another. We shall discuss them in turn. F G H

The Association relies strongly on the fact that the glass bottle manufacturing industry is a "continuous process" industry. The constituent materials of the glass are molten together at high temperatures in a furnace. It is essential for economy of production that the furnace should continue to operate, as nearly as possible, for twenty-four hours in each day and for seven days in each week. Even during holiday periods, such as Christmas, great care has to be taken to keep to a minimum the cooling off or closing down of the furnace. The furnace itself has a life of from two to four years. Any interruption, such as sometimes inevitably happens, for repairs to, or re-building of, a furnace necessarily involves a heavy increase in the average cost of production. If a furnace were to be shut down because of lack of orders, the consequential loss would be serious. Moreover, with the most modern and up-to-date plant, with which many of the members are equipped, not only does the furnace feed molten glass to a number of machines, I

A but each machine itself has five, or in some cases six, sections. The furnace continuously feeds molten glass into each machine and into each section of each machine in rapid succession. In each section are the moulds on which the bottles are formed by the feeding thereto of the molten glass from the furnace. If, because of lack of enough orders, a machine, or even one or more of the sections of a machine, cannot productively be used, there is obviously a decrease in saleable
B output; but there is not a corresponding saving in costs of production because, apart from the actual raw material, the remainder of the costs are incurred to almost the same extent as if all the machines, or all sections of the machine, had been in use in producing saleable products. Evidence on this matter, from the cost accountant's standpoint, was given by Mr. J. O. Bradbrook, chief accountant of United Glass, Ltd., who produced figures to demonstrate how, in a particular
C instance, a profit could be turned into a substantial loss if one six-section machine, out of six machines fed by a single furnace, were to be taken out of operation. Thus, the Association maintained, this continuous process industry is peculiarly and exceptionally vulnerable to any lack of balance, even though temporary, between the available volume of orders for the supply of bottles and the available capacity to produce bottles. The manufacturer is particularly concerned to
D ensure that his machines operate at full capacity, so far as this can possibly be achieved. He is particularly sensitive to a fall in orders resulting in any part of his capacity being idle, even temporarily.

Another feature of the industry on which the Association to some extent relied—though it is right to say that the extent of their reliance on it lessened as the hearing proceeded—is the seasonal fluctuations which exist on the requirement
E by purchasers of the delivery of glass bottles from the manufacturers. Statements, figures and graphs showed that there occur, with a fair degree of regularity year by year, peak periods and troughs in the requirement of deliveries of bottles. The peak periods and troughs vary to some extent for different types of bottles; but, taking the industry as a whole, the peak periods of demand occur in the second and fourth quarters of the year and the troughs occur in the first and
F third quarters. It is apparent that, in the present state of the industry, these fluctuations in the requirement for deliveries are largely evened out, because the manufacturers, being well aware of the general trend, use the periods when demand for deliveries is low to manufacture bottles and hold them in stock, against the periods of high demand for deliveries. That this is so is apparent from the figures to which we have already referred as to the percentage of employ-
G ment of the productive capacity of the industry. It is clear that there have been no substantial periods of idle manufacturing capacity whether for seasonal or for any other reasons.

This leads on to the question of stocking of glass bottles, on which factor, also, the Association have placed much emphasis. It is a question which is directly related to the general system of business prevailing in the glass bottle industry
H as regards the placing of contracts and orders. The purchasers with whom the court is concerned on this reference (with the exception of a comparatively small amount of business done by wholesale dealers or factors in glass bottles) are what are sometimes known as "packers" or "fillers". They buy the empty bottles, usually direct from the manufacturers, though in some cases from wholesalers who themselves buy from the manufacturers, for the purpose of filling the
I bottles with a commodity and thereafter selling the filled bottles (filled with milk, beer, sherry, whisky, perfume, medicine or whatever it may be) to the public at large. For reasons which we shall give later, and as a result of a development at a late stage of the hearing, the court is not concerned with any question whether the ultimate purchasers of the goods in the filled bottles gain any benefit or advantage from the Association's price restrictions. The court is concerned with suggested benefits and advantages only to the purchasers of empty glass bottles; that is, the "packers" or "fillers" and, in a small degree, the wholesalers and factors. The purchasers rely on the manufacturers from whom they

buy their bottles to make deliveries at short notice to meet their requirements. The manufacturers are in general the holders of stocks of bottles; they have provided themselves with large warehouse space. The purchasers, normally, are not equipped with warehouse space for new empty bottles awaiting filling and use, other than for comparatively small buffer stocks. It would be an expensive matter for the purchasers of bottles to provide proper covered storage space for their new bottles awaiting use, especially since bottles in storage occupy proportionately a large amount of space in relation to their cost. For example, in the evidence of Mr. R. W. Rowledge, managing director of United Glass, Ltd., it is calculated that, in the case of half-pint beer bottles, warehousing space is occupied by goods (that is, empty bottles) with a value of only 5s. per cubic foot of space occupied. The purchasers in general appear to be well content that the greater part of such storage of new empty bottles as is necessary should be the responsibility of the manufacturers rather than of themselves. They appear to regard it as more satisfactory and economical in existing conditions that the storage should be so provided, with the cost of storage obviously coming in as an element in the price which they pay for the bottles. The purchasers, as a result, necessarily rely very heavily, in existing conditions, on the willingness and ability of the manufacturers with whom they deal to have the stocks available as and when they are required, and to deliver them promptly when the purchaser notifies his requirements for the immediate future.

It is the Association's contention that, with the abrogation of the price restrictions, there would be resulting uncertainty as to the loyalty of the customers and as to future prices. Hence the manufacturers would be less willing than now to make bottles for stock, and, as a result, the purchasers themselves would suffer by reason of not getting their empty bottles as and when they are needed. Thus, it is suggested, not only at the ordinary seasonal peak periods would the purchaser be in danger of a shortage of bottles, but also at exceptional peak periods this would happen. In a time of influenza epidemic, for example, the supplier of medicines in bottles might find himself without the empty bottles which he suddenly needed; or, in a time of prolonged hot weather, the brewer might find himself unable to cope with the extra demand for bottled beer because of shortage of bottles. The purchaser is, however, well aware of the importance of being able to get deliveries of bottles at short notice in times of seasonal or unexpected rise in demand for the bottled goods. One would, therefore, expect that he would take all possible steps to make arrangements with the manufacturers to ensure that his needs would be met. The Association say, nevertheless, that, in a time of "price war", or even in a time of potential fluctuation of prices of glass bottles, many purchasers would not be willing to commit themselves to a long-term contract (such as for a period of a year) to a particular manufacturer, or to two or three manufacturers, as now; they would be unwilling to take the risk of a competitor being able thereafter to buy glass bottles at a lower price; they would, therefore, not be prepared to enter into anything more than short-term contracts with the manufacturers. The manufacturers, then, would not be prepared to take the risk of manufacturing in advance of actual orders for the bottles. The purchasers would suffer in the long run, and probably also in the short run. If a manufacturer made bottles for stock without having a firm contract or order, he would, it is said, be peculiarly vulnerable, in this industry, to pressure from buyers to lower his prices, since the buyer would know that the manufacturer was stocked up and must dispose of his stocks. Thus, conditions would be made more favourable to the start of a "price war", or, if it had already started after the abrogation of the restrictions, the war would be intensified.

It is clear from the evidence that the purchasers of glass bottles place a great deal of importance on the certainty of obtaining prompt deliveries as required, and that there generally exists a close, and often long-standing, co-operation between the purchasers and the manufacturers in relation to the meeting of the

A purchasers' needs. The Association's thesis involves the proposition that the purchasers, if the price restrictions were to be abrogated, either would be prepared to sacrifice their need for prompt deliveries in the hope of obtaining a lower price, or would somehow or other be forced so to do in the conditions which would then prevail. In this connexion, it is to be observed that the Association claim that most purchasers of glass bottles make agreements with one or more of the members of the Association for a supply of glass bottles during a period of twelve months. (By the conditions of sale imposed under the Association's restrictions, no member is allowed to make a contract for a quantity larger than the purchaser's estimated requirements for twelve months.) We are not satisfied on the evidence that a twelve months' contract is general or normal throughout the industry. In some cases, purchasers, and at least one member manufacturer who gave evidence for the Association, seemed to be very doubtful whether they had legally binding contracts at all, as distinct from "gentleman's agreements". This doubt may in part be caused by the conception, which is not uncommon, that a "contract" involves a formal document setting out terms and signed by the parties. It may well be that some purchasers and manufacturers are, in fact, legally bound by oral or written contracts, even though they conceive that there is no more than an agreement, more or less vague, and binding in honour only, if binding at all. However that may be, it is clear that some at least of the purchasers have arrangements which apply for only three months or six months at a time. In no case, so far as the evidence went, even where the arrangements involved supply over a period of twelve months, were there any clear terms or stipulations as to the rate at which, or the instalments by which, or the date on which, deliveries were to be given by the manufacturer or taken by the purchaser. No doubt the general understanding—it does not seem to be higher than that—is that deliveries will be asked for and given reasonably in accordance with the purchaser's requests, the manufacturer relying on the fact that, often from long experience, he knows the general pattern which is likely to be followed in the purchaser's requirements, possibly, it is said, even better than the purchaser himself.

F All this leads to the clear conclusion that, in this industry, the interests of both manufacturers and purchasers require a very close working understanding and co-operation between them, for their mutual benefit; and that this fact is well known and clearly recognised by at least the great majority of both manufacturers and purchasers; that it would require some very strong inducement before the manufacturers would be prepared to refuse to meet the reasonable needs of the purchasers as to stocking and deliveries; and that it would also require some very strong inducement before the purchasers—or at any rate the great majority of them—would be prepared to do anything which would involve the risk that their needs as to stocking and prompt deliveries would not be met.

The same conditions as we have set out in the preceding paragraph apply to the question of a possible deterioration in the quality of glass bottles, if the price restrictions were to be condemned. The Association say that, as an almost inevitable concomitant of the "price war" which, they say, would follow the abrogation of the restrictions, there would, sooner or later, be a serious falling off in the quality of the bottles manufactured. This would come about, they say, because the margin of profit of the members, already too low, would then be reduced to an uneconomic level. Manufacturers would either deliberately lower their standards of quality, or would take risks for the purpose of effecting economies in the hope that the quality would not be impaired. The most probable form of economy, we were told, was that there would be a reduction in the manufacturer's standards of inspection of the newly produced bottles. Also, moulds would be used after they should have been replaced. At present twenty per cent., and sometimes even as much as forty per cent., of newly produced bottles may be rejected by the manufacturers' inspection. If the standards of inspection were to be reduced or moulds overworked, defective bottles, such as bottles with dimensions outside the limits of tolerance allowed in the specification, might slip

through unobserved. Many of the trade witnesses called on behalf of the Association—that is, persons engaged in the businesses of “packers” and “fillers” of bottles of various sorts—expressed the fear that, if the “price war” came, quality would deteriorate, with most unfortunate results to themselves. With the modern developments of very high speed packing and filling machines, any errors or irregularities in bottle dimensions can produce unfortunate results and financial loss, as a result of frequent interruptions to the filling or packing process. All the trade witnesses, while expressing this fear, made it clear that they themselves would not, so far as it lay in their power, be prepared to take the risk of defects in quality in return for the benefit of a price reduction.

The other feature of this industry which the Association assert to be a special feature and important factor—and a still more important factor if the price restrictions were to be abrogated—is the existence of a comparatively small number of very large buyers of glass bottles, who would exert pressure for securing lower prices. Evidence given by Mr. Rowledge showed that, in the case of United Glass, Ltd., there were twenty buyers, out of a total number of customers of some two thousand to three thousand, who took about thirty-five per cent. of the company's total production. Forty per cent. of the company's total number of customers individually took not more than £200 worth of business each year, contributing about $\frac{1}{2}$ per cent. of the company's total income from the sale of bottles. If one assumes that this company's experience is fairly typical of the industry as a whole, it appears that there is a very large number of small buyers of glass bottles, and a comparatively small number of very large buyers. The Association assert that there is, even with the price agreement in existence, very heavy pressure from the large buyers for reduction in price, pressure to which the Association has had on occasion to yield. If the price agreement were to be condemned, it is asserted, that pressure would be still further increased, because individual manufacturers would no longer have the confidence that the big buyer would be unable to get a lower price if he were to place his order elsewhere; and the big buyers would be well aware of the additional pressure which they could thus exert on the individual manufacturers. This potential pressure by large buyers is particularly important, say the Association, in a “continuous process” industry. The Association, in this connexion, rely strongly on evidence given by a witness called by the Registrar, Mr. C. J. Robertson, who is the managing director of a company of preserve manufacturers, with large requirements for jam jars. Mr. Robertson said that he had recently obtained a lower price for a new, lighter weight, jam jar from a manufacturer outside the Association, and that he had, in effect, thereafter told members of the Association: “If you don't reduce your price in the special list, you won't get many orders”. Mr. Robertson agreed, in cross-examination, that, if the Association's agreement were to be terminated, the scope would be enlarged for that kind of negotiation, and that, to some extent, he would take advantage of the enlarged scope. He added:

“We do not often do that sort of thing, but in this case we have an immovable price fixed by the Association, and we feel we are entitled to do what we can to change it.”

We have no doubt that in free price competition the large buyers would seek to obtain lower prices. We have also no doubt that they would be in a stronger position to negotiate if there were no price agreement among members of the Association. We have no means of knowing whether, at present, prices are relatively higher for the large buyers or for the small buyers, or whether any adjustment which might take place by reason of pressure of large buyers would be likely to result in inequities being produced. Unless it could be established—and it has certainly not been established on the evidence—that there would be a resulting increase in prices to the small and medium buyers more than equivalent in amount to the saving to the large buyers, it is difficult to see how

any such resulting adjustments would involve a loss of advantage to the purchasers of glass bottles as a class. The Association sought to rely on this allegation of increased pressure by large buyers principally for the purpose of suggesting that it would be an important factor in the outbreak of the "price war" which they asked the court to hold, would follow on the abolition of the restrictions.

The Association seek to justify the price restrictions under s. 21 (1) (b) of the Restrictive Trade Practices Act, 1956, on the ground that their removal would deny to the public as purchasers certain specific and substantial benefits or advantages which, it is contended, are enjoyed by the public as purchasers by virtue of the restrictions or of arrangements or operations resulting therefrom.

In the course of the hearing, a question arose under s. 21 (1) (b): Who are "the public as purchasers" of the goods? Though in the end it became unnecessary to decide the question, it is appropriate to state how it arose and why a decision was unnecessary. The manufacturers sell bottles mainly to fillers thereof. A small proportion is sold partly to factors and partly to wholesalers. The factors buy at a five per cent. discount on list prices, their purchases commonly being delivered direct by the manufacturer to the sub-purchaser. They do a certain amount of stocking; they sub-sell at list prices. The wholesalers buy at list prices, stock and re-sell in small batches to small fillers at an advance on list prices. Thus far sales have been of empty bottles, bought to be re-sold as such, or to be filled.

Originally in the Association's statement of case, specific and substantial benefits were alleged not only to the purchasers above mentioned, but also to those who purchase the containers when filled. Ultimately, no such benefit to these latter was asserted. It will be borne in mind that, in applying s. 21 (1) (b) of the Act, all who purchase the goods in question must be kept in the field of view (see *Re Black Bolt and Nut Asscn. of Great Britain's Agreement* (2)). With that in mind it was argued for the Association as follows: First, that "the goods" can be taken to be empty bottles, or bottles suitable for filling; on that basis purchasers of filled bottles are not in the field of view. Second (if that be wrong), that people who buy a bottle of whisky or a jar of jam cannot be sensibly regarded for the purpose of the section as purchasers of the bottle or jar, even though the property in the container passes to them on the sale, and though no doubt part of the price represents label, cork, cap and bottle. Hereunder it may be remarked that in relatively few cases could it be suggested that the purchaser of milk acquires the property in the bottle; drinkers of bottled beer on licensed premises do not; nice questions might arise when deposits are paid against the return of the bottle; inasmuch as National Health Service prescriptions involve a small flat payment by the patient and an allowance to the dispensing chemist by the Ministry of, at present, 1.62d. for the container (of whatever kind), who in such cases buys the bottle containing the medicine? Third, the Association argued that, if that also be wrong, and those who purchase bottles with their contents must be included as part of "the public as purchasers", nevertheless by far the most important part of that public, in the circumstances of the case, consists of those who buy bottles for re-sale or for filling; consequently, if the relevant benefits can be established in relation to that part, they are (within the principles laid down in the *Black Bolt and Nut* case (3)) established in relation to the public as purchasers as a whole, notwithstanding that no such benefit can be established in relation to those members thereof who purchase filled bottles, viewed in isolation. Counsel for the Registrar disputed the first and second of these arguments, but accepted the third. Since there was not a full discussion on the first two points, we express no opinion on them. To avoid misunderstanding, we should, however, make it clear that, if there were any question of detriment to purchasers of the filled bottles arising out of the

(2) [1960] 3 All E.R. at p. 137; L.R. 2 R.P. at p. 94.

(3) [1960] 3 All E.R. 122; L.R. 2 R.P. 50.

Association's restrictions, the Association would not be enabled, simply by limiting the relevant "public as purchasers" under s. 21 (1) (b) to the purchasers of empty bottles, thereby to avoid consideration by the court of the possible detriment to the public as purchasers of the filled bottles. It is, perhaps, convenient to make here the comment that references in *Re Wholesale Confectioners' Alliance of Great Britain and Northern Ireland's Agreement* (4) to the relevant public should not be taken as being in any way a departure from the principle laid down in the *Black Bolt and Nut* case (5).

It is necessary in the special circumstances which have arisen in this reference to refer to the nature of the Association's case as it was originally pleaded and presented. That case differed very materially in its essence from the case which was ultimately urged on the court on behalf of the Association, after certain important amendments to the statement of case had been requested and allowed on two separate occasions during the hearing. In the Association's statement of case as it stood at the time when the hearing of the reference began, it was averred in para. 20 (a) that the benefits and advantages which the original purchasers of the bottles (that is, of the unfilled bottles), with whom alone the court is now concerned, enjoyed by virtue of the restrictions and of arrangements resulting therefrom were: (i) very low prices of glass bottles; (ii) reasonable stability of the prices of glass bottles; and (iii) maintenance and improvement of the quality of glass bottles. It was further averred by para. 22 of the statement of case that, after the removal of the price restrictions, those benefits and advantages would be lost in the following respects: (a) at all times the prices of glass bottles would fluctuate sharply; (b) at times of normal or high demand for glass bottles the prices of glass bottles would be higher than the very low prices mentioned; and (c) at times of low demand for glass bottles there would be competition of a kind which would inevitably result in deterioration in the quality of glass bottles. It was further averred in para. 23 that the removal of the price restrictions would lead to competition of a kind which would force many of the members of the Association to give up the glass bottle manufacturers' business and one or more of the members would probably acquire the monopoly of producing and supplying glass bottles and consequently the prices of glass bottles would be substantially increased.

It will be seen that the essence of the case, as presented originally in the pleadings, was: in times of normal or high demand for bottles there would be higher prices if the price restrictions were no longer in force; in times of low demand there would be price competition resulting in lower prices and, in consequence, deterioration of quality; fluctuations in price, presumably in part at least dependent on fluctuation between high, normal and low demand; and ultimately, presumably as a result of a period of low demand and lower prices, the elimination of certain manufacturers and the emergence of a monopoly or, at best, a very few small groups, who, taking advantage of their position, would increase prices above the present level. The proofs of evidence of witnesses representing members of the Association were to some extent in consonance with the case as thus pleaded. For example, Mr. Barrows, the independent chairman of the Association, in his proof of evidence gave forecasts of what he thought would happen (a) "in times of full and rising trade" and (b) "in times of reducing trade", if the price restrictions were to be abrogated. In times of full and rising trade, he thought, "prices would generally go up due to the limitation of manufacturing capacity and the strength of the sellers' market". There was some doubt whether Mr. Barrows' "time of full and rising trade" was intended to relate only to "times of high demand", as mentioned in para. 22 (b) of the statement of case, or also to "times of normal demand", covered by the same sub-paragraph. Mr. Barrows in evidence said, and we accept, that

(4) [1961] 1 All E.R. 116; L.R. 2 R.P. 135.

(5) [1960] 3 All E.R. 122; L.R. 2 R.P. 50.

A he intended to refer only to "times of high demand". It follows that, so far as his proof of evidence goes, he did not visualise, or at least did not think fit to mention, any untoward consequences in "times of normal demand". As regards "times of reducing trade", which correspond with "times of low demand" in para. 22 (c) of the statement of case, Mr. Barrows said in his proof of evidence that there would soon be price cutting, that manufacturers would quickly be making losses, that failures would soon become the order of the day, that a number of producers would go out of business, that there would be amalgamations between the surviving producers and that the trade would eventually become concentrated in the hands of two or three producers who would have monopolistic powers, and would use them to dictate terms of trade and prices, at least to the smaller buyers. In the process of the price war, prices would fluctuate sharply, to the inconvenience of purchasers of bottles, quality would deteriorate, and purchasers would not be able to obtain deliveries of stocks of bottles as and when they required them. As we have said, Mr. Barrows made no forecast of any unfortunate consequences in relation to what the statement of case calls "times of normal demand". In the statement of case, it was averred that in such times prices would be higher if the price restrictions were not in force.

D Higher prices are totally inconsistent with the conception of a "price war". Mr. Rowledge, in his proof of evidence, in substance related his forecast of a "price war" to the experiences of the 1920's and 1930's when, as has been mentioned, there was serious surplus capacity in the industry. His forebodings, therefore, appeared to be related almost, if not quite, exclusively to the hypothesis of "times of low demand"; that is, the demand for bottles being substantially less than the productive capacity of the industry. Mr. Moir, of Rockware Glass, Ltd., gave no reasons in his proof of evidence for thinking that a "price war" would be likely to begin, in the absence of the price restrictions, if demand and productive capacity were substantially in balance with one another. Mr. Shaw, representing one of the smaller members, was very apprehensive about the effect of the pressure of the larger buyers on the economy of the smaller manufacturers; but he, also, offered no clear explanation or reason why anything disastrous should happen at times when the production capacity of the industry no more than matched the demand.

At an early stage in the hearing, it became apparent that the Association's witnesses were not supporting the case that, if the restrictions were abrogated, there would be higher prices in times of normal demand. On the fifth day of the hearing, counsel for the Association sought, and were granted, leave to amend the statement of case, and on the eighth day further amendments were made with the leave of the court. In the statement of case, as finally amended, in addition to other changes, para. 22 (b) was struck out, so that it was no longer asserted that "at times of high or normal demand" prices would be higher without the restrictions. This is clearly a change of front which is of the greatest importance, if it is right to foresee for the future that demand is likely to be "normal". If that be the correct forecast, the Association's case as originally presented is wholly inconsistent with the conception of a "price war" occurring, since it is impossible to visualise a "price war" coincident with continuing higher prices. By their amendment, the Association in effect seek to contend that, even if demand for glass bottles is likely to remain "normal"—that is, with a close balance between the extent of the demand by purchasers and the capacity of the industry to produce bottles—still, somehow or other, there is likely to be a "price war" which will bring with it the suggested concomitant disadvantages to the purchasers of lower quality, worse service, instability of prices, and an ultimate emergence of more or less monopolistic conditions with a higher general level of prices. It is clear on the evidence that the demand for glass bottles in the United Kingdom is likely to increase and, with increasing demand, it is far from easy to see how productive capacity is likely to exceed demand unless, indeed,

some special cause for the bringing about of a lack of balance can be found to be likely to arise from the mere fact of the abrogation of the price restrictions. A

All the witnesses for the Association who were asked the question agreed that the prospects were that the demand for glass bottles would continue to increase in the foreseeable future; perhaps to increase very substantially. There did not appear to be any fear that other types of container would take the place of glass bottles to such an extent as to affect the general increase in demand for glass bottles. The industry, as we mentioned at the outset of our judgment, has, for a considerable time past, been in a state in which its total production capacity, steadily increasing, has been fully employed. In a future where rising demand is undoubtedly to be foreseen, it would require some very special circumstances to bring about a change whereby productive capacity was seriously in excess of demand. In the absence of substantial excess capacity, it would require some very special circumstances to render probable conditions of intensive price-cutting, such as is the necessary hypothesis of the Association's case in justification of the continuance of the price restrictions. Where, as here, the suggestion of the "price war" is related in the Association's original pleadings only to "times of low demand", which we have no reason on the evidence to suppose are likely to occur, other than to a minor degree in seasonal fluctuations of requirements for deliveries of bottles; where, as here, the proofs of evidence of witnesses representing the Association either did not suggest that a "price war" would occur except in times of low demand or did not offer any acceptable reason for such a suggestion, it is necessary for the court to examine with particularly close scrutiny the reasons which are ultimately offered in the evidence. It is, of course, true, as counsel for the Association pointed out, that the mere fact that reasons are offered belatedly is not a ground in itself for rejecting them; afterthoughts may be right; first thoughts may be wrong. We do not, merely on account of their belatedness, reject the reasons put forward in the evidence as showing the probability of a "price war" in the foreseeable conditions of demand and capacity in this industry if the price restrictions are abrogated. But we are bound to examine them in the light of an undoubted change of front which has occurred between the time when the statement of case was delivered, or, indeed, the time when the proofs of some of the witnesses were prepared, and the time when the submissions of the Association emerged in their final form during the hearing. D

Mr. Barrows, whose views as expressed in his proof of evidence on this matter have already been referred to, was asked by the court when it was that he first thought that a "price war" would start in conditions of full employment of the capacity of the industry. His answer was: E

"I think probably when I began to see the proofs of the evidence of the manufacturers and became fully cognisant of the curious unbalance that can arise in a manufacturer's business although there is a very full demand." F

Later, the court offered him the opportunity, after re-reading the proofs in question, to return to the witness-box in order to point out the passages which had put this thought into his mind. He did not take advantage of this opportunity. We have no doubt that Mr. Barrows was doing his best to assist the court, but we are satisfied that his explanation was not correct, and we are left in uncertainty how it was that Mr. Barrows came to change his mind, and why it should have been that, if a "price war" is really to be regarded as probable in the conditions of normal (that is, full) demand in the industry, the case should have been presented as it was in the statement of case, which, no doubt, was most carefully considered by the members of the Association; or in the proofs of evidence, which no doubt were considered with equal care by the witnesses concerned. H

The view of the members of the Association as to the possibility of a "price war", if the price restrictions should be abrogated, does not, however, rest there. There is further, and in our view very cogent, evidence that such a result in I

A times of full demand, was not regarded as being likely, at least until very shortly before the hearing began; and we have heard no explanation which satisfies us as to any reason for such a change of view shortly before the hearing. The further evidence to which we refer relates to an issue of new capital by one of the member companies of the Association, Jackson Brothers (of Knottingley), Ltd. Late in 1960, at a time when the hearing of this case was imminent, Jacksons B raised some £460,000 of new capital for improvement of their works and the building of a research block (£50,000), the running of which was estimated to cost £40,000 per annum. Some £260,000 was raised by a rights issue to shareholders at 13s. per 5s. share on the basis of representations contained in a letter from the board which forecast an increased profit in 1961 of £80,000 attributable to the proposed improvements and to varied and increased production resulting therefrom. In estimating this increase in profits, no allowance or discount was made C for the effects of a "price war" following the possible termination of the restrictions by this court. The evidence of Mr. Jackson (a director of Jacksons) on this matter did not follow any very clear or consistent pattern and it would not be useful to analyse it here in detail. Let it suffice to say that we conclude from it that his board did discuss or consider the possibility of a severe "price war" in D the event of termination of the agreement, but concluded that this possibility could be properly and safely ignored in the conditions of balance between capacity in the industry and demand which existed and could reasonably be expected to continue, there being no reasonable possibility of excess capacity such as contributed to the price cutting before 1935. Mr. Jackson, in his oral evidence, nevertheless envisaged a "price war" notwithstanding conditions of balance E between demand and capacity. He said he came to this conclusion as a result of certain events which came to his knowledge late in 1960, but which seemed to us insufficient to have justified a change in the considered view which he and his board had, in our view, previously reached and had presumably retained as recently as the allotment letters in November, 1960.

The specific and substantial benefits and advantages to the purchasers of F glass bottles which it is now claimed in the case, as finally presented, are likely to be lost if the price restrictions should be abrogated may be summarised as follows: (a) the prices of glass bottles would be no longer uniform and would fluctuate sharply; (b) at times of low demand, or in the course of the foreseen severe price competition, it would be impossible to maintain and improve the quality of glass bottles; instead the quality would deteriorate; (c) the exist- G ing close co-operation of the members in research, design and similar matters, and the resulting improvement in quality, and reduction in price, would disappear or be gravely lessened; (d) members would no longer produce for stock at times of seasonal low demand; (e) the severe competition for the orders of the large buyers would result in such buyers paying unreasonably low prices, and, consequently, all other buyers would pay higher prices than if the restrictions were to H continue; (f) purchasers of glass bottles would no longer obtain prompt delivery at short notice; and (g) the "price war" would ultimately result in something in the nature of a monopoly in the hands of those manufacturers who survived, and the monopoly conditions would result in higher prices.

Before we state our conclusions as to these seven suggested benefits and advantages, we should express our views as to the Association's main contention, I which lies behind their submission as to the prospective loss of most, if not all, of these suggested benefits and advantages. That contention is the submission that the abolition of the restrictions would be followed by a "price war" of considerable severity. First we should say a few words about the commonly used phrase, a "price war". This phrase is used with varying significations. Of course, it involves price reductions; sometimes it involves price reductions expressly designed to drive competitors out of business; sometimes it involves price reductions designed merely to bring the reducer into a market, or to increase his existing, or to retain or recapture his pre-existing, share thereof. In any

event, the phrase has the colour of a progressive cutting of current prices, as distinct from the ordinary to and fro of price competition in a reasonably stable market. A "price war", therefore, sometimes involves aims and always involves degree. The possibility of a "price war" with the express aim of crippling rivals is not, in our judgment, relevant here; we are concerned only, if at all, with degree. We, therefore, do not pose to ourselves a question whether a "price war" will result from the abolition of the price restrictions, but rather (initially) the question whether we are satisfied, on balance of probabilities, that such abolition will result in a fall in prices such as will lead to the results forecast by the Association.

The witnesses from members of the Association, faced with the fact that the productive capacity of members is being fully utilised and has been fully utilised for a considerable time past, and, faced with the fact that the demand for bottles is likely to increase in future, suggested in their oral evidence that severe price competition, sufficient to produce the various consequences mentioned in the statement of case, would be likely to be caused through the creation of excess capacity in the industry as a result of the switching of orders by one or more of the large buyers, in an effort to obtain lower prices. The switch might not be of the whole of a large buyer's order. Indeed, at present the large buyer not infrequently obtains his bottles from two or more different manufacturers. As a result of such a transfer of an order, in whole or in part, the manufacturer who received the order might increase his manufacturing capacity at a substantial capital cost, and the manufacturer who lost the order would be so anxious, because of the "continuous process" nature of the industry, to have his capacity in full use that he would cut his prices in order to fill his idle capacity, by attracting orders away from another manufacturer. So, it was said, the process of undercutting would start, and so it would continue with increasing severity, bearing most harshly on the smaller manufacturers. Even if no new manufacturing capacity were to be created, a lack of balance could, it was suggested, readily be created within the industry, accentuated perhaps by seasonal fluctuations in requirements for deliveries. These conditions would arise, it was said, from the special features of this glass bottle manufacturing industry which have already been discussed; that is, in particular, the sensitivity of a continuous process industry, the seasonal fluctuations, the influence of large buyers because of the harm that can be done to a manufacturer by the loss of a large order, and the practice of making for stock. These forebodings were supported by the evidence of witnesses, some called by the Association, some called by the Registrar, who represent companies which are fillers of various types of bottles or are wholesalers or factors. The great majority of them feared that, if the restrictions were to disappear, conditions would arise where they would find that they were offered defective bottles, or were not getting deliveries as they required, or, in the case of the smaller buyers, paying higher prices than now because the larger buyers would be paying less; or, in the long run, they would find themselves having to buy from a small number of large manufacturing companies or groups, which might be less ready or less able to deal promptly, efficiently and economically with the special requirements of the smaller buyers. So far as these trade witnesses were concerned, it is necessary to point out that they could not claim any first-hand familiarity with the internal affairs or conditions of the glass bottle manufacturers; nor were they able to give any clear or convincing reasons why, in the conditions which we have mentioned, price competition should become such as to produce the various unfortunate consequences which they claimed to foresee. In every instance, as regards quality for example, the trade witnesses were insistent that they themselves would not dream of deliberately buying an inferior quality product for the sake of a lower price, or of deliberately risking a breakdown in prompt deliveries in order to obtain cheaper bottles. It was clear that the great majority of them had close, long-standing and valued connexions with particular manufacturers, which we have no doubt they would wish to continue in their own interests. In almost every case the fear was expressed that someone else would be

A responsible for starting what we may colloquially call "the rot". In our judgment, the evidence of these trade witnesses, despite the fears which they expressed (based largely perhaps on a general state of contentment with the known and on the fear of the unknown, since price restrictions have been the order of the day in this industry for some twenty-five years) tended strongly to support the view that it would take a good deal more of a disturbance than is likely to be created by the abolition of the price restrictions to cause any substantial number of purchasers of glass bottles to be prepared to take any action, such as trying to drive prices down to an uneconomic level, which they realise very well might have the consequence of harming their own interests.

So far as concerns the view put forward by the witnesses from the Association, we have no doubt that the larger buyers may quite possibly seek to negotiate lower prices for their large orders, and in that sense use pressure to attain this end. That is a normal part of the operation of a free market. We are, however, unable to accept the likelihood—and we are concerned only with the balance of probabilities—that, in conditions of substantially full employment of capacity in the industry and with the prospect of a rising demand, there would be such switching of orders, or threats of switching of orders, as to drive prices down to a level at which the various suggested consequences would be likely to occur in any substantial degree. There is not sufficient room for manoeuvre, in a field where demand and capacity are substantially in balance, and where a rapid increase in capacity by means of overtime or week-end work is impossible, for the large buyers to put the manufacturers individually in such a weak bargaining position that they would be forced to accept uneconomic price levels or to risk loss of customers by deterioration in quality or service. We are unable to accept the suggestion that if, indeed, the abolition of the price restrictions would leave the industry in serious peril of prices being forced down to an uneconomic level, any manufacturer would either choose or be forced to take that opportunity substantially to increase his productive capacity, thereby creating the very conditions of excess capacity which would aggravate the danger. The evidence of the manufacturer witnesses in this matter was inconsistent with itself and far from convincing.

Our view, then, is that price competition in this industry in present and foreseeable conditions is not likely to lead to any disastrous consequences for the industry itself, let alone for the purchasers of glass bottles. We are strongly confirmed in that view by the matters which we have already discussed as to the late stage at which the suggestion was put forward that such consequences would happen at a time when productive capacity and demand are, and are likely to remain, in close balance for the industry as a whole. We are further confirmed in that view by the matters which we have already discussed relating to the recent issue of new capital by one of the member companies.

We can now deal briefly with the various specific and substantial benefits and advantages which we have already enumerated as being those which the Association's case in its final form asserts to exist and to be likely to be lost if the price restrictions should be condemned. First, there is loss of uniformity and stability of prices. So far as concerns uniformity, there is undoubtedly a considerable, though by no means complete, measure of uniformity of prices by virtue of the restrictions. We cannot accept that such uniformity is a specific and substantial benefit to purchasers. No doubt some of them, perhaps many of them, regard it as a convenience, as a trouble-saving state of affairs. It may well make life easier for many purchasers. This case, however, is very far removed from being what we may describe as being a "shopping" case, such as was established in the *Black Bolt and Nut Asscn.'s Agreement* case (6). As regards stability of prices, it is true that the changes in general price level since 1955 have been remarkably few, and it is commendable that despite rising costs there has been no increase in general price level since June, 1957. Whether

some increase in prices may now be due, and whether, indeed, such increase, at any rate in some lines or to some purchasers, may occur whether with or without the restrictions, are not matters on which we need, or are able, to speculate.

We refer to passages in the judgment of the court in *Re Yarn Spinners' Agreement* (7):

"We think that any scheme which imposes a minimum price is bound in this or in other similar respects to contribute towards price stability. Any form of price control will probably make prices more stable than they would be in a free market. If price stability could be obtained without the sacrifice of a free market, it would undoubtedly be a benefit; if it can be looked at in isolation, it is no doubt a benefit. But we do not think that the proper way of considering this point is to admit price stabilisation as a benefit to the purchasing public . . . What we have to consider is whether price stabilisation, as an alternative to a free market, is a benefit to the purchasing public in the circumstances of this particular case. We cannot think that, as a general rule, it is a benefit; if we were to hold that, we would be going contrary to the general presumption embodied in the Act that price restrictions are contrary to the public interest. There may be particular cases where price stabilisation confers a peculiar benefit sufficiently great to outweigh the loss of a free market, but this is not one of them."

This statement of principle was re-affirmed by the court in *Re Scottish Asscn. of Master Bakers' Agreement, Re Wholesale and Retail Bakers of Scotland Asscn.'s Agreement* (8). On the evidence in the present case, we do not find any special circumstances which warrant the conclusion that price stabilisation confers a peculiar benefit sufficiently great to outweigh the loss of a free market.

Secondly, the Association assert that the benefit to the purchasers of the maintenance and improvement of quality would be lost, and that, instead, quality would be likely seriously to deteriorate, to the grave disadvantage of purchasers of glass bottles. We are unable to accept, on the evidence before us, that this is likely to happen. For the reasons which we have given, we do not foresee price competition of a nature that would be likely to drive prices down to such a level that there would be a serious danger that manufacturers, whether deliberately or by taking the risk of reducing standards of inspection or overworking moulds, would lower the quality of their products or would fail to keep pace with their customers' requirements. It is clear from the evidence that for a manufacturer to produce defective bottles would be the shortest and surest way of losing the majority of his customers. It is clear from the evidence that the majority of the purchasers of glass bottles are acutely aware of the detriment to them in accepting the risk of obtaining defective bottles in return for price reductions. Moreover, it was stated in evidence that it is quite impracticable for manufacturers of bottles to produce two qualities, one superior and the other inferior. The large buyers—the very ones whose pressure it is asserted will lead to reduction in quality—would most certainly insist on the maintenance of proper standards of quality in the bottles purchased by them, and the manufacturers would most certainly do everything possible to avoid the risk of losing their custom by lowering standards of quality. If the standard of quality is maintained for the large buyers, it must also be maintained for the medium or small buyers.

Thirdly, the Association aver that the abrogation of the price restrictions would destroy, or seriously impair, the existing close co-operation between members in research, design and similar matters, with resulting loss to the purchasers of benefits which they now have, including the benefits of economies resulting from improved designs and techniques. This, it is suggested, would

(7) [1959] 1 All E.R. at p. 317; L.R. 1 R.P. at pp. 188, 189.

(8) [1959] 3 All E.R. 98; L.R. 1 R.P. 347.

A happen whether the resulting price competition was of a "cut-throat" variety or whether it was of a less intense nature. We accept that the introduction of price competition may quite possibly result in some falling off in co-operation between members. We are, however, not able on the evidence to hold that the probable diminution in co-operation on these matters would be such as to constitute the loss of a specific and substantial benefit or advantage.

B Fourthly, it is averred that purchasers would lose the existing advantage that members of the Association produce bottles for stock at times of low seasonal demand. It was admitted in evidence that this could not relate to special bottles. We see no reason, on the evidence, to suppose that it is probable that, in the conditions which would exist if the restrictions were to be abrogated, manufacturers would be any the less ready, willing and anxious, in order to

C maintain continuing business with their customers, to use the periods of low seasonal demand to manufacture standard bottles for stock to be delivered during the periods when seasonal demand for deliveries is high. The alternative of the plant running at less than full capacity during the first and third quarters of the year would be no more attractive, and, so far as we can see, no more necessary, than it is at present. We do not believe that there would be

D any substantial alteration to the present pattern of the industry, whereby the majority of purchasers notify their anticipated requirement in advance to the manufacturers, whether or not under a binding contract for three, six or twelve months, and take the deliveries as they require them; and whereby the purchaser values and maintains the advantages of a close and continuing relationship with one or more particular manufacturers.

E Fifthly, it is claimed by the Association that the abrogation of the price restrictions would result in the larger buyers, by means of their increased power in a free market, forcing prices for their purchases to an unreasonably low level, with the result that the manufacturers would seek to recoup themselves in whole or in part by charging higher prices than now to all other purchasers. The court is obliged to regard the purchasers of empty glass bottles as one single

F category. We cannot segregate a part of that category and say "There is a disadvantage to them, and we shall disregard the compensating advantage to other purchasers". There is no evidence which would justify us in holding that, even if the Association's expectation were correct, the result would be the loss of a specific and substantial benefit or advantage to the purchasers as a whole. This is a fatal objection; but we would add that, although the consequence suggested is a possible consequence, we are not satisfied that it is more

G probable than not. We should mention that a considerable number of the smaller purchasers, who buy bottles to fill them, make their purchases through wholesalers. There was some evidence that the wholesaler's margin of profit leaves scope for the possible absorption of some increase in the manufacturers' prices. There was also some evidence to suggest that, in so far as it is possible

H to assess the relative levels of prices, certain lines which are bought principally by smaller buyers may at the present time be relatively low in price.

Sixthly, the Association say that a specific and substantial advantage which would be lost is the present state of affairs whereunder purchasers can obtain prompt delivery of bottles at short notice. This state of affairs does undoubtedly exist now and it is greatly valued by purchasers, both small and large. This aspect is clearly closely related to the question of making for stock which we have already considered. The suggested loss of this advantage depends on the hypothesis of a general change in the pattern of the industry, an alteration of the purchasers' own habits of notifying their anticipated requirements in advance, and an alteration in the manufacturers' practice of manufacturing for stock. For reasons which we have already indicated, we do not think it likely that these changes would take place, at least to any substantial degree, if the industry were in price competition.

Seventhly, and lastly, it is said that the price competition would be such

that a monopoly would be created, or that only a few companies or groups of manufacturers would remain, and that in these conditions the level of prices would be raised above the level which would exist if the price restrictions were to continue. We do not regard it as likely that price competition would produce the result of driving many of the manufacturers out of business or of giving rise to the conditions visualised. If, however, we should be wrong in this view, we are unable to say, on the evidence before us, that we are satisfied that in such conditions, with price competition existing between a number of companies or groups, the consequence would necessarily, or even probably, follow that prices in general would be raised to a higher level than would be the case if the price restrictions were to continue.

We, therefore, hold that the Association have failed to discharge the onus of proof which rests on them of satisfying us that the removal of the price restrictions would deny to the purchasers of empty glass bottles any specific or substantial benefits or advantages enjoyed or likely to be enjoyed by them as such, whether by virtue of the restrictions themselves or of any arrangements or operations resulting therefrom. As this was the limit of the case which the Association sought to make out in support of the price restrictions, it follows that they have not established their case, and the price restrictions must be declared to be contrary to the public interest. It is unnecessary, in the circumstances, to consider questions of possible detriment.

In addition to the price restrictions, there is a considerable number of other restrictions comprised in the Association's agreement and, therefore, brought before the court. It is unnecessary to deal with them in detail, since counsel for the Association made it clear that, if the price restrictions were to be condemned, the Association would not seek to support the remaining restrictions. It is, however, fair to say that the great majority of the remaining restrictions can properly be regarded as necessary ancillaries to the price restrictions, and counsel for the Registrar, as regards many of them, did not seek to attack them, if the price restrictions were to be upheld. There is, however, one of the ancillary restrictions which we must briefly mention. It is contained in the conditions of sale of the Association. It is headed: "Non-liability for Third-Party Claims". It provides, in effect, that a contractual clause is to be inserted in connexion with all sales of glass bottles whereby the purchaser agrees that the member shall not be liable for any claims for injury or damage sustained by the purchaser, his servants or agents, after the bottles have been delivered, and, further, that the purchaser shall indemnify the manufacturer against claims for loss, injury or damage sustained by a third party after delivery of the bottles. This means that the purchaser is left to bear the risk of any injury or damage resulting to the purchaser himself or to any third party as a result of the manufacturers having sold defective bottles, even though the defect arises from the manufacturer's own negligence. It was explained on behalf of the Association that this clause was introduced in order to ensure uniformity of conditions of sale, that it is the sort of matter which would reasonably be covered by insurance, that, in fact, the clause has never been used to defeat a claim by a purchaser, and that it was intended as a safeguard against unfounded claims. No purchaser who gave evidence and who was asked the question was aware of the existence of this clause as a part of his contract for the purchase of bottles. We would only say this: We should have had no hesitation whatever in declaring this restriction to be against the public interest, even if all the other restrictions had been in the public interest.

In the result, all the restrictions brought before the court are declared to be contrary to the public interest.

Order accordingly.

Solicitors: *Allen & Overy* (for the British Bottle Association); *Treasury Solicitor*.

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

A Re ASSOCIATED TRANSFORMER MANUFACTURERS' AGREEMENT.

[RESTRICTIVE PRACTICES COURT (Russell, J., Sir Stanford Cooper and Mr. W. L. Heywood), November 21, 22, 23, 24, 25, 28, 29, 30, December 1, 2, 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 19, 20, 21, 1960; January 11, 12, March 24, 1961.]

B *Restrictive Trade Practices—Reference—Transformers—Price restrictions—Whether all restrictions could be grouped together for purposes of one paragraph of s. 21 (1) while one restriction was taken severally for purposes of another paragraph—“Earnings” of export business meant gross earnings—Quantitative standard of preponderance of preponderant buyer based on United Kingdom market—Whether removal of restrictions would deny public substantial benefit—Whether restriction reasonably necessary to enable members to negotiate fair terms for supply of goods to preponderant buyer—Whether removal of restrictions would be likely to cause substantial reduction in volume or earnings of export business—Restrictive Trade Practices Act, 1956 (4 & 5 Eliz. 2 c. 68), s. 21 (1) (b), (d), (f).*

D *Restrictive Trade Practices—Court—Practice—Evidence—Proofs—Exchange of proofs and supply of proofs for court—Confirmation in evidence-in-chief—Additions to proofs.*

Parties to a registrable agreement are entitled to attempt to discharge the onus which is on them under s. 21 (1) of the Restrictive Trade Practices Act, 1956, by taking all restrictions together (other than those purely ancillary and appropriate to s. 21 (1) (g)), or by taking them in groups, or, if a restriction has, on its language, a severable restrictive part, by taking that part severally (see p. 238, letter I, to p. 239, letter A, post).

E Dictum in *Re Blanket Manufacturers' Asscn.'s Agreement* ([1959] 2 All E.R. at p. 10), not applied.

F In s. 21 (1) (f) of the Restrictive Trade Practices Act, 1956, the word “earnings” means turnover and refers to gross earnings not net profits, and in the phrase “volume or earnings” the word “volume” either refers also to turnover or else is an alternative yardstick by weight, yardage, gallonage, etc., whenever the business of the particular trade or industry is appropriate to such a yardstick (see p. 239, letter H, and p. 240, letter A, post).

G For the purpose of para. (d) of s. 21 (1), the quantitative standard of preponderance should be based on the United Kingdom market (see p. 240, letter E, post).

H The Associated Transformer Manufacturers were an unincorporated association consisting of ten members, who included all home manufacturers who made the largest types of electrical power transformers, which were used to convert electricity from one voltage or pressure to a different one, either upwards or downwards. Some manufacturers of the medium and medium to large transformers were not members of the Association. Some manufacturers of the smaller range of transformers were outside the Association, and in this range there was keen competition. Transformers could be classified into categories and of one category the Central Electricity Generating Board was the preponderant buyer. The main restrictions were restrictions as to prices at which the parties would sell the goods concerned. In broad outline, the parties agreed not to tender except at a minimum price, which itself was based on the average of the three lowest costings tabled by the parties, plus a percentage of profit considered by the Association to be appropriate, less common discounts and selling factors. The court found that the broad picture of the home trade was as follows. Utilisation of electric power in the United Kingdom was increasing at an average rate of not less than eight per cent. compound every year. With that marched an expanding demand for the goods. The tendency was to transmit at increasingly higher voltages and, consequently, to require transformers of

higher rating and voltage and size, which brought problems of design and manufacture by no means limited to mere enlargement. There was a substantial protective tariff against imports.

The members of the Association were also members of an Export Agreement which also involved a price-fixing system which entailed discussion of specifications and tabling of proposed tender prices by the members interested. The average of the two latest was taken as the basis. Where thought necessary, a selling factor was applied by way of reduction. The effect was that of level tendering at a figure which it was hoped would combine the highest price (and, therefore, profit) with a successful tender. Under the export agreement, the parties co-operated both through committees of local staffs and agents and through signatories' business and technical meetings in pooling and discussing relevant commercial information, in jointly evaluating foreign specifications, and in exchange of technical information in relation to methods of fulfilling the specification, and sometimes in connexion with the submission of alternative specifications. The court found that the broad picture in the export field was that, in the smaller ranges, there was an increasing tendency towards local manufacture. This was not expected in the larger field, but competition in that field was very keen from other European countries, and difficult to meet notwithstanding preferences in certain Commonwealth countries.

The Registrar of Restrictive Trading Agreements referred the restrictions to the court under s. 20 (1) and s. 20 (2) (a) of the Restrictive Trade Practices Act, 1956*. The Association sought to defend the restrictions under s. 21 (1) para. (b) (as conferring specific and substantial benefits on transformer purchasers) and para. (f) (as beneficial to exports) and to defend under s. 21 (1) (d)† (as necessary defence against preponderant buyers) a severable

* Section 20, so far as relevant, provides: "(1) The court shall have jurisdiction, on application made in accordance with this section in respect of any agreement of which particulars are for the time being registered under this Part of this Act, to declare whether or not any restrictions by virtue of which this Part of this Act applies to the agreement (other than restrictions in respect of matters described in paras. (b) to (d) of s. 8 (8) of this Act) are contrary to the public interest.

"(2) An application to the court under the foregoing subsection may be made—
(a) in any case, by the registrar . . .

"(3) Where any such restrictions are found by the court to be contrary to the public interest, the agreement shall be void in respect of those restrictions; and . . . the court may . . . make such order as appears to the court to be proper for restraining all or any of the persons party to the agreement . . . (a) from giving effect to . . . the agreement in respect of those restrictions; . . ."

† Section 21 (1), so far as relevant, provides:—"For the purposes of any proceedings before the court under the last foregoing section, a restriction accepted in pursuance of any agreement shall be deemed to be contrary to the public interest unless the court is satisfied of any one or more of the following circumstances, that is to say . . . (b) that the removal of the restriction would deny to the public as purchasers, consumers or users of any goods other specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them as such, whether by virtue of the restriction itself or of any arrangements or operations resulting therefrom . . . (d) that the restriction is reasonably necessary to enable the persons party to the agreement to negotiate fair terms for the supply of goods to, or the acquisition of goods from, any one person not party thereto who controls a preponderant part of the trade or business of acquiring or supplying such goods, or for the supply of goods to any person not party to the agreement and not carrying on such trade or business who, either alone or in combination with any other such person, controls a preponderant part of the market for such goods . . . (f) that, having regard to the conditions actually obtaining or reasonably foreseen at the time of the application, the removal of the restriction would be likely to cause a reduction in the volume or earnings of the export business which is substantial either in relation to the whole export business of the United Kingdom or in relation to the whole business (including export business) of the said trade or industry . . . and is further satisfied (in any such case) that the restriction is not unreasonable having regard to the balance between those circumstances and any detriment to the public or to persons not parties to the agreement . . . resulting or likely to result from the operation of the restriction."

A restriction as to the price at which one category of transformer was to be sold to the Central Electricity Generating Board.

Held: the restrictions were deemed by s. 21 (1) of the Act of 1956 to be, and were declared to be, contrary to the public interest, because—

B (i) (as regards s. 21 (1) (b)) although there probably would be some reduction in prices in the home market, the court was not satisfied that there would be any such curtailment of research or development as would deprive purchasers to any substantial extent of the opportunity to obtain transformers of increased power and rating that the continuance of the price restrictions might give, nor did the court envisage any reduction in quality (see p. 246, letters B to E, post); moreover, even if the parties would no longer collaborate in the exchange of costing and technical data, it was not established that this would deprive the purchasers of any substantial benefit or advantage, and, accordingly, circumstances satisfying s. 21 (1) (b) had not been established by the Association (see p. 247, letters A and C, post).

D (ii) (as regards s. 21 (1) (f)) the court was not satisfied that the removal of the home price restrictions would be likely to cause a reduction in the earnings of the export business in transformers which was substantial in relation to the whole business of transformer manufacture; and accordingly circumstances within s. 21 (1) (f) were not established (see p. 248, letter B, post).

E (iii) (as regards s. 21 (1) (d)) the Association had not shown that the abolition of the particular price restriction relating to the category of goods of which the Central Electricity Generating Board was the preponderant buyer would result in other than “fair terms” (i.e., terms on which the efficient manufacturer could make and sell the goods at a reasonable, but no more than a reasonable, profit) to the manufacturers; accordingly, circumstances satisfying s. 21 (1) (d) had not been established (see p. 249, letter F, post).

F Definition of “fair terms” in *Re Water-Tube Boilermakers’ Assn.’s Agreement* ([1959] 3 All E.R. at p. 274) accepted.

Per CURLIAM: s. 21 (1) (d) can rarely be invoked where there is no disposition on the part of the preponderant buyer to enforce unreasonable terms (see p. 248, letter F, post).

Observations on the functions of proofs of evidence (see p. 236, letters C to F, post).

G [For the Restrictive Trade Practices Act, 1956, s. 21, see 36 HALSBURY’S STATUTES (2nd Edn.) 954.]

Cases referred to:

Blanket Manufacturers’ Assn.’s Agreement, Re, [1959] 2 All E.R. 1; L.R. 1 R.P. 208; [1959] 1 W.L.R. 442; *affd.* C.A., [1959] 2 All E.R. 630; L.R. 1 R.P. 271; [1959] 1 W.L.R. 1148.

H *Water-Tube Boilermakers’ Assn.’s Agreement, Re*, [1959] 3 All E.R. 257; L.R. 1 R.P. 285; [1959] 1 W.L.R. 1118.

Reference.

I Pursuant to the Restrictive Trade Practices Act, 1956, s. 20 (2) (a), the Registrar of Restrictive Trading Practices referred to the Restrictive Practices Court the agreement made between the Associated Transformer Manufacturers and relating to electrical power transformers and certain related equipment. The objects of the agreement were to promote the welfare of the industry, and to secure to the public the advantages of the close co-operation between the manufacturers of plant the subject-matter of the agreement, and to that end:—(i) to study market requirements and conditions; (ii) to foster progress and standardisation and thereby to reduce the costs of production and to maintain and improve the standard of quality; (iii) to secure economic prices based on the costs of efficient producers thereby enabling signatories to devote adequate

funds to development and research and to the training of engineers; (iv) to reduce the cost of tendering; (v) to secure equitable conditions of contract; and (vi) to maintain the stability necessary in industry in order to expand British trade. Every signatory was to support and further the objects of the agreement and comply with and observe both the letter and the spirit of the obligations on his part contained therein, and an undertaking to observe and perform the conditions and obligations was signed. Any signatory might withdraw from the agreement by giving to the secretary not less than three calendar months' notice in writing of his intention so to do and stating his reasons for such notice.

The facts and the restrictions are stated in the judgment of the court.

On Dec. 1, 1960, during the course of the hearing, RUSSELL, J., made the following observations about the functions of proofs of evidence: "The purpose of exchanging proofs in these cases is to save time at the hearing. It enables counsel to cross-examine on complicated matters with a fuller understanding of those matters and without adjournments. It is sometimes inevitable that additions are made in the course of evidence-in-chief, and in such cases the content of such additions should be given to the other side as soon as they are decided on, preferably in rider form, for insertion in the proof. The purpose of supplying the proof to the court for advance reading is also to save time in examination-in-chief. Counsel so examining must bear this in mind in deciding the extent to which matters in the proof are repeated orally. In some instances, little or no examination-in-chief is needed other than a confirmation on oath that the contents of the proof are true. In all cases, the witnesses should give this general confirmation, after indicating any passages which he wishes first to qualify or which he wishes to exclude from that confirmation. The fact that a witness has so qualified or excluded does not remove the qualified or excluded passages from the field of cross-examination. It is something which, from its presence in his proof, he might once have considered to be correct".

B. J. M. MacKenna, Q.C., E. W. Walker and D. A. Grant for the Associated Transformer Manufacturers.

John Megaw, Q.C., and Arthur Bagnall for the Registrar.

Cur. adv. vult.

Mar. 24. RUSSELL, J., read the following judgment of the court: This reference concerns an agreement to which the following companies are parties: Associated Electrical Industries, Ltd., Fuller Electric, Ltd., Crompton Parkinson, Ltd., The English Electric Co., Ltd., Ferranti, Ltd., The General Electric Co., Ltd., Hackbridge & Hewitt Electric Co., Ltd., Johnson & Phillips, Ltd., C. A. Parsons & Co., Ltd. and Bruce Peebles & Co., Ltd. Together they constitute an unincorporated association known as "The Associated Transformer Manufacturers". The agreement originally referred to has been since superseded by an agreement dated Jan. 1, 1960, and the latter is the one with which we deal. To the original agreement, Bonar Long & Co., Ltd. was a party, but has left the Association. The British Thomson-Houston Co., Ltd. and Metropolitan-Vickers Electrical Co., Ltd. were also parties, but, since July 1, 1959, are now replaced by Associated Electrical Industries, Ltd., which has incorporated into its transformer division the transformer activities of those two companies, though in the data they are listed under those two names. The reference goods are electrical power transformers and certain related equipment. Such transformers are used to convert electricity from one voltage or pressure to a different one, either upwards or downwards. Electric power is produced at generating stations at a voltage of 15,000 volts. For purposes of transmission, it is desirable to increase that voltage very considerably. At present in the United Kingdom this is initially raised to 275,000 volts by an appropriate transformer. The present tendency is to higher voltage transmission. At a later stage it is stepped down by another transformer from 275,000 to 132,000 volts; next from 132,000 to 33,000 volts; later to 11,000

- A** volts. Ultimately, the ordinary domestic consumer receives his electric power transformed to 240 volts. There are intermediate stages, and industrial users may take power at varying voltages. In England and Wales, the Central Electricity Generating Board operates the generating stations and distributes to the area boards at a pressure of 33,000 volts. Of the supply authorities in England and Wales, it is consequently the Central Board which is most concerned with
- B** transformers capable of dealing with power at over 33,000 volts and the Area Boards with those of 33,000 volts and below. An ampere is a measure of rate of flow. Transformers are rated in terms of a capacity of thousand volt amperes, or kilovolt amperes or kVA. A transformer may be three-phase or single-phase, three single-phase having the same total kVA as one three-phase. The voltage pressure referred to in this judgment as 33,000 is equivalent to "system highest"
- C** 36,000 volts, which is the description actually used in the Association's agreement.

- The agreement divides the reference goods into six categories: A. Transformers of 5 kVA upwards to and including 1,500 kVA three-phase (or 500 kVA single-phase) for voltages up to and including 33,000 volts; B. Transformers above 1,500 kVA three-phase (or 500 kVA single-phase) up to and including 33,000 volts; C. Transformers of 5 kVA and above, for more than 33,000 volts; D. Arc suppression coils, reactors and voltage regulators, which are not actually transformers nor parts of transformers but are used with transformers as part of the supply system; E. Mining type transformers, including flame-proof transformers; F. Furnace transformers, for electric furnaces which require low voltage and high amperage. The agreement also divides the purchasers into seven different classes: (i) Central Electricity Generating Board (to which we will refer as "the C.E.G.B."); (ii) The South of Scotland Electricity Board and the North of Scotland Hydro Electric Board, which between them in Scotland combine the functions fulfilled in England and Wales by the C.E.G.B. and the Area Boards; (iii) The Electricity Board of Northern Ireland, the Belfast Corporation and the Londonderry Corporation, which between them in Northern Ireland combine the same functions; (iv) The twelve Area Boards in England and Wales; (v) The
- F** National Coal Board; (vi) Government departments; (vii) All other purchasers. The agreement covers sales in the United Kingdom and not exports.

- The main restrictions are restrictions as to the prices at which the parties will sell the reference goods. At this stage, it suffices to say that, in broad outline, the parties agree not to tender except at a minimum price, which itself is based on the average of the three lowest costings tabled by the parties, plus a
- G** percentage of profit considered by the Association to be appropriate, less common discounts and selling factors. We may state here that, in certain ranges in respect of Area Boards, the Association also operates collective rebate provisions. Ultimately it was not sought to justify the collective rebate provisions, and we, therefore, condemn them as being against the public interest pursuant to the statute. The Association seeks to defend the restrictions under the Restrictive
- H** Trade Practices Act, 1956, s. 21 (1), para. (b) (as conferring specific and substantial benefits on transformer purchasers), para. (f) (as beneficial to exports), and para. (d) (as necessary defence against preponderant buyers). Certain restrictions are also supported as ancillary under para. (g). Ultimately, for the purposes of para. (d), the Association relied only on the restriction as to the price at which category C transformers are to be sold to the C.E.G.B. This plea is,
- I** of course, alternative to the wider claim put forward under para. (b) and para. (f).

It is convenient to refer here to some legal points which have arisen in the course of the case. Clause 11 of the agreement is in the following terms:

"Maintained Prices. Each signatory hereby undertakes, as separate and distinct obligations, that as to each class of purchaser set out in cl. 8 hereto and for each such class in respect of each category of plant set out in sch. C hereto, that he will not quote (except by agreement of not less than eighty per cent. of all signatories) a price less than the price calculated in accordance with section II. Provided that in the event of any undertaking in

respect of any such class of purchaser and in respect of any such category of plant being held void for restraint of trade or otherwise such avoidance shall not affect any of the above undertakings in respect of any other class of purchaser or category of plant.”

This clause is designed to separate or render severable, for example, the price restriction on category C goods sold to the C.E.G.B. from other price restrictions. In *Re Water-Tube Boilermakers' Asscn.'s Agreement* (1), the court was of opinion that, prima facie, the Association had established a case under para. (d) in relation to the C.E.G.B. as preponderant buyer of the reference goods, but held that the restriction was more than was reasonably necessary under that paragraph, in that it extended also to persons other than the C.E.G.B. The form of cl. 11 was avowedly adopted in order to avoid such criticism in the present reference.

The Association sought to group all the forty-two price restrictions together for the purpose of its case under para. (b) and para. (f), while confining itself to the one restriction for the purpose of its alternative case under para. (d). In argument, the Registrar inclined to the view that all the price restrictions should be regarded as one restriction, and maintained that the attempted fragmentation for the purposes of para. (d) was not permissible. Alternatively, he asserted that, if there were here, having regard to the language of cl. 11 of the agreement, forty-two different and separate price restrictions, so that the Association was able to choose one for the purposes of para. (d), it could not group the forty-two restrictions for the purposes of para. (b), or para. (f), having regard to the references throughout the section to “restriction” in the singular, and each must pass the tests laid down in isolation. The Association argued that it was entitled to group all the provisions as to price for the purpose of para. (b) and para. (f), either on the ground that they may fairly be regarded as one restriction comprising forty-two restrictive parts, or on the ground that, if there are forty-two different restrictions, nevertheless the references to “restriction” in the singular extend to restrictions in the plural, having regard to the Interpretation Act, 1889, there being no context to the contrary (2). The Association further contended that, if it fails under para. (b) and para. (f), it is entitled to approach para. (d) in the alternative on the limited front of the C category C.E.G.B. price restriction, either on the ground that this is a restrictive part of a larger restriction which, by virtue of the form of cl. 11 of the agreement is severable, on the principle well known in the ordinary law of covenants in restraint of trade, or on the ground that it stands by itself as a restriction.

We prefer the arguments of the Association on this matter. We think it right to say that there is no context which excludes the application of the Interpretation Act, 1889, to the references in s. 21 to “restriction” in the singular. The fact that there are elsewhere references to restrictions in the plural is not such a context. Also, we consider the other approach to be sound. If there be a restriction which, on its language, has a severable restrictive part, we see no reason why respondents in these cases should be barred from seeking in the alternative and in the last resort from saving that part of their arrangements under para. (d). Agreements and arrangements affected by the statute are very varied in form and character, and it would be unfortunate and unnecessary for the operation of the statute if the way were open for nice arguments in any case whether there were one or more restrictions, as distinct from the relatively simple question whether a restrictive term is severable in the sense above mentioned. In our judgment, parties to a registrable agreement are entitled to attempt to discharge the heavy onus which is on them under, for example, para. (b), by taking all restrictions together (other than those purely ancillary and appropriate to

(1) [1959] 3 All E.R. 257; L.R. 1 R.P. 285.

(2) See s. 1 (1) (b) of the Interpretation Act, 1889; 24 HALSBURY'S STATUTES (2nd Edn.) 206.

- A para. (g)), or, if they wish, may take them in groups, or, in so far as severable in the sense above mentioned, severally. If this were not so, they might be faced with the proposition that, whereas all the restrictions in the agreement taken together conferred a specific and substantial benefit on the public as purchasers and their removal would deny that benefit, nevertheless each must be taken separately and in isolation and as though it were the sole restriction,
- B and none (so viewed) might qualify under the paragraph. This seems to us to be a situation not required by the statute. Moreover, it seems no objection that a successful Association might in theory subsequently drop certain of the restrictions, and that the remainder would not have alone carried the day. A change of circumstances can bring with it a review of the arrangement. Another aspect of this point which has weighed with us is this: Were we to take the view that
- C the Association failed under para. (b) and para. (f), but might have succeeded under para. (d) except for an impermissible fragmentation—according to the Registrar's argument in law—the outcome would presumably be a new agreement confined to C category goods sold to the C.E.G.B. and a fresh reference. A construction of the statute leading to that result—a result which, for different and inescapable reasons, would have occurred in the *Water-Tube Boilermakers'* case (3)—is not readily to be adopted.
- D

In coming to the foregoing conclusions, we have in mind the views expressed by this court in *Re Blanket Manufacturers' Assn.'s Agreement* (4), to which our attention was drawn by counsel for the Association. We observe that, in that case, the attention of the court was not drawn to the possible application of the Interpretation Act, 1889. Moreover, the statement "The validity of each resolution must, in our opinion, be considered separately" must be considered in the light of the facts relating to the restrictions in that case, where there was not one agreement. For those reasons, we do not consider that the sentence quoted is applicable to this case. Accordingly, we hold that the Association is entitled to seek to satisfy the requirements of para. (b) and para. (f) on the basis of all the restrictive provisions affecting price, and in the alternative to

E seek to satisfy the requirements of para. (d) on the basis of the restrictive provision affecting prices charged to the C.E.G.B. for C category goods. In so far as it may be necessary to have a commercially logical and sensible division of "goods" for the purposes of para. (d), we consider that, under the voltage system of transmission, category C is such.

F

A second point of law may here be conveniently disposed of. In the course of

G arguments under para. (f), it was suggested that "a reduction in volume or earnings of the export business" referred to turnover on the one hand and net profits on the other hand, so that it was relevant and permissible to inquire into the possible drop in profits from the export business resulting from removal of the home restrictions. "Volume", it was said, must mean turnover, "earnings" must mean something different; therefore, "earnings" can only mean net

H earnings or profits. Although the paragraph is not easy to construe in all its parts on any basis, we consider this construction wrong. "Earnings", in our view, mean turnover. That is what concerns the public interest in relation to the export trade, and not the rate of profit earned by individual exporters. Moreover, if it meant net profits, an odd situation could arise in two hypothetical cases where the removal of restrictions would have a fourteen per cent. adverse effect

I on the profitability of the export trade. In the one case where a fifteen per cent. profit on turnover was being earned, the reduction in net profit of fourteen per cent. might be relevantly substantial, whereas in the other case where only one per cent. net profit was being earned, the reduction in net profits could not exceed one per cent. It was pointed out that "volume" would scarcely mean tonnage in relation to the whole export business of the United Kingdom, very

(3) [1959] 3 All E.R. 257; L.R. 1 R.P. 285.

(4) [1959] 2 All E.R. at p. 10; L.R. 1 R.P. at pp. 254, 255.

many items being not measured by weight; but an equally impossible task is surely set if one is to inquire into the net profits of all exports from the United Kingdom. In our view, the phrase "volume or earnings" is either a reference to the same thing—that is, turnover—or else "volume" is an alternative yardstick by weight, yardage, gallonage, etc., whenever the business of the particular trade or industry is appropriate to such a yardstick. In any event, "earnings" refers to gross earnings and not net profits. A

The third point of law which may conveniently be now dealt with is this: It arose in connexion with the claim under para. (d) in relation to sales in category C to the C.E.G.B. The figures for the years 1956-57, 1957-58 and 1958-59 of orders placed with members by the C.E.G.B. in that category show that, expressed as percentages of all United Kingdom orders placed with those members, they were respectively eighty-eight, seventy-five and ninety-one per cent.; and the evidence showed plainly that the addition of United Kingdom orders placed with manufacturers who are not members would not significantly affect those percentages. But it was argued that there were no figures in evidence of total world demand in that category and no means of knowing whether, and probably every reason to doubt that, the C.E.G.B.'s purchases represented a preponderant part of the world market. This argument is not, we think, consistent with the views expressed by this court in the *Water-Tube Boilermakers'* case (5). There the restrictions covered not only the United Kingdom but also certain territories overseas. In determining whether the C.E.G.B. controlled a preponderant part of the market, the court referred to figures which showed the C.E.G.B. as purchasing eighty-three per cent. of the demand in the United Kingdom and fifty-six per cent. of the demand in all territories covered by the restrictions. Only a passing reference was made to some orders from outside those territories, and it is plain that, in the quantitative approach, those were ignored. In our view, the quantitative standard of preponderance must here be based on the United Kingdom market, in which the C.E.G.B. plainly purchases the preponderant part of C category goods. B C D E

One other short point may here be mentioned. As will be seen, contracts in this category with the C.E.G.B. result from tenders, and, under the agreement, from tenders at level prices from the members, which are either accepted or not. The Registrar argued that, since there was no negotiation under the agreement, it could not be said that the restriction was reasonably necessary to enable the members to "negotiate" fair terms. We consider that to be too narrow a view of the word "negotiate", and, indeed, of the paragraph as a whole, which is broadly designed to enable persons reasonably to avoid a particular situation in which, without the restriction, they would be unable to negotiate fair terms. Indeed, we think that the Registrar's submission is inconsistent with the views of this court in the *Water-Tube Boilermakers'* case (5). F G

Scheduled to the Association's statement of case are tables showing the home trade orders of the Association members in reference goods divided by class of customer and category of goods for the years ended June, 1957, 1958 and 1959. From that the following facts emerge: Total orders were—and these figures follow the three years we have mentioned—19.5 million pounds, 16.9 and 13.8. Category A orders were 4 million pounds, 4.1 and 3.3. Category B orders were 3.7 million pounds, 4.8 and 2.9. Category C orders were 10.4 million pounds, 7.1 and 7.2. The C.E.G.B. ordered eighty-eight per cent., seventy-five per cent. and ninety-one per cent. of category C goods; and fifty per cent., thirty-two per cent. and forty-nine per cent. of all reference goods. The England and Wales Area Boards ordered sixty-three per cent., sixty-eight per cent. and seventy-two per cent. of category A goods, and sixty-three per cent., sixty-nine per cent. and sixty-five per cent. of category B goods. Those category C goods not ordered by the C.E.G.B. were nearly all ordered by other supply authorities in the United H I

A Kingdom. Output does not march with orders placed, as may be seen from the following figures for home sales invoiced, all types of reference goods: 1955, 15.6; 1956, 16.5; 1957, 17.6; 1958, 17.0; 1959, 16.1. Note, however, that these years are not identical with the years June to June just mentioned.

B The members of the Association include all home manufacturers who make the largest types of transformer. There are, perhaps, fifty or sixty manufacturers of reference goods outside the Association, a few of whom manufacture large transformers up to a rating of 60,000 kVA and a voltage of 132,000 volts. The Association members manufacture a greater value of transformers than do the outside manufacturers, most of whom confine themselves to small transformers. The members of the Association export about one-third of their total production, and, though precise figures are not available, it is thought that the Association exports are over three-quarters of the United Kingdom exports of reference goods. C Inasmuch as members of the Association are concerned with (inter alia) transformers of the highest rating and capacity, both at home and also in the export market where long distances require high voltages for economy of transmission, the bulk of the expenditure on research and development is that of members of the Association. D In the light of the steady trend both at home and abroad towards increasingly higher ratings and voltages, this expenditure (which is virtually not needed at all in relation to small transformers) is an important part of their business activities.

E The manufacture of transformers (at least of the larger type) is an industry that involves a high ratio of capital to costs. A decline in throughput below normal employment of productive capacity has an increasingly marked effect on the level of profits earned by the manufacturer. Optimum utilisation of productive capacity is related to the mix of sizes and ranges of transformers in a factory's throughput. A considerable proportion of the staff employed are technically qualified or skilled and not readily replaceable if dismissed in a slack period. F A transformer factory is laid out as such and cannot normally be converted as a short-term measure either wholly or partly to other processes. By far the greater part of orders placed are placed by putting out to tender. The ability to make for stock is extremely limited and confined to the small ranges.

G Prior to 1927, there had for some years been a price-fixing association, the Transformer Conference. At that time the new higher voltages grid (of 132,000 volts) was about to be put into operation, and tenders were invited for large transformers. One large company considered that it had a design which enabled it to produce those transformers a great deal more economically and, therefore, to tender at a considerably lower figure than others, yet still at an ample profit to itself. In the result, that company broke away from the conference, which broke up. Some of the transformers produced by that company developed serious faults, due to an insufficient understanding by the designers (shared, H we may say, by the customers) of the problems involved in the new departure into the higher voltage transmission system. As a consequence, of course, there was great disruption in the development of the system and loss caused to the customer (the supply authorities). Ultimately, the result of the break-up of the conference was a price war in the transformer industry, which extended with increasing severity into all sizes of transformer and was halted only when the Transformer Manufacturers' Association was formed in 1932. I We have mentioned the defective transformers because this episode was initially put before us as a grave warning of how a price war can result in a cutting of expenditure on the research and development essential to meet the problems of increasingly high voltage transmission, and in depreciation of quality. It is, indeed, nothing of the sort. It was an example of a company which produced a faulty design, possibly through insufficient research and development work, at a time when it was, and had for many years been, within the shelter of a price-fixing association. It is, indeed, the obvious fact that a price-fixing agreement does not ensure that such problems

will be always successfully met. Of reduction in quality after the beginning of A
and as a consequence of that price war the evidence was slight.

Prior to 1955, the system of price-fixing varied in the Association, sometimes B
being based on an average of the four or five lowest costings, and sometimes otherwise where departures into voltage fields new at least in the home market were concerned. Since 1955, the average of the three lowest costs or costs estimates C
has been the general rule, adding a percentage for profit, and applying such discounts or selling factors as from time to time have seemed commercially appropriate. In the result, in many ranges price lists have been established, necessarily very extensive in detail and complicated. There has been considerable standardisation in certain ranges in collaboration with the supply authorities. To these price lists are applied variations due to rise or fall in costs of basic materials and labour according to an imprecise formula accepted by the supply D
authorities. The general principle is to re-assess the basic price for a transformer or range every few years by taking the average of the three lowest returned costs, and the resultant price is substituted in the price list.

Profit figures earned in recent years by members of the Association were put before us, on the basis of which it was submitted that the profits of members were never excessive, and on smaller transformers (up to 7,500 kVA, which embraces category A and part of category B) were unduly low. It was also submitted that recently profits on export trade were unduly low. We give some figures from the available data:

Weighted Average Profit on Members' Total Sales of Reference Goods Home and Export

Year	Total in pounds	Profit as a percentage on total cost of sales
1955	23.4 million	18.7
1956	23.4 million	13.8
1957	24.4 million	9.0
1958	24.9 million	8.3
1959	24.2 million	8.3

The figures give an over-all weighted profit average for these years of 11.4 per cent. The highest individual average was company "J" at 16.9 per cent. The occasions when individual members showed over twenty per cent. were:

Company "A" (1955) 32.5 per cent. and (1956) 21.6 per cent.

Company "C" (1955) 27.5 per cent. and (1956) 20.9 per cent.

Company "I" (1955) 21.5 per cent.

Company "K" (1955) 20.3 per cent.

The weighted profit averages of members for these years, expressed as a percentage of capital employed on an historic basis and a replacement value basis, were approximately as follows:

	Historic Basis	Replacement Value Basis
1955	21.3	18.5
1956	15.7	13.7
1957	10.2	8.8
1958	9.7	8.4
1959	9.6	8.5

Weighted Average Profits as percentage on total cost of sales—Home and Export, all reference goods

	Smaller		Larger		All Sizes
	Home	Export	Home	Export	Export
1955	14.7	2.6	24.8	19.9	13.9
1956	10.5	—5.5	25.2	9.7	3.4
1957	5.5	—4.5	23.3	—7.9	—6.2
1958	7.4	0.3	18.5	—3.3	—2.3
1959	0.0	—1.7	19.2	2.4	1.4

A The over-all average for larger transformers in the home market in which the Association has a near monopoly is 22.1 per cent. The relationship between home and export trade, which we have already touched on, is indicated in the Association's figures for sales in the years 1955 to 1959 inclusive, which show total home 83.1 million and export 36.4 million. The corresponding figures for small transformers are: home 51.4 million and export 24 million. The figures indicate

B some relative stress on larger transformers in the export market.

The Association supplied some figures of utilisation of capacity. These were a good deal canvassed in the course of evidence and argument, and it is plain that there are difficulties in the way of any precise estimates of capacity utilisation, whether estimated and expressed in terms of megavolt amperes (mVA), as was done by the Association, or in terms of sterling planned throughout, as was

C preferred by Mr. Hobill of Ferranti. But a reasonably broad picture may be found in the figures. These may be summarised for the years 1955 to 1959 in terms of percentage utilisation, the figures being divided into transformers up to 1,500 kVA, from 1,500 to 7,500 kVA, and over 7,500 kVA. It should be explained that the statistical data provided do not fit with the categories already mentioned. The reason is that they follow the categorisation originally found in the Association's agreement, which has been changed since the reference, largely with an

D eye on possible preponderant purchasers under para. (d) of s. 21 (1), of whom in the end only one remained, namely, the C.E.G.B. in relation to goods in category C. We give a table of average percentage utilisation of capacity for the years 1955, 1956, 1957, 1958 and 1959, in that order: Up to 1,500 kVA, 74, 79, 71, 67, 63; 1,500 to 7,500 kVA, 87, 88, 75, 72, 52; over 7,500 kVA, 84, 82, 87, 89, 92.

E It should be explained that these over-all figures are made up from individual figures which sometimes vary very widely from member to member, and in the period there were certain increases in capacity by members. There was also evidence that in respect of large transformers—due to a fall in exports—some members' figures later in date than the table showed a fall. One company's was estimated to fall from ninety-three per cent. to seventy-eight per cent. Another

F company's over-all capacity utilisation figure for 1959 being ninety-three per cent. was, due partly to increased capacity, estimated at sixty-two per cent. for 1960, and for the same year at seventy-three per cent. expressed in terms of the 1959 capacity.

The broad picture of the home trade which emerged from the evidence was this: Utilisation of electric power in the United Kingdom is increasing at an average

G rate of not less than eight per cent. compound every year. With that marches an expanding demand for the reference goods. The tendency is to transmit at increasingly higher voltages and, consequently, to require transformers of higher rating and voltage and size. This tendency, as in the past, brings problems of design and manufacture by no means limited to mere enlargement, though we consider that manufacturers and the supply authorities are now far better

H than in 1927 able on the one hand to understand and overcome the problems and difficulties of increased high voltage transmission and on the other hand to produce correct specifications and scrutinise tenders, quality and design. There is a substantial protective tariff against imports. In the largest sizes at present, certain members of the Association are the only manufacturers in the United Kingdom. In the medium and medium to large transformers, there are some manufacturers outside the Association. In the smaller field, there are a number of

I manufacturers outside the Association, and in this range there is keen competition. Several of those outside manufacturers are relatively small in size, with modest establishments and overheads, expenditure on research by them being unnecessary and on development little, since they concentrate on the standard ranges. The general system of purchasing is by specification and tender by selected manufacturers.

The broad picture in the export field is that, in the smaller ranges, there is an increasing tendency towards local manufacture. This is not expected to develop

in the larger field; but competition in this field is very keen from other European countries, and difficult to meet notwithstanding preferences in certain Commonwealth countries. Until recently in the United States of America prices were high and some very profitable contracts obtained by a member or members contributed to support the capacity and profit figures for 1959. Lately, as is now well known, prices have fallen there, and a number of heads have rolled. There is some reason for thinking that these profitable contracts came to the United Kingdom partly because of sub rosa price-fixing in the United States of America. Over-all it is understood that the export market in transformers is very keen, and calls for every effort on the part of manufacturers in the United Kingdom by way of maintenance of quality, salesmanship, commercial diligence, low tendering, and the avoidance of any practice which might possibly antagonise customers. The members of the Association are also members of an export agreement. This involves also a price-fixing system, though different in operation from the home agreement system. Put very broadly, this involves discussion of specifications and tabling of proposed tender prices by the members interested. The average of the two latest is taken as the basis. Where thought necessary, a selling factor is applied by way of reduction. We do not think it necessary to complicate the picture by detail such as a reference to differences due to differing iron and copper power "loss" factors in different designs. In summary, the effect is that of level tendering at a figure which it is hoped will combine the highest price (and, therefore, profit) with a successful tender. Under the export agreement, the parties co-operate both through committees of local staffs and agents and through signatories' business meetings and technical meetings in pooling and discussing relevant commercial information, in jointly evaluating foreign specifications, which are sometimes considered obscure in their intentions, and in exchange of technical information in relation to methods of fulfilling the specification, and sometimes in connexion with the submission of alternative specifications. Members individually also naturally spend money in an endeavour to sell abroad not only on maintaining local agents in some countries but also on executive travel and sending overseas engineers for inquiry and consultation.

Before examining the matters further, we set out in summary form the case put forward by the Association under the three paragraphs of s. 21 (1) that we have mentioned. The case made under para. (b) may thus be summarised: Removal of the restrictions will result in a decline in prices and, therefore, in profits. This decline in profits will be sufficiently serious to lead to a reduction in expenditure on research and development. This reduction will render the industry less able to meet, or to meet readily and reliably, the future requirements of purchasers for new and improved types of transformer, including those of higher rating and voltage. That reduction in ability will amount to a denial to the purchasers of specific and substantial benefits which are likely hereafter to be enjoyed by the purchasers if the restrictions remain to support the profit levels. Moreover, the decline in profits will be sufficiently serious to lead to a reduction of expenditure in the production of the goods, adversely affecting their quality. The adverse effect on quality will amount to a denial to the purchasers of specific and substantial benefits and advantages enjoyed or likely to be enjoyed by them as a consequence of the support given to the price levels by the restrictions. Finally, it is argued that the existence of the restrictions requires and encourages collaboration and exchange of information between the members on costings and on technical matters; that, without the restrictions, such collaboration and exchange would cease, or largely cease; that, to the extent to which it would cease, it would render the members less able to produce the best goods most efficiently at best cost; that that reduction in ability will amount to a denial to the purchasers of specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them as a result of the encouragement given to such collaboration and exchange by the existence of the restrictions.

- A** The case under para. (f) may be thus summarised: Removal of the restrictions will result in a decline in home prices and, therefore, in profits. This decline in profits will be sufficiently serious to lead to a reduction in expenditure on research and development. This reduction will render the members less able to meet, or to meet readily and reliably, the future requirements of overseas customers for new and improved types of transformer, including those of higher rating and voltage. The same decline in home profits will be sufficiently serious to lead to a reduction of expenditure in the production of the goods, adversely affecting their quality. It will also lead to a reduction in expenditure designed to secure export orders, such as the retention of local agents and the sending of engineers to investigate local conditions. The export agreement involves collaboration between members and exchange of information on commercial and technical matters relating to export inquiries both in this country and through local overseas committees of members' representatives; such collaboration and exchange is of value in obtaining export business for members; it would not continue when the members were in full price competition in the home market; indeed, the export agreement itself would not continue, which agreement it is said has maintained the high level of exports. Further, the reduction in prices and profits would be such that the members would not tender for so many export orders at the unprofitable levels ruling and expected to rule in the export market. For all these reasons, the removal of the home price restrictions would, it is argued, be likely to cause a reduction in the earnings of the export business which is substantial in relation to the whole business of the transformer manufacturing business.
- E** The case made under para. (d) may be thus summarised: If the price restrictions as to "C" category goods are abandoned, there will be reductions in the prices obtainable for them to a level less than will provide a reasonable profit to the efficient manufacturer of such goods. Some restriction is reasonably necessary to avoid the prices thus falling to lower than fair prices. The relevant restriction is no more than is reasonably necessary to prevent that occurring and to achieve fair prices. The C.E.G.B. controls a preponderant part of the market in "C" category goods. The restriction is limited to the C.E.G.B. Therefore, the conditions of para. (d) are satisfied. We leave aside at present the consideration of restrictions on prices of other reference goods to the C.E.G.B. which it is sought to support as "earth stoppers" under para. (g).
- F**

- We turn now to the case put forward under para. (b) of s. 21 (1). Our first consideration must be the probability of a decline in home prices, as a result of an abolition of the price restrictions, bearing in mind that we must be satisfied on a balance of probabilities that, if there is one, it will result in a curtailment of research and development, or in quality, sufficient to deprive the purchasers of the reference goods of specific and substantial benefits or advantages. On this and other matters it would be possible, at the cost to those who hear or read the judgment, at great length to include in this judgment a detailed analysis of the evidence which has been given on this question. We have since the hearing read again the proofs of witnesses and the whole transcript of evidence and argument on this and other points; and we are dealing with problems which have much in them of a jury point, and do not consider that such a course would serve any useful purpose. We have in mind all that was said of the importance of full employment of capacity on profitability, of the high proportion of capital and indirect costs, of the temptation to cut prices to fill a gap or a foreseen gap, of the current tendency towards some idle capacity, of the importance of obtaining a share of the substantial orders placed, and placed by tender, by the supply authorities, and what was referred to sometimes as the "lumpishness" of the industry, which is, of course, nothing approaching that which was to be found in the case of *Water-Tube Boilermakers* (6). We have in mind also the theory of
- G**
- H**
- I**

the economists that home prices will tend always to approximate to export prices as manufacturers increasingly compete in the more profitable (or less unprofitable) home market, though Mr. Paish for the Registrar significantly qualified this by reference to manufacturers taking a wider view about the continuing or future importance to them of the export market. For our part, we do not think this is a theory that can be applied in practice with any confidence as indicative of a price war. We have in mind also the suggestion that there is fluctuating or cyclic demand, and the necessity in any factory for expansion of capacity to be made in substantial steps. A B

Having all the points in mind indicative of a possibility of price reductions which were urged on us, we conclude that there may well, and probably will, be some reduction in prices in the home market, particularly in those sizes in which the Association has had the equivalent of a monopoly and in which the lowest cost producer has been unable to quote a price commensurate with his costs. But, notwithstanding the evidence given on the points, and having regard to the fact that research and development is an essential activity of the industry in its expansive aspect, we are not satisfied that there will, as a result of reductions in price, be a curtailment of research or development such as will deprive purchasers to any substantial extent of such opportunity of obtaining transformers of increased power and rating as is afforded to them by reason of the existence of the price restrictions and is likely to be afforded to them by its continuance. So far as quality is concerned, equally we do not envisage a reduction—or at least any relevant to the question of denial of a substantial benefit or advantage. It is possible there might be some reduction in margins that have been provided in excess of specifications, but purchasers are nowadays well qualified to scrutinise quality and to specify for it, and it appears to us that no manufacturer who proposed to stay in business would prejudice his good name, or run any risk of so doing, in this matter of quality. We find ourselves in agreement with the chairman of Crompton Parkinson, Ltd. when, in a recent speech to his shareholders, he stressed how essential is the maintenance of quality in times of keen competition. He said this: C D E F

“The increase in competitive conditions and the break up of many of the national trading associations which maintained stable prices have produced a situation, which must inevitably have a depressing influence on profit, and which can only be offset by ensuring that both the quality and efficiency of our products and the methods by which they are made are of the highest standard. Constant technological progress in both design and production is therefore more than ever a necessity.” G

We are not disposed to agree with the economist called by the Association who was minded to regard such a statement as merely for home consumption by the upward looking shareholders.

It is, we think, right to express our views under this head on one matter. The evidence forecasting drastic price cutting suggested that manufacturers would tend to accelerate the fall in prices if they were cutting in the dark; that is, without knowing at what price the last contract had gone which he had missed. The supply authorities, as the evidence showed, are not to be regarded as active depressors of the market, but as authorities prepared to pay a fair price showing a reasonable profit. We cannot see why any feelings of delicacy should prevent notification, after tender accepted, of the price tendered and (since this is an essential part of the true evaluation of the price) the figures for iron and copper losses quoted, whether this notification is by manufacturers inter se or by the relevant purchaser. H I

The other point made under para. (b) of the subsection does not depend on reduction in prices. It is simply that, if the parties are in price competition, they will no longer collaborate in the exchange of costing and technical data that has so far obtained. We think it may well be that such limited collaboration as has

A taken place will not continue—or at least not to the same extent; but we are certainly not persuaded on the evidence under this head that such change in practice as may follow the abolition of the price restrictions will deprive the purchasers of any substantial benefit or advantage which is procured for them by the price restrictions. In this connexion also we would remark that there seems to be a general feeling that it is unethical, or wrong, or “not done” for a purchaser to disclose to rival manufacturers details of performances which have been achieved or undertaken by a manufacturer; for example, on matters such as flux density or impedance voltage figures. We are told on both sides of the industry that to state more than price, perhaps “loss” figures, and that the specification was complied with, would be wrong. Of course, we quite understand that tender details should not be disclosed in the tender stage; but, apart from that, we would have thought that there would be nothing to which exception could reasonably be taken by manufacturers if the purchaser endeavours to ensure the best performance from all sources of supply thereafter, by letting it be known what can be done.

Accordingly, in our judgment, the Association have not established a *prima facie* case under para. (b). We refrain from expressing a view whether the case under para. (b) would in any event have qualified under the heading of “specific”.

Our next consideration is the case put forward under para. (f) of s. 21 (1). We have already considered a possible curtailment of expenditure on research and development and a possible fall in standards of quality due to reductions in home prices following the abrogation of the price restrictions. We do not expect any such curtailment or fall to be such as would have a significant adverse effect on export earnings. Indeed, the tendency of export requirements in the higher voltages to run ahead of home requirements makes research and development an even more essential tool of the trade. It is next suggested that members would, as a result of a fall in home prices, curtail expenditure designed to improve the likelihood of securing export orders, such as local overseas representation or the sending of engineering and other representatives abroad. The demand for transformers is, of course, expanding. We have given careful consideration to the expressions of opinion given by manufacturers under this head, and are not satisfied that there will be any reduction in such expenditure such as is likely to cause a significant drop in export earnings. The third way in which reduction in home prices is said to be likely to cause a fall in export earnings is that members of the Association will be less inclined to tender for export orders at the low prices currently ruling. Again, we have considered the opinion of manufacturers under this head, but this proposition we do not accept. Finally in relation to para. (f), it is alleged that export earnings will fall because, when in price competition in the home market, the parties to the export agreement will no longer co-operate as they have in the pooling of commercial information relative to the export market, the joint evaluation of foreign specifications, the exchange of technical data relating to export inquiries, and so forth. It is, indeed, the view expressed by the manufacturers that the export agreement would not survive. As to this, we were not greatly impressed by the evidence of the value of the exchange of commercial and technical information and the joint evaluation of points of obscurity in foreign specifications, in maintaining or increasing export earnings to any significant extent. But if the parties are quite certain that a degree of co-operation on these lines must substantially improve the prospects of obtaining export orders, we consider that co-operation to that degree will probably survive, despite a state of price competition in the home market. So far as the export agreement itself is concerned, its operation results in level tendering, a practice which is generally disliked by purchasers and which must tend to produce in them a spirit of resistance which cannot in principle be a good thing for export earnings, a practice which, it is known, lost to the United Kingdom one very substantial order and which may have (though there is no evidence to show it) lost others, and which may hereafter, if persisted

in, lose more. The system of basing prices not on the lowest price but on the average of the two lowest must tend, even taking into consideration the subsequent application of a selling factor, to prevent the keenest price being quoted out of the United Kingdom. Whatever may have been the situation in the past, a system involving a restrictive practice such as this must, in our view, have (if anything) a tendency to decrease export earnings, in the situation of competition which now exists and will continue in the export market. Grouping together the factors above mentioned, we are not satisfied that the removal of the home price restrictions will be likely to cause a reduction in the earnings of the export business in transformers which is substantial in relation to the whole business of transformer manufacture, and the Association's case under para. (f) fails.

We now consider the case for the Association under para. (d) of s. 21 (1). On the figures already given, it is plain that the C.E.G.B. is a person not party to the agreement, and not carrying on the trade or business of acquiring or supplying C category transformers, who controls a preponderant part of the market for those transformers. The question is whether the system of fixing prices for the supply of such transformers to the C.E.G.B. is reasonably necessary to enable the members of the Association to negotiate fair terms for the supply of such transformers to C.E.G.B. It was argued that there were special features which would produce a reduction of prices to the C.E.G.B. for "C" category goods to below the "fair terms" level. It was asserted that makers of those goods must get orders from the C.E.G.B. if they are to keep their factories employed; that the knowledge that one customer has at his disposal such a big proportion of the available orders would induce individual manufacturers to offer the goods at prices which would be unremunerative to them; that the importance of securing an order from the C.E.G.B. is such that a manufacturer may from time to time be compelled to put in a figure considerably below the figure he would quote if his sole aim were to make a reasonable profit; that such tenders would bring down the price at which orders could be obtained by other manufacturers, with serious consequences for the industry. In this connexion we observe that, while on the evidence we are confident that the C.E.G.B. would not take any steps calculated to depress prices to lower than a reasonable level for these goods, the section is not dependent for its applicability on a positive attitude on the part of the buyer: see the *Water-Tube Boilermakers'* case (7). It is, we think, rarely that this paragraph can be successfully invoked where there is no disposition on the part of the buyer to force unreasonable terms. In the *Water-Tube Boilermakers'* case (8), the goods in question were less frequently ordered and varied in cost between one and six million pounds each, and we quote the following passage from the judgment in that case:

"We must not be understood as saying that, whenever there is a preponderant buyer who employs the method of competitive tender, a case for some restriction is at once made out. In the ordinary case where such a procedure is followed, the normal results of competition will come into play. The more efficient tenderers will gradually obtain a bigger share of the market and will drive the less efficient out of business. That is as it should be, and will not usually give rise to the necessary conditions for the operation of the paragraph. In the case before us, however, there is no room for the free play of competition in the ordinary sense. Here we have six big and efficient firms who ought in the national interest, having regard to the expected long-term demand, to stay in the business. In the meantime, there are these very few, very large, orders which it is expedient should to some extent be spread over the industry and not concentrated in the hands of very few."

We were given some figures of the ten largest orders placed by C.E.G.B. in

(7) [1959] 3 All E.R. 257; L.R. 1 R.P. 285.

(8) [1959] 3 All E.R. at p. 274; L.R. 1 R.P. at p. 341.

A certain years, which did not approach the figures of cost of water-tube boilers. We have already referred to the weighted average profits in the home market on larger transformers (over 7,500 kVA) for the years 1955 to 1959. The figures are: 1955, 24.8 per cent.; 1956, 25.2 per cent.; 1957, 23.3 per cent.; 1958, 18.5 per cent.; 1959, 19.2 per cent., giving an over-all average of 22.1 per cent. These figures exclude the figure of any member who accounts for less than five per cent. of the sales. The individual averages (with similar exclusion) for the same period vary between 29.6 per cent. high and 14.6 per cent. low, the next lowest being 20.9 per cent. These figures are not coincident with "C" category, since they include all reference goods over 7,500 kVA, of which some do not exceed the 33,000 voltage. The rate of profit on "C" category goods in the home market is not, therefore, ascertainable. There is no means of arriving at a figure of capital employed in relation to "C" category goods—or even in relation to the "larger" class above mentioned; but, having regard to the greater length of time taken to complete the larger transformers (though there are progress payments), there is reason to suppose that the ratio of turnover to capital employed in the "larger" class is slightly less than one to one. On the other hand, in the larger sizes of the "larger" class—which would be the "C" category goods—the greatest additions have been made by the Association to the selected cost figure by way of percentage for profit, and no selling factor has been involved. We think it likely that, had the figures of profit on "C" category goods in the home market been separately assessed, the percentages would have been higher than those already mentioned. We draw attention also to the fact that the capacity utilisation figures are highest in the case of "larger" transformers. We re-assert in this context that there is no sound reason why the prices and other relevant details of successful tenders should not be made known, either by the manufacturers or (if they will not) by the C.E.G.B.

Accepting, for the purpose of our decision, the definition of "fair terms" given in the *Water-Tube Boilermakers'* case (9)—that is to say, terms on which the efficient manufacturer can make and sell the goods at a reasonable, but no more than a reasonable, profit—and bearing in mind the evidence on the question, and also the rates of profit which we have just discussed, we are not satisfied that the abolition of the price restriction as to "C" category goods sold to the C.E.G.B. will result in other than fair terms to the manufacturers.

Accordingly, the restriction is not reasonably necessary to achieve that end, and the Association's case fails also under para. (d). We may add that there was considerable argument whether the operation of the price restriction, based on an average, with a so far incomplete rationalisation of costings systems, and a resistance to the disclosure of profit margins based on profit percentage additions unilaterally fixed by the Association, except to a limited and averaged extent, could in any event be described as "reasonably necessary" for the purpose; but this we need not discuss.

We would mention one aspect of para. (d) in connexion with the definition of "fair terms" already mentioned. It may be that the definition is not of universal application. In any particular market it might be that, without any restrictions, prices generally will be, perhaps for a period, below the defined level of fair terms, and that, with a particular restriction aimed at the preponderant buyer alone, prices to other purchasers will remain below the defined level. We are by no means sure that a restriction which will result in the preponderant buyer paying more than other buyers could be justified under the paragraph, even though it will result in the preponderant buyer paying only no more than will give to an efficient manufacturer a reasonable profit. It may be that the paragraph is limited to such a restriction as will prevent the preponderant buyer obtaining more favourable or more unfair terms than the generality of buyers; and this view might be supported either by regarding the word

"fair" in the section as not absolute but relative to the market generally, or by regarding the words "reasonable profit" in the judicial definition as relative to the level of profit obtainable from other purchasers. In the present case, these questions do not fall to be decided. There was no evidence that with the restriction against the C.E.G.B. alone there would be lower prices charged to the other purchasers of "C" category goods than would be charged to the C.E.G.B., and it would have been unsafe for the court to assume that it would be so when the matter had not been canvassed in evidence. A

In the result, the Association fails in their attempt to establish a *prima facie* case under any of the three paragraphs. It is, consequently, not necessary to discuss the question of detriments under the balancing provisions of s. 21 (1) of the Restrictive Trade Practices Act, 1956. The restrictions other than the price restrictions admittedly cannot stand without them, and, accordingly, we declare that all the restrictions under the agreement are contrary to public policy by force of the statute. B

Order accordingly.

Solicitors: *Bristows, Cooke & Carmichael* (for the Associated Transformer Manufacturers); *Treasury Solicitor*. C

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.] D

Re BAKER (Infants).

[CHANCERY DIVISION (Pennycuik, J.), March 9, 10, 13, 14, 15, 1961.] E

Education—School attendance—Enforcement—Jurisdiction—Wardship proceedings—Mother's persistent refusal to send children to school after two convictions—Application by local education authority to have children made wards of court and directions given as to their education—Whether court should exercise the inherent jurisdiction derived from the Sovereign in relation to infants and make the children wards of court—Education Act, 1944 (7 & 8 Geo. 6 c. 31)—Law Reform (Miscellaneous Provisions) Act, 1949 (12, 13 & 14 Geo. 6 c. 100), s. 9. F

Notwithstanding repeated school attendance orders, followed by prosecutions, the mother of seven children, who was living separate from their father, refused to send to school those children who were of school age. On an application by the local education authority under the Law Reform (Miscellaneous Provisions) Act, 1949, s. 9, for an order making three of the children who were of school age wards of court and giving directions as to their education, G

Held: the Education Act, 1944, restricted the inherent jurisdiction of the Sovereign as exercised by the court in relation to infants by disabling it from giving any direction as to the children's education at variance with the provisions of the Act (e.g., the court could not prevent the making of a school attendance order nor direct that a child should receive education otherwise than in accordance with such an order), and, as the court should only exercise the inherent jurisdiction after deciding that the proposed exercise would be for the infant's benefit, it was not proper to use that jurisdiction as a means of enforcing an attendance order; accordingly, the court would make no direction as to the education of the children but would direct that they should cease to be wards of court (see p. 253, letter G, to p. 254, letter B, post). H

Dictum of LORD EVERSHED, M.R., in *Re M. (an infant)* ([1961] 1 All E.R. at p. 795) applied. I

[As to statutory duty to receive education, see 13 HALSBURY'S LAWS (3rd Edn.) 555 et seq., paras. 1181 et seq; and for cases on the subject, see 19 DIGEST 564 et seq., 61 et seq.]

A For the Education Act, 1944, s. 7, s. 35 to s. 40 and s. 76, see 8 HALSBURY'S STATUTES (2nd Edn.) 152, 180 to 185 and 210.]

Cases referred to:

A.-G. (*on the relation of Horncchurch U.D.C.*) v. *Bastow*, [1957] 1 All E.R. 497; [1957] 1 Q.B. 514; 121 J.P. 171; [1957] 2 W.L.R. 340; 28 Digest (Repl.) 744, 39.

B *M. (an infant), Re*, [1961] 1 All E.R. 201; [1960] 3 W.L.R. 1045; *affd.* C.A., [1961] 1 All E.R. 788; [1961] 2 W.L.R. 350.

Adjourned Summons.

C This was an application under s. 9 of the Law Reform (Miscellaneous Provisions) Act, 1949, by originating summons dated May 9, 1960, taken out by the Norfolk County Council for an order that three infants, Robin, Felicity and Wendy Baker, who were of school age, might be made wards of court and that directions might be given as to their education. The respondents were Joy Elsbeth Baker, the mother of the infants, and Peter Shaw Baker, the father of the infants. The facts appear in the judgment.

D *Charles Sparrow* for the Council of the Administrative County of Norfolk.

Arthur Bagnall for the mother.

T. A. C. Burgess for the father.

Cur. adv. vult.

E Mar. 15. **PENNYCUICK, J.:** This is a summons taken out by the Norfolk County Council in the matter of three infants—Robin, Felicity and Wendy. The respondents are the mother and father respectively of the infants. The summons asks, first, that the infants may be made wards of court, and, second, that directions may be given as to their education.

F The mother and father are at present separated; the mother is living in a country district in Norfolk. Her family consists of seven children—an older son who is now aged fifteen, the three infants to whom the present summons relates: they are aged respectively fourteen and a half, thirteen and twelve years; and three younger children. The mother has a rooted objection of principle to sending her children to school and has waged a prolonged defensive battle on this issue against the council, the local education authority.

G The council has made a succession of school attendance orders under the Education Act, 1944, resulting in a series of prosecutions before the justices. In 1954 the first prosecution was dismissed because the council had not complied in certain respects with the requirements of the Act. On Nov. 15, 1957, the justices convicted the mother and imposed a fine of 10s. in respect of each child, the children then including the eldest son who is now past school age. The mother appealed to quarter sessions who, on May 16, 1958, dismissed her appeal. H On Nov. 28, 1958, the justices again convicted the mother and imposed a fine of £1 in respect of each child. The mother appealed to quarter sessions, which dismissed her appeal on Feb. 10, 1958, and to the Queen's Bench Divisional Court, which dismissed her appeal on Feb. 5, 1960. The mother persists in her refusal to comply with the school attendance orders. These orders, as they now stand amended, require the attendance of the children at the South Dereham secondary modern school.

I The council now seeks to enforce school attendance by means of these proceedings. Evidence has been filed by Mr. F. J. Earl, the administrative assistant to the Education Committee of the council, and the mother and father. All three have been cross-examined before me on their affidavits. I come without hesitation to the conclusion, so far as I am concerned to do so, that the mother is not causing the children to receive efficient full-time education as required by the statutory provisions of the Education Act, 1944.

I turn to the relevant provisions of the Education Act, 1944. Section 7 says:

"The statutory system of public education shall be organised in three progressive stages to be known as primary education, secondary education, and further education; and it shall be the duty of the local education authority for every area, so far as their powers extend, to contribute towards the spiritual, moral, mental, and physical development of the community by securing that efficient education throughout those stages shall be available to meet the needs of the population of their area."

Section 35 defines "compulsory school age" as "any age between five years and fifteen years". Section 36 says:

"It shall be the duty of the parent of every child of compulsory school age to cause him to receive efficient full-time education suitable to his age, ability, and aptitude, either by regular attendance at school or otherwise."

Section 37 says:

"(1) If it appears to a local education authority that the parent of any child of compulsory school age in their area is failing to perform the duty imposed on him by the last foregoing section, it shall be the duty of the authority to serve upon the parent a notice requiring him, within such time as may be specified in the notice not being less than fourteen days from the service thereof, to satisfy, the authority that the child is receiving efficient full-time education suitable to his age, ability, and aptitude either by regular attendance at school or otherwise."

"(2) If, after such a notice has been served upon a parent by a local education authority, the parent fails to satisfy the authority in accordance with the requirements of the notice that the child to whom the notice relates is receiving efficient full-time education suitable to his age, ability, and aptitude, then, if in the opinion of the authority it is expedient that he should attend school, the authority shall serve upon the parent an order in the prescribed form (hereinafter referred to as a 'school attendance order') requiring him to cause the child to become a registered pupil at a school named in the order: Provided that before serving such an order upon a parent the authority shall, where practicable, afford him an opportunity of selecting the school to be named in the order and, if a school is selected by him, that school shall, unless the Minister otherwise directs, be the school named in the order."

"(3) If the local education authority are of opinion that the school selected by the parent as the school to be named in a school attendance order is unsuitable to the age, ability or aptitude of the child with respect to whom the order is to be made, or that the attendance of the child at the school so selected would involve unreasonable expense to the authority, the authority may, after giving to the parent notice of their intention to do so, apply to the Minister for a direction determining what school is to be named in the order."

Section 37 (4) provides, in effect, that the parents may make application for the substitution of another school. Section 37 (5) says:

"If any person upon whom a school attendance order is served fails to comply with the requirements of the order, he shall be guilty of an offence against this section unless he proves that he is causing the child to receive efficient full-time education suitable to his age, ability, and aptitude otherwise than at school."

Section 39 is concerned with the duty of parents to secure regular attendance of a registered pupil. Then s. 40 (1) says:

"Subject to the provisions of this section, any person guilty of an offence against s. 37 or s. 39 of this Act shall be liable on summary conviction, in the case of a first offence against that section to a fine not exceeding £1,

A in the case of a second offence against that section to a fine not exceeding £5, and in the case of a third or subsequent offence against that section to a fine not exceeding £10 or to imprisonment for a term not exceeding one month or to both such fine and such imprisonment."

Section 40 (2) says (1):

B "It shall be the duty—(a) in the case of an offence against s. 37 of this Act, of the local education authority by whom the school attendance order in question was made . . . to institute proceedings for such offences as aforesaid wherever, in their opinion, the institution of such proceedings is necessary for the purpose of enforcing the duty imposed upon a parent by this Act to cause his child to receive efficient full-time education suitable to his age, ability, and aptitude, and no such proceedings shall be instituted except by or on behalf of a local education authority."

C The remaining subsections of s. 40 deal with the position after the child has become a registered pupil, and are not directly in point. Section 76 reads:

D "In the exercise and performance of all powers and duties conferred and imposed on them by this Act the Minister and local education authorities shall have regard to the general principle that, so far as is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure, pupils are to be educated in accordance with the wishes of their parents."

E The effect of the provisions which I have just read is that the parent is bound to cause the child to receive efficient full-time education, either by regular attendance at school, or otherwise. If the local authority is not satisfied that the parent is performing this duty, the local authority, subject to certain preliminary procedure and provided that in its opinion it is expedient that the child should attend school, must serve on the parent a school attendance order requiring the parent to cause the child to become a registered pupil at the school named in the order, as to which the parent has a limited power of selection. If the parent fails to comply with the requirements of the order, and is unable to prove that he is causing the child to receive efficient full-time education otherwise than at school, he is guilty of an offence and, on summary conviction for this offence, he is liable to fines of a specified progressive amount, and on the third offence, to imprisonment also.

F It is clear to me that the Education Act, 1944, has, by necessary implication, restricted the inherent jurisdiction of the Sovereign as exercised by this court, to the extent that the court cannot give any direction at variance with the provisions of the Act. In particular, the court cannot prevent the making of a school attendance order; nor, so long as a school attendance order is in force, can the court direct that the child shall receive education otherwise than in accordance with the order: that is to say, by becoming a registered pupil and attending regularly at the school named in the order. Counsel who appears for the council, accepts, and indeed, asserts this proposition; but he contends that, subject only to the limitations imposed by the Act, the inherent jurisdiction of this court remains unimpaired, and that, in exercise of this jurisdiction, the court can give a direction, the effect of which will be to enforce the school attendance orders made by the council. That is, indeed, the whole purpose of the present application.

I In my judgment, the Act, by placing outside the jurisdiction of the court the decision whether or not a child should receive education in accordance with a school attendance order, has equally put it outside the proper scope of the jurisdiction of the court to enforce such an order. The court, in the exercise of its inherent jurisdiction, can only properly give a direction after it has decided that

(1) Section 40 (2) is printed as amended by the Education (Miscellaneous Provisions) Act, 1948, s. 11 and Sch. 1, Part 1, so far as is relevant.

the act directed to be done is for the benefit of the infant concerned: see in this connexion the principle laid down by s. 1 of the Guardianship of Infants Act, 1925. It seems to me necessarily to follow that the court cannot properly give a direction where the decision whether the act is to be done rests with some other authority, so that the court is not itself able to decide whether or not the act is for the benefit of the infant.

Much assistance on this point is to be derived from *Re M. (an infant)* (2). In that case a local authority had vested in itself under s. 2 of the Children Act, 1948, the rights and powers of the infant's parent. The infant's foster mother issued a summons making the infant a ward of court, and the local authority applied for an order de-warding the infant. CROSS, J., acceded to the application of the local authority, and his decision was upheld by the Court of Appeal.

CROSS, J., in the court of first instance gave his reasons, beginning as follows (3):

"I agree; but, viewing the matter for the moment as free from authority, I think that the provisions of the Act of 1948 to which I have referred lead inevitably to the conclusion that the prerogative has been restricted . . . [and ending] So long, therefore, as the local authority are acting within the powers given to them by the Act, this court, as I see it, has no right, let alone any duty, to inquire into the wisdom of their decisions."

In the Court of Appeal LORD EVERSHED, M.R., with whom the other members of the court agreed, stated as follows (4):

"On those premises, that is to say in the absence of any challenge as to the propriety of what the local authority or its officers have done as distinct from their wisdom, I feel compelled, by the clear indication of the language to which I have alluded in the statute, to conclude that this matter of judging the present best interests of the child in the circumstances of this case has been placed by Parliament in the exclusive jurisdiction of the local authority. Counsel for the appellant conceded that on the premises, as I have stated them, the onus would be heavy on him to persuade the Chancery courts to override or disregard the conclusions of the local authority. That argument and that concession appear to me to involve counsel in something of a dilemma. For the purposes of deciding the immediate questions which now have been raised, either the prerogative jurisdiction survives and exists or it does not; and if it does survive and exist, then the decision as to what now is in the best interests of the child must rest not with the local authority, but with the court. There seems to me to be no escape from that result."

Towards the end of his judgment LORD EVERSHED, M.R., said (5):

"It may perhaps be useful for me to add by way of summary the following:

"(i) The prerogative right of the Queen as *parens patriae* in relation to infants within the realm is not for all purposes ousted or abrogated as the result of the exercise of the duties and powers by local authorities under the Children Act, 1948: in particular the power to make an infant a ward of court by invocation of s. 9 of the [Law Reform (Miscellaneous Provisions) Act, 1949] is unaffected.

"(ii) But even where a child is made a ward of court by virtue of the Act of 1949, the judge in whom the prerogative power is vested will, acting on familiar principles, not exercise control in relation to duties or discretions clearly vested by statute in the local authority, and may, therefore, and in a case such as the present normally will, order that the child cease to be a ward of court. This result will occasion no surprise to those familiar with wardship proceedings, for in many cases where infants are made wards of court, the directions of the court are sought only on particular matters, such,

(2) [1961] 1 All E.R. 201.

(3) [1961] 1 All E.R. at p. 204.

(4) [1961] 1 All E.R. at p. 793.

(5) [1961] 1 All E.R. 788, see at p. 795; the propositions are stated at the beginning of the headnote.

A e.g., as the place of education or to control the activities of the infant in relation to marriage or undesirable associations where a united parental control has failed; in such cases the court makes no order as to the custody, care or maintenance, for that remains in the hands of unimpeachable parents and the court does not interfere in relation to such matters.

B “(iii) There remains the right (and duty) of the judge in whom the prerogative power is vested, to control the activities of a local authority in cases where the local authority is shown to be acting in some way in breach or in disregard of its statutory duties.”

The passages which I have read, although addressed to an entirely different situation under a different Act (6), appear to me to be directly in point as to the principles to be applied in the present case.

C Counsel appearing for the council sought to meet this difficulty in a number of ways. First, he contended that this court, although precluded by the Education Act, 1944, from making a decision whether the children should receive education in accordance with the school attendance orders made under the Act, may yet consider whether such compliance would be for the benefit of the children, and, if satisfied that it is for the benefit of the children, may enforce the school attendance orders. I find the greatest difficulty in the conception that this court can, or should, conduct an independent inquiry of this kind into a matter on which the decision has been entrusted to the local authority; and in any case this contention cannot be reconciled with the statements which I have just quoted from the judgments in *Re M. (an infant)* (7).

E Secondly, he contended that this court is bound to assume that compliance with the school attendance orders was for the benefit of the children concerned. No doubt the Education Act, 1944, was passed in what Parliament conceived to be the interests of children generally; but Parliament legislates for the community as a whole, and I do not think that there is anything in the Act or in the general law which entitles the court to assume that its provisions are necessarily for the benefit of every particular child between the ages of five and fifteen.

F Thirdly, he contended, with truth, that the Act has by no means wholly excluded the parent from control of his children's education; and he referred to the general provision in s. 76, and more particularly, to the limited powers contained in s. 37. Therefore, he says, the jurisdiction of the court stands unimpaired to a corresponding extent. But this contention does not meet the present point: G namely, that the court is being asked to enforce school attendance orders, in the operation of which the court has no discretion.

It may be that these specific contentions do not do justice to the forceful argument of counsel on behalf of the council. In broad terms, he urges that these children are in jeopardy, and that the court ought to come to their rescue. I feel much sympathy with this plea; but the court can only act within its proper H jurisdiction, and it seems to me that I am not entitled to stretch that jurisdiction in order to meet the unusual circumstances of the present case. Indeed, it would be a dangerous precedent to do so.

I have been referred to *A.-G. (on the relation of Hornchurch U.D.C.) v. Bastow* (8), and in particular to the statement of DEVLIN, J., to this effect (9):

I “However, I think it must be a matter of administrative discretion, whether the enforcement of the law is best achieved, in the face of someone who is determined to defy it, by going to the magistrates' court in a series of applications of that sort, or by going to the High Court and asking it to use its powers, which would amount to the imposition, if necessary, of an indefinite sentence until such time as the defendant had purged his contempt.”

There is, however, a vital difference between an application to enforce a public

(6) The Law Reform (Miscellaneous Provisions) Act, 1949, s. 9 (3).

(7) [1961] 1 All E.R. at p. 795. (8) [1957] 1 All E.R. 497; [1957] 1 Q.B. 514.

(9) [1957] 1 All E.R. at p. 502; [1957] 1 Q.B. at p. 522.

right, as was the position in that case, and an application to the inherent jurisdiction of this court to protect the interests of particular infants.

For the reasons given above, I have come to the conclusion that enforcement of these school attendance orders lies outside the proper function of this court, and that the council must rely on the sanctions contained in the Act itself.

I should like to make it clear that I do not intend to express the slightest agreement with the mother's views on the education of children in general, or of her own children in particular. Equally, I do not intend to express the slightest disagreement with the views expressed by the Norfolk justices or the Queen's Bench Divisional Court. On the contrary I too have come to the clear conclusion that the mother is not causing her children to receive efficient full-time education as required by the Act.

I must refer, in conclusion, to one further contention advanced by counsel for the mother, and by counsel for the father: that the present application is ultra vires the council. I do not think this contention takes me any further. If I am right in my view that the court cannot properly make the order sought by the council, then obviously the application fails on that ground. If, on the other hand, the court could properly make the order, then it seems to me that the council would have power to make the application as being incidental to, or consequential on, the exercise of its powers under the Education Act, 1944.

I propose, therefore, not to make any direction as to the education of the infants. I direct that these children cease to be wards of court.

Summons dismissed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Clerk of county council*, Norwich (for the Council of the Administrative County of Norfolk); *Piesse & Sons*, agents for *Russell Steward, Stevens & Hipwell*, Norwich (for the mother); *Field, Roscoe & Co.*, agents for *Sadler, Lemmon & Gethin*, King's Lynn (for the father).

[Reported by JENIFER SANDELL, Barrister-at-Law.]

PRACTICE DIRECTION.

CHANCERY DIVISION.

Adoption—Dispensing with consent of parent or guardian—Evidence—Practice—Adoption Act, 1958 (7 & 8 Eliz. 2 c. 5), s. 5.

An applicant for an adoption order who wishes the court to dispense with the consent of a parent or guardian must set out, in a statement or statements separately exhibited to the affidavit in support, the evidence on which he intends to rely. It shall be the duty of the guardian ad litem (unless otherwise directed) to take steps to inform the parent or guardian of the application to dispense with his or her consent and of the date for the hearing of the application before the master and to send him or her a copy of the statement or statements of evidence lodged by the applicant in support of the application.

If a serial number has been assigned to the applicant in accordance with r. 3 of the Adoption (High Court) Rules, 1959 (S.I. 1959 No. 479), the memorandum identifying the statement as an exhibit to the applicant's affidavit must omit the applicant's name and the proposed adoptive name of the infant and any reference to the applicant in the statement must be by the serial number and not by name. In such case the guardian ad litem must also warn the applicant or his solicitors that if he attends the appointment before the master it may not be possible to prevent the parent or guardian from discovering his identity.

By direction of RUSSELL, J.

W. F. S. HAWKINS,
Chief Master, Chancery Division.

Mar. 24, 1961.

A HONG KONG FIR SHIPPING CO., LTD. v. KAWASAKI KISEN KAISHA, LTD.

[QUEEN'S BENCH DIVISION (Salmon, J.), January 30, 31, February 1, 2, 3, 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 22, 1961.]

B Shipping—Charterparty—Unseaworthiness—Incompetent and inadequate engine-room staff—Whether charterers entitled to repudiate charter.

C By a time charter dated Dec. 26, 1956, it was mutually agreed between the owners of the vessel Hong Kong Fir, classed Lloyd's 100 A1, and the charterers that (cl. 1) the owners would let and the charterers hire the vessel for twenty-four months from the date of her delivery to the charterers at Liverpool "she being in every way fitted for ordinary cargo service" and that (cl. 3) the owners would "maintain her in a thoroughly efficient state in hull and machinery during service". Under the charter hire was payable at the rate of 47s. per ton but it was provided that no hire should be paid for time lost exceeding twenty-four hours in carrying out repairs to the vessel and that such off-hire periods might at the charterers' option be added to the charter time. The vessel was delivered to the charterers at Liverpool on Feb. 13, 1957, and the same day she sailed for Newport News, U.S.A., to load a cargo of coal which she was to carry to Osaka. When she was delivered to the charterers at Liverpool her engine room was undermanned and her engine-room staff incompetent although the owners knew that the vessel's machinery was very old and therefore required an ample and efficient engine-room staff to maintain it. During the voyage to Osaka the vessel was off hire for repairs to her engines for a total period of about five weeks and when she arrived at Osaka, on May 25, 1957, it was found that the engines were in a very bad state and that it would take a further fifteen weeks to make the vessel seaworthy. The condition of the engines at Osaka was due mainly to the inefficiency of the engine-room staff on the voyage from Liverpool. By Sept. 15, 1957, the vessel had been made seaworthy in every respect and then had an efficient and adequate engine-room staff; at that date she was still available to the charterers for seventeen months. In mid-June there had been a steep fall in freight rates from 47s. to 24s. per ton and by mid-August the rates had dropped again to 13s. 6d. per ton. On June 6 and on Sept. 11, 1957, the charterers had written to the owners repudiating the charter. In an action by the owners for wrongful repudiation the trial judge found that the owners were in breach of cl. 1 of the charter in delivering a vessel that was unseaworthy with regard to her engine-room staff and were also in breach of cl. 3 in negligently failing to maintain the vessel in an efficient state, but that in June there were no reasonable grounds for thinking that the owners were unable to make the vessel seaworthy by mid-September at the latest. The charterers contended that the owners' breaches of charter entitled them to repudiate the charter, alternatively that the charter had been frustrated.

Held: the charterers were not entitled to repudiate the charter for the following reasons—

I (i) unseaworthiness by itself did not entitle the charterers to rescind the charter, and a fortiori a breach of the owners' obligation to maintain the vessel in an efficient state could not by itself entitle the charterers to rescind (see p. 264, letter B, post); therefore the charterers could not succeed in establishing a right to repudiate the charter unless the delay in making the vessel seaworthy was likely at the date of repudiation to be so great as to frustrate the commercial purpose of the charter.

Tarrabochia v. Hickie ((1856), 1 H. & N. 183), and dictum of DEVLIN, J., in *Universal Cargo Carriers Corpn. v. Citati* ([1957] 2 All E.R. at p. 82) followed.

Judgment of LORD ELLENBOROUGH, C.J., in *Havelock v. Geddes* ((1809), 10 East, 555), dictum of BUCKNILL, J., in *The Europa* ([1908] P. at p. 93) and speeches of LORD ATKINSON in *Kish v. Taylor* ([1912] A.C. at p. 617), of LORD SUMNER in *Atlantic Shipping & Trading Co. v. Louis Dreyfus & Co.* ([1922] All E.R. Rep. at p. 563) and of LORD ATKIN in *Hain S.S. Co., Ltd. v. Tate & Lyle, Ltd.* ([1936] 2 All E.R. at p. 601) explained.

(ii) in judging delay for the purposes of (i) ante, p. 257, there was no real difference between a yardstick of "reasonable time" and one of "frustrating time" (see p. 264, letter D, post).

Dictum of DEVLIN, J., in *Universal Cargo Carriers Corp'n. v. Citati* ([1957] 2 All E.R. at p. 83) followed.

(iii) at the dates of repudiation, viz., June 6 and Sept. 11, the delay likely to occur or which had occurred in making the vessel seaworthy was not so great as to render the prospective performance of the charter a thing radically different from what was undertaken, so that there was no frustration of the charter and the delay was insufficient to justify its repudiation (see p. 265, letter F, post); moreover in considering the issue of frustration neither the steep fall in freight rates nor the fact that under the charter off-hire periods might be added to the charter time was material (see p. 264, letter H, post).

[As to unseaworthiness due to an incompetent and insufficient crew, see 30 HALSBURY'S LAWS (2nd Edn.) 466, para. 622; as to the effect of unseaworthiness, see *ibid.*, 471, para. 628.

As to the doctrine of frustration, see 8 HALSBURY'S LAWS (3rd Edn.) 185-191, paras. 320-323.

For cases on fitness of the ship, see 41 DIGEST 325, 326, 1833-1838.]

Cases referred to:

Atlantic Shipping & Trading Co. v. Louis Dreyfus & Co., [1922] All E.R. Rep. 559; [1922] 2 A.C. 250; 91 L.J.K.B. 513; 127 L.T. 411; 15 Asp. M.L.C. 566; Digest Supp.

Clifford v. Hunter, (1827), 3 C. & P. 16; Mood. & M. 103; 172 E.R. 303; 29 Digest 189, 1488.

Compania Cantabrica de Navigacion v. Anglo-American Oil Co., Ltd., (1923), 16 Lloyd's Rep. 235; 39 T.L.R. 614; 41 Digest 472, 3033.

Davis Contractors, Ltd. v. Fareham Urban District Council, [1956] 2 All E.R. 145; [1956] A.C. 696; [1956] 3 W.L.R. 37; 3rd Digest Supp.

Europa, The, [1908] P. 84; 77 L.J.P. 26; 98 L.T. 246; 11 Asp. M.L.C. 19; 41 Digest 480, 3129.

Hain S.S. Co., Ltd. v. Tate & Lyle, Ltd., [1936] 2 All E.R. 597; 155 L.T. 177; 19 Asp. M.L.C. 62; 55 Lloyd's Rep. 159; Digest Supp.

Havelock v. Geddes, (1809), 10 East, 555; 103 E.R. 886; 41 Digest 325, 1834.

Kish v. Taylor, [1912] A.C. 604; 81 L.J.K.B. 1027; 106 L.T. 900; 12 Asp. M.L.C. 217; 41 Digest 485, 3170.

Metropolitan Water Board v. Dick, Kerr & Co., Ltd., [1918] A.C. 119; 87 L.J.K.B. 370; 117 L.T. 766; 82 J.P. 61; 12 Digest (Repl.) 456, 3410.

Port Line, Ltd. v. Ben Line Steamers, Ltd., [1958] 1 All E.R. 787; [1958] 2 Q.B. 146; [1958] 2 W.L.R. 551; 3rd Digest Supp.

Rio Tinto Co., Ltd. v. Seed Shipping Co., (1926), 134 L.T. 764; 17 Asp. M.L.C. 21; 41 Digest 483, 3161.

Snia Societa di Navigazione Industria e Commercio v. Suzuki & Co., (1924), 29 Com. Cas. 284; 41 Digest 304, 1659.

Stanton v. Richardson, *Richardson v. Stanton*, (1872), L.R. 7 C.P. 421; 41 L.J.C.P. 180; 27 L.T. 513; 1 Asp. M.L.C. 449; *affd.* Ex.Ch., (1874), L.R. 9 C.P. 390; H.L., (1875), 45 L.J.Q.B. 78; 41 Digest 303, 1651.

Tamplin (F. A.) S.S. Co., Ltd. v. Anglo-Mexican Petroleum Products Co., Ltd., [1916] 2 A.C. 397; 85 L.J.K.B. 1389; sub nom. *Re Tamplin (F. A.) S.S. Co., Ltd. & Anglo-Mexican Petroleum Products, Co., Ltd.*, 115 L.T. 315; 13 Asp. M.L.C. 467; 12 Digest (Repl.) 442, 3361.

Tarrabochia v. Hickie, (1856), 1 H. & N. 183; 26 L.J.Ex. 26; 156 E.R. 1168; 41 Digest 326, 1836.

Tully v. Howling, (1877), 2 Q.B.D. 182; 46 L.J.Q.B. 388; 36 L.T. 163; 3 Asp. M.L.C. 368; 41 Digest 356, 2052.

Universal Cargo Carriers Corpn. v. Citati, [1957] 2 All E.R. 70; [1957] 2 Q.B. 401; [1957] 2 W.L.R. 713; *affd.* C.A., [1957] 3 All E.R. 234; [1958] 2 Q.B. 254; [1958] 3 W.L.R. 109; 3rd Digest Supp.

Action.

In this action the owners of the vessel Hong Kong Fir claimed from the charterers of the vessel damages for wrongful repudiation of the charterparty. By their defence the charterers alleged that they were entitled to repudiate the charterparty because of breaches of the charter by the owners in delivering to the charterers a vessel that was unseaworthy or not fitted for ordinary cargo service; in failing to exercise due diligence to make the vessel seaworthy and in giving an inaccurate description in the charterparty of the vessel's steaming capability. Alternatively, the charterers claimed that because of these breaches the vessel could not be rendered seaworthy or fit for ordinary cargo service or be put into a thoroughly efficient state in respect of her machinery within a reasonable time or within such time as would not frustrate the commercial purpose of the charterparty. The charterers counterclaimed for damages for breach of the charterparty.

The relevant terms of the charter, a Baltic and International Maritime Conference Uniform Time Charter, are set out, and the facts are stated, in the judgment, post.

Stephen Chapman, Q.C., M. R. E. Kerr and C. S. Staughton for the owners.

Ashton Roskill, Q.C., Basil Eckersley and Brian Davenport for the charterers.

Cur. adv. vult.

Feb. 22. SALMON, J., read the following judgment: The plaintiffs are the owners of a diesel vessel called the Hong Kong Fir which was built in 1931. They purchased this vessel for £397,500 from the Avon Shipping Co., Ltd. (which is a subsidiary of the New Zealand Shipping Co.) at about the same time as they entered into the charter to which I shall presently refer. In the contract of sale the vessel was described as "Classed at Lloyd's 100 A1 Special Survey passed July, 1955". The contract contained provisions that the vessel was to be delivered with its class maintained and that she should be taken with all faults and errors of description but subject otherwise to the provisions of the contract. By a time charter dated Dec. 26, 1956, the owners chartered this vessel to the defendants. The material words of the charter read as follows:

"It is this day mutually agreed between Hong Kong Fir [Shipping] Co., Ltd., Hong Kong, owners of the vessel called Antrim to be renamed Hong Kong Fir . . . classed Lloyd's 100 A1 . . . and fully loaded capable of steaming about twelve and a half knots in good weather and smooth water . . . and Messrs. Kawasaki Kisen Kaisha, Ltd., Kobe, Japan, charterers, as follows:

"1. The owners let, and the charterers hire the vessel for a period of 24 (twenty-four) (with one month more or less at charterers' option) calendar months from the time . . . the vessel is delivered and placed at the disposal of the charterers . . . at Liverpool . . . she being in every way fitted for ordinary cargo service . . .

"3. The owners to provide and pay for all provisions and wages, for insurance of the vessel, for all deck and engine-room stores and maintain her in a thoroughly efficient state in hull and machinery during service . . .

"6. The charterers to pay as hire: 47s. (British sterling forty-seven

shillings) per deadweight ton on vessel's deadweight of 9,131 tons per thirty days, commencing in accordance with cl. 1 until her re-delivery to the owners...

" 11. (A) In the event of dry docking or other necessary measures to maintain the efficiency of the vessel, deficiency of men or owners' stores, breakdown of machinery, damage to hull or other accident, either hindering or preventing the working of the vessel and continuing for more than twenty-four consecutive hours, no hire to be paid in respect of any time lost thereby during the period in which the vessel is unable to perform the service immediately required. Any hire paid in advance to be adjusted accordingly

... " 12. Overhauling of machinery whenever possible to be done during service, but if impossible the charterers to give the owners necessary time for overhauling. Should the vessel be detained beyond forty-eight hours hire to cease until again ready.

" 13. The owners only to be responsible for delay in delivery of the vessel or for delay during the currency of the charter and for loss or damage to goods on board, if such delay or loss has been caused by want of due diligence on the part of the owners or their manager in making the vessel seaworthy and fitted for the voyage or any other personal act or omission or default of the owners or their manager or their servants...

" 32. Any off-hire time by reason obtained in cl. 11, charterers' option to add off-hire time to vessel's period under this charter. And such option to be declared one week after vessel is on hire again before expiration of this charterparty.

" 44. This charterparty is also subject to the vessel being taken over by Messrs. Hong Kong Fir Shipping Co., Ltd., Hong Kong, in Liverpool, according to purchase agreement."

I have read the only relevant clauses, and I have omitted from them the immaterial words.

The vessel was delivered to and placed at the disposal of the charterers on Feb. 13, 1957. She sailed in ballast from Liverpool at 6 p.m. that day. The intention was that she should proceed to Newport News in Virginia, U.S.A., and there pick up a cargo of coal and carry it to Osaka, calling on the way at Cristobal in the Panama Canal zone. The Atlantic crossing was stormy but by no means exceptional for the time of year. She arrived at Newport News on Feb. 28, where she loaded her cargo, and was off hire for one day nineteen hours, £1,180 being spent on repairs to her main engine attached pumps. She left Newport News on Mar. 6 and arrived at Cristobal on Mar. 15, having met with two serious accidents on the way. At Cristobal she was off hire for about eleven days, and £8,220 was there spent in repairs, chiefly to No. 5 and No. 8 engines, and also to the bilge and general service pumps. She left Cristobal on Mar. 26 en route for Osaka. She sustained another accident to No. 5 engine on Mar. 31 and also had a major breakdown of the scavenge pump on Apr. 2. Temporary repairs were carried out to the scavenge pump at sea, but they would not have enabled her to cross the Pacific in safety. Accordingly she made for San Pedro, near Los Angeles, where she arrived on Apr. 14. Here she was off hire for about twenty-two days, sixteen hours, and a further £12,000 was spent on repairs. She left San Pedro on Apr. 29 and arrived at Osaka on May 25. It was there discovered that her main engine and auxiliaries were in a very bad state, due chiefly to corrosion. A further £37,500 was spent on repairs and she was not ready to put to sea until Sept. 15. Thus it will be seen that between Liverpool and Osaka she was at sea for about eight and a half weeks, off hire for about five weeks, and had £21,400 spent on her for repairs. Whilst at Osaka a further period of about fifteen weeks and an expenditure of £37,500 were required to make her ready for sea.

In the meantime there had been a very steep fall in the freight market. By

A mid-June the rate had fallen from 47s. to 24s. per ton, and by mid-August there had been a further fall to 13s. 6d. per ton. On June 5 and 6, and on July 27, the charterers wrote repudiating the charter and claiming damages for breach of contract. On Aug. 8 and 12 the owners wrote intimating that they would treat the contract as cancelled by the charterers' wrongful repudiation and claim damages. It has been argued on behalf of the charterers that two letters written

B on the owners' behalf on Sept. 9 and 10 respectively waived their former acceptance of the charterers' alleged wrongful repudiation. On the other hand it has been argued on behalf of the owners that once repudiation is accepted the contract is dead, and there can be no question of waiver. It is argued that the letters relied on by the charterers as a waiver could at the most amount to a fresh offer to enter into a new contract on the same terms as the old. Without expressing

C any concluded view, I am inclined to think that the owners are right on this point. It does not, however, seem to be material since the charterers wrote on Sept. 11 again repudiating the charter and the owners formally accepted this repudiation on Sept. 13. The position on June 6 was not materially different from that on Sept. 11. In June it was known that a very long time would be required to repair the vessel, and then presumably a further substantial period

D for her trials. By Sept. 11 the repairs and trials had been virtually completed. If the charterers were entitled to repudiate on Sept. 11 they were equally entitled to do so on June 6.

The owners now bring this action claiming damages for wrongful repudiation of contract. The charterers' defence is that they were entitled to throw up the charter because of breaches of the charter on the part of the owners. The breaches

E relied on by the charterers are: (i) A breach of the obligation under cl. 1 of the charterparty to deliver a seaworthy vessel. The vessel is said to have been unseaworthy in respect of her machinery and of her engine-room staff; (ii) A breach of the obligation under cl. 3 of the charterparty to maintain the vessel properly; and (iii) A breach of the obligation to deliver a vessel capable of making about 12½ knots in good weather and smooth water. The charterers contend that

F any of these breaches would per se entitle them to throw up the charter. Alternatively they say that they were so entitled by the failure of the owners to remedy the breaches (a) within a reasonable time, or (b) within what has been referred to in argument as "a frustrating time," that is to say, they contend that the breaches were such that the delay involved in remedying them frustrated the commercial purpose of the charter.

G One of the chief issues in this case is whether the vessel was seaworthy when she left Liverpool on Feb. 13. Counsel for the charterers, relying on the facts outlined at the beginning of this judgment, says that the owners are on the horns of a dilemma: either the machinery was in a thoroughly bad condition at the start or it was wrecked by the incompetence of the engine-room staff during the course of the voyage. Counsel for the owners says that everything can be explained on the basis of heavy weather, bad luck and perhaps one isolated piece of

H negligence on the part of the chief engineer.

[HIS LORDSHIP then reviewed the evidence and made the following findings of fact. On Feb. 13, 1957, when the vessel was delivered to the charterers, she was seaworthy with regard to her machinery which then was in a reasonably good condition but, because of age, needed to be maintained by an experienced,

I competent and adequate engine-room staff. At the date of delivery, however, the vessel was unseaworthy with regard to her engine-room staff since, applying the test in *Clifford v. Hunter* (1) and *Rio Tinto Co., Ltd. v. Seed Shipping Co.* (2), a reasonably prudent owner knowing, as did the owners in the present case, that the machinery was old and required maintenance by an experienced and dependable staff, would not have allowed the vessel to put to sea with an engine-room staff which on the facts was incompetent and numerically insufficient. The

(1) (1827), 3 C. & P. 16.

(2) (1926), 17 Asp. M.L.C. 21.

condition of the machinery on the vessel's arrival at Osaka was due partly to heavy weather but also to the inefficiency of the engine-room staff on the voyage from Liverpool. By Sept. 15, 1957, the owners had provided a competent and ample engine-room staff. On those findings, the owners were in breach of cl. 1 of the charter (having failed to provide a vessel fitted for cargo service), and they were also in breach of cl. 3 in failing to maintain the vessel in an efficient state owing to the negligence of the owner's servants, the engine-room staff. These breaches being caused by want of due diligence by, or vicariously attributable to, the owners, they were not protected by cl. 13 of the charter (for which see p. 260, letter C, ante). Both at the date of the charter, Dec. 26, 1956, and at the date of delivery of the vessel to the charterers, she was capable of steaming at about 12½ knots in good weather and smooth water. HIS LORDSHIP continued:]

There remains to be considered the effect in law of the findings of fact at which I have arrived. Counsel for the charterers argues that the obligation to deliver a seaworthy vessel is a condition precedent to the charterer's liability under the charterparty and that the breach of this obligation is a fundamental breach of contract which, since it was never waived, per se entitles the charterers to throw up the charterparty. There is no reported case of a breach of the owner's obligation to deliver a seaworthy vessel being held by itself to entitle the charterer to escape from the charterparty. On the other hand, there is a considerable body of authority over the last 150 years for the proposition that such a breach does not allow the charterer to escape unless the delay involved in remedying the breach would frustrate the commercial purpose of the charter. Although it is argued by counsel for the charterers that *Havelock v. Geddes* (3) was decided on the basis that the charterers had waived the term as to seaworthiness, in my view the judgment of LORD ELLENBOROUGH, C.J., is clearly based on the ground that the seaworthiness clause is not a condition precedent to the owner's rights under the charterparty. *Tarrabochia v. Hickie* (4), is a decision directly contrary to counsel's contention. He seeks to distinguish it on the ground that it concerned a voyage charter. It is difficult to see why seaworthiness should be a condition precedent in a time charter if it is not a condition precedent in a voyage charter. In *Tully v. Howling* (5), where there was a time charter for twelve months from a certain date, the owners were unable to deliver their vessel until two months after that date, the intervening time being necessary to make her seaworthy. MELLOR, J., in the court below (6) and BRETT, J., in the Court of Appeal (7) found for the charterers on the ground that the time required to make the vessel seaworthy frustrated the object of the charterparty. The other judges based their judgment on the ground that the charterers, having contracted to take the vessel for twelve months, could not be obliged to take her for ten months. In *Stanton v. Richardson*, *Richardson v. Stanton* (8), the decision in *Tarrabochia v. Hickie* (4) was approved. BRETT, J., observed (9):

"... that the conclusion to be drawn from all the cases analogous to this is, that if the breach of contract by the shipowner be such as to justify the charterer in not putting the cargo on board at the moment of the breach, and it cannot be remedied within such a time as not to frustrate the object of the voyage, this absolves the charterer altogether."

DEVLIN, J., has expressed the view, with which I respectfully agree, that these authorities are conclusive; see *Universal Cargo Carriers Corpn. v. Citati* (10). If further authority were needed I would refer to the judgment of BAILHACHE, J.,

(3) (1809), 10 East, 555.

(5) (1877), 2 Q.B.D. 182; 3 Asp. M.L.C. 368.

(6) (1877), 2 Q.B.D. at p. 184; 3 Asp. M.L.C. at p. 369.

(7) (1877), 2 Q.B.D. at pp. 188, 189; 3 Asp. M.L.C. at p. 371.

(8) (1872), L.R. 7 C.P. 421; 1 Asp. M.L.C. 449; *affd.* Ex.Ch., (1874), L.R. 9 C.P. 390.

(9) (1872), L.R. 7 C.P. at p. 437; 1 Asp. M.L.C. at p. 455.

(10) [1957] 2 All E.R. at p. 82; [1957] 2 Q.B. at p. 433.

(4) (1856), 1 H. & N. 183.

A in *Compania Cantabrica de Navigacion v. Anglo-American Oil Co., Ltd.* (11), and to the judgments of BANKES and SCRUTTON, L.JJ., in *Snia Societa di Navigazione Industria e Commercio v. Suzuki & Co.* (12). Counsel for the charterers relies on certain dicta of BUCKNILL, J., in *The Europa* (13) but I think that these amount to no more than a statement that if a ship is unseaworthy at the time of loading the charterer is not obliged to load whilst she remains so and not that
 B he may rescind the contract. Indeed, the very basis of the decision in *The Europa* (14) is that the term as to seaworthiness is not a condition precedent to the charterer's obligations under the contract. Counsel for the charterers also relies strongly on the following passage in the speech of LORD ATKINSON in *Kish v. Taylor* (15):

C "The fact that a ship is . . . from any cause unseaworthy when about to start on her voyage, will justify the charterer . . . in repudiating his contract and refusing to be bound by it . . .".

But the House of Lords in *Kish v. Taylor* (16) expressly affirmed and followed *The Europa* (14). Indeed, LORD ATKINSON says (17):

D "It was held by BUCKNILL and BARGRAVE DEANE, JJ., on a line of reasoning which appears to me convincing, that the charterparty, notwithstanding this unseaworthiness, was not displaced . . .".

I cannot think that LORD ATKINSON intended the passage on which counsel for the charterers relies to be read in the wide sense for which counsel contends. If he did, it was obiter and inconsistent with the authorities including the decision in *Kish v. Taylor* (16) itself. I think, however, that LORD ATKINSON meant to refer only to the charterer's obligation to load. Counsel for the charterers next
 E relies on the following passage in the speech of LORD SUMNER in *Atlantic Shipping & Trading Co. v. Louis Dreyfus & Co.* (18):

"Underlying the whole contract of affreightment there is an implied condition upon the operation of the usual exceptions from liability, namely, that the shipowners shall have provided a seaworthy ship."

F It is argued that this passage is in effect a statement that the term as to seaworthiness goes to the whole root of the contract and that therefore any breach of this term must entitle the charterers to rescind. LORD SUMNER, however, was in my judgment considering no such problem. The point before him was whether an exception clause governed the implied term as to seaworthiness, and the perhaps strange rule of construction was re-affirmed that, whilst an express
 G term as to seaworthiness must be read in the light of the exception clause, an implied term as to seaworthiness because it underlies the whole contract of affreightment is unaffected by the exception clause.

Counsel for the charterers finally relied on *Hain S.S. Co., Ltd. v. Tate & Lyle, Ltd.* (19), where LORD ATKIN stated (20) that any departure from the voyage contracted, however slight the deviation, is of such a serious character that the
 H other party to the contract is entitled to treat it as going to the root of the contract and to declare himself no longer bound by it. Counsel for the charterers says that unseaworthiness is at least as important as deviation and accordingly by analogy must have the same result. I do not accept this contention. LORD ATKIN was dealing solely with deviation, and analogies are sometimes dangerous
 —not least in this branch of the law.

I It may be that on principle it is difficult, as counsel for the charterers contends,

(11) (1923), 16 Lloyd's Rep. 235.

(12) (1924), 29 Com. Cas. 284.

(13) [1908] P. at p. 93; 11 Asp. M.L.C. at p. 21.

(14) [1908] P. 84; 11 Asp. M.L.C. 19.

(15) [1912] A.C. at p. 617; 12 Asp. M.L.C. at p. 220.

(16) [1912] A.C. 604; 12 Asp. M.L.C. 217.

(17) [1912] A.C. at p. 616; 12 Asp. M.L.C. at p. 220.

(18) [1922] All E.R. Rep. at p. 563; [1922] 2 A.C. at p. 260; 15 Asp. M.L.C. at p. 569.

(19) [1936] 2 All E.R. 597; 19 Asp. M.L.C. 62; 55 Lloyd's Rep. 159.

(20) [1936] 2 All E.R. at p. 601; 19 Asp. M.L.C. at p. 64; 55 Lloyd's Rep. at p. 173.

to see why any breach of so important an obligation as that relating to seaworthiness should not by itself give the charterers the right to rescind as soon as they become aware of it. On the other hand, it would be strange if, for example, a charterer after receiving satisfactory service from a vessel could repudiate the charterparty on learning that she was in fact unseaworthy in some minor particular and had been so at the date of delivery under the time charter notwithstanding that she could easily and speedily be rendered seaworthy. However this may be, the authorities which I have reviewed and by which I am bound in my judgment clearly establish that unseaworthiness by itself gives the charterers no right to rescind, and I accordingly so hold. A fortiori a breach of the condition to maintain the vessel in a thoroughly efficient state cannot by itself entitle the charterers to rescind.

It follows that the charterers cannot succeed in their defence unless the delay in making the vessel seaworthy was or appeared likely at the date of the repudiation to be so great as to frustrate the commercial purpose of the charter. Counsel for the charterers argues that the delay must be judged by whether it was reasonable or unreasonable and that it is not necessary for him to show that it would frustrate the contract. If he means that a reasonable time may be shorter than a time that works frustration, I do not agree with him. For this purpose, there can be no real difference between the "reasonable time" yardstick and the "frustrating time" yardstick. As DEVLIN, J., observed in *Universal Cargo Carriers Corpn. v. Citati* (21):

"The truth is that there is nothing wrong in using a reasonable time as a yardstick provided you determine what is reasonable by considering whether or not there has been unreasonable delay in the light of the object which the parties had in mind. It is only when the two yardsticks have in effect been shown to be the same that the courts have accepted the test of reasonableness. Where they have been contrasted . . . the test of reasonable time has been rejected."

I have every sympathy with the charterers in the natural irritation they must have felt at the inconvenience and possible hardship caused to them by this vessel's halting voyage to Osaka and the prospect of the vessel being detained there some months for further substantial repairs. Nevertheless, as LORD RADCLIFFE pointed out in *Davis Contractors, Ltd. v. Fareham Urban District Council* (22):

"... it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for."

I appreciate also that there was a catastrophic fall in the freight market between February and June of 1957 and that it would only be natural in these circumstances for the charterers to wish to escape from the charterparty if they lawfully may. I do not think, however, that in considering the issue of frustration the fall in the market can be material. Neither on the other hand are the clauses dealing with off hire of particular materiality. It is true that they show that some substantial period for repairs and overhaul during the currency of the charter were contemplated and that these off-hire periods might, at the charterer's option, be added on to the charter time, but they do not mean that the parties intended the contract to bind no matter how long the off-hire periods might last. These clauses would not have prevented the charterparty from being frustrated if, for example, the vessel had been out of commission for the whole of 1957. I am not sure whether it is permissible to equate time lost for repair on account of the owner's breach of contract with time lost through some supervening cause such as requisition for which the owner is blameless. The authorities

(21) [1957] 2 All E.R. at p. 83; [1957] 2 Q.B. at p. 434.

(22) [1956] 2 All E.R. at p. 160; [1956] A.C. at p. 729.

are not very helpful on this point. It might be thought that an owner should be in a better position if the delay is in no way attributable to him than if it is wholly his fault. On the other hand, it is perhaps difficult to see why logically there should be any difference qua frustration between the two cases.

Apart from *Snia Societa di Navigazione Industria e Commercio v. Suzuki & Co.* (23) there does not appear to be any reported case where a charter has been held to be frustrated on account of unseaworthiness after the charterers have received some service under it. The facts in that case were exceptional. The charterers, after the failure of repeated efforts of the owners to make the vessel seaworthy, had good reason to believe that the shipowners would never be able to do so. If in this case the engine-room crew engaged at Osaka had proved to be incompetent and as a result the engine had again suffered serious breakdown, this case would have been much more analogous to the *Snia* case (23), for then there would have been reasonable grounds to suppose that the shipowners could never make the vessel seaworthy and that accordingly for the remaining period of the charterparty the charterers would receive no substantial benefit under it. As it is, the vessel was being repaired and undergoing sea trials for over three months at Osaka, but on Sept. 15 she was admittedly in every respect seaworthy and was then still available for about seventeen months under the charterparty. In my view the charterers had no reasonable grounds in June for thinking that the owners would be unable to make the vessel seaworthy at the latest by mid-September. That they had in fact elected not to exercise their option under cl. 32 to add on the off-hire periods is of no significance, since obviously they would, in no circumstances, have done so, having regard to the then state of the freight market. Like DIPLOCK, J., in *Port Line, Ltd. v. Ben Line Steamers, Ltd.* (24), I shrink from adding to what LORD RADCLIFFE described (25) as an anthology of phrases by attempting any restatement of the principle of frustration.

Whether one applies the test enunciated by EARL LOREBURN in *F.A. Tamplin S.S. Co., Ltd. v. Anglo-Mexican Petroleum Products Co., Ltd.* (26), or that by LORD DUNEDIN in *Metropolitan Water Board v. Dick, Kerr & Co., Ltd.* (27), or the test of the implied term, the basic idea is the same. In the end the problem is to look at the delay and the events that have occurred against the period and other terms of the charterparty and decide whether in truth the circumstances in which performance is called for would render it a thing radically different from that which was undertaken. I reach the conclusion that it does not and that the charterparty has not been frustrated.

It follows that the charterers had no legal right to repudiate the charterparty. They would, however, be entitled to such damage as they suffered by reason of delay caused by the owner's breaches of the charterparty, but the counterclaim under this head has been abandoned. There must accordingly be judgment for the owners for the agreed sum of £158,729 with interest as agreed at six per cent. from May 31, 1958, and the counterclaim must be dismissed.

Judgment accordingly for the shipowners.

Solicitors: *William A. Crump & Son* (for the owners); *Constant & Constant* (for the charterers).

[Reported by WENDY SHOCKETT, Barrister-at-Law.]

(23) (1924), 29 Com. Cas. 284. (24) [1958] 1 All E.R. 787; [1958] 2 Q.B. 146.

(25) In *Davis Contractors, Ltd. v. Fareham Urban District Council*, [1956] 2 All E.R. at p. 159; [1956] A.C. at p. 727.

(26) [1916] 2 A.C. 397; 13 Asp. M.L.C. 467.

(27) [1918] A.C. 119.

K. v. K.

[COURT OF APPEAL (Holroyd Pearce, Harman and Davies, L.JJ.), February 23, 24, 1961.]

Husband and Wife—Maintenance—Agreement—Variation by court—“Change in the circumstances in the light of which any financial arrangements . . . were made”—Realisation of expectation held at time of agreement—Whether change in circumstances—Maintenance Agreements Act, 1957 (5 & 6 Eliz. 2 c. 35), s. 1 (3) (a).

The parties were married in 1927 and in 1952 they entered into a written agreement whereby the husband agreed to pay a fixed annual sum to the wife for her maintenance. At the date of the agreement the husband was forty-nine and the wife fifty-six years of age. The wife had suffered for some years from osteo-arthritis, and its development was to be expected. She was not then in employment but it was contemplated that she might undertake voluntary work. The husband's income had always been liable to severe fluctuation and, although he had offered to pay to the wife a third of his gross income each year, pointing out to her that in the normal course his average earnings were likely to increase, she preferred to receive under the agreement a fixed annual sum which was agreed at £750 less tax. One-third of the husband's average annual income for the three years preceding the date of the agreement was £666. Since that date his income had substantially increased, but it would always be a fluctuating income. He had made gifts of money to the wife apart from the payments made under the agreement. Each of the parties had only a modest capital. In 1960 the wife applied under the Maintenance Agreements Act, 1957, s. 1 (3)*, for the alteration of the financial terms of the agreement by reason of “a change in the circumstances in the light of which any financial arrangements contained in the agreement were made”.

Held: the expression “circumstances in the light of which” financial arrangements were made, occurring in s. 1 (3) (a) of the Maintenance Agreements Act, 1957, meant the circumstances which influenced the parties and were in their contemplation when the agreement containing the arrangements was made, and the words included events anticipated by the parties; therefore, there was not a “change in the circumstances” when an expectation held at the time of the agreement was realised, although there might be one when an expectation so held was not realised, and, accordingly, the wife was not entitled to have the agreement altered under s. 1 (3) as the possibility of an increase in the husband's income had been in the contemplation of the parties at the time of the agreement when she had deliberately chosen a fixed income.

Decision of CAIRNS, J. ([1961] 1 All E.R. 130) reversed.

[As to the statutory power of the court to vary financial arrangements in a maintenance agreement, see 19 HALSBURY'S LAWS (3rd Edn.) 889, para. 1470.]

For the Maintenance Agreements Act, 1957, s. 1 (3), see 37 HALSBURY'S STATUTES (2nd Edn.) 495.]

Interlocutory Appeal.

This was an appeal by the husband from a judgment of CAIRNS, J., dated Dec. 2, 1960, and reported [1961] 1 All E.R. 130, on an application by the wife under s. 1 (3) of the Maintenance Agreements Act, 1957, for an order varying the terms of an agreement made between her and the husband on June 4, 1952. CAIRNS, J., held that, by reason of changes in the circumstances in the light of which the agreement was made, the agreement should be altered, and he referred back to the registrar the ascertainment of what alteration was just in all the circumstances.

* The relevant terms of s. 1 (3) are printed at p. 267, letter G, post.

A The facts are stated in the judgment of the Court of Appeal delivered by HOLROYD PEARCE, L.J.

John Latey, Q.C., and A. B. Hollis for the husband.

Victor Williams and Joseph Jackson for the wife.

HOLROYD PEARCE, L.J., delivered the following judgment of the court:

B This is a husband's appeal from an order of CAIRNS, J., holding that a wife's application to vary the provisions of a maintenance agreement satisfied the provisions of the Maintenance Agreements Act, 1957, and should go to the registrar to determine the amount of the variation.

The Maintenance Agreements Act, 1957, is one of many pieces of legislation resulting from the Report of the Royal Commission on Marriage and Divorce.

C The mischief at which it aimed was clear. The support of a wife by a husband is a matter with which the courts are concerned. There is machinery in the magistrates' courts and the Divorce Court for making orders for maintenance, and for varying such orders when circumstances alter. Where, however, the parties made their own maintenance arrangements by agreements in writing, the court had no means of varying them unless the maintenance was so bare as to constitute failure to maintain. Such agreements, although they were reasonable originally, might by changes of circumstance become inequitable.

D The preamble to the Act reads:

"An Act to make provision with respect to the validity and alteration by the court of financial arrangements in connexion with agreements between the parties to a marriage, whether made during the continuance or after the dissolution or annulment of the marriage, for the purposes of those parties' living separately; and for purposes connected therewith."

E Section 1 (1) applies to

"any agreement in writing made . . . between the parties to a marriage for the purposes of their living separately, being—(a) an agreement containing financial arrangements . . ."

F It is conceded that the agreement here in question comes within that description. The relevant words of s. 1 (3) are as follows:

G "Where an agreement to which this section applies is for the time being subsisting . . . and on an application by either party the High Court . . . is satisfied either—(a) that by reason of a change in the circumstances in the light of which any financial arrangements contained in the agreement were made . . . the agreement should be altered so as to make different . . . financial arrangements . . . the court may by order make such alterations in the agreement . . . as may appear to the court to be just having regard to all the circumstances . . ."

H The point was taken before the registrar that the change of circumstances alleged by the wife in this case did not come within s. 1 (3) (a) and could not constitute the foundation for an alteration order. The registrar referred the matter to the judge, who found not only that the court could make an order, but also that it should do so. He referred the case back to the registrar to settle the amount of the variation.

I The parties were married in June, 1927, the wife then being a widow. Through the equal fault of both, the parties ceased to live together. The following facts are set out in the learned judge's judgment (1):

"The husband is a stockbroker who in 1952 was aged forty-nine and the wife was then aged fifty-six and had for some years suffered from osteoarthritis. She was not then, I think, doing any paid work. The husband's income as a stockbroker has always been liable to severe fluctuation. For

this reason, when negotiating the terms of the agreement he offered to pay the wife a third of his gross income each year. She refused and said she would prefer a fixed income. The husband pointed out that in the normal course his average earnings would increase as time went on and that his offer would therefore prove more favourable in the long run but the wife (who was separately represented by a solicitor) insisted that she would prefer a fixed income of £750 less tax and this was agreed. The husband states, and the wife does not deny, that £750 was more than a third of his average annual income during the previous three years. He is here apparently referring to the last three years for which accounts were available (that is to say up to the year 1950-51) when, as appears from the figures which I am about to mention, one-third of his average income was £666."

The learned judge then set out the figures of the husband's income for eleven years from 1948 to 1959, and concluded (2):

"The average yearly income for the first three years of this period works out at £1,998 and the last three years at £5,363."

It is to be noted that this latter three-year average is produced by a figure of £9,655 in 1958-59 (which, as one knows, was an unusually busy year for the Stock Exchange), and of only £2,100 in the preceding year, and of £4,334 in the year before that.

The judge found no evidence of any change in the modest capital possessed by the parties. The husband has treated the wife with financial generosity over and above the payments made under the agreement. At the time of the agreement it was thought that the wife would probably do voluntary work, but it was not thought probable that she would earn. She has, however, been earning £6 15s. per week for most of the time. Her osteo-arthritis has developed. In her affidavit she says that she is only kept mobile by regular fortnightly treatment, and she fears that she may have to give up her work by reason of her increasing age and disability. Her counsel tells us that she has in fact now given it up. Had she continued working, her income would be £1,346 gross or £979 net, her expenses being £700. If she has stopped working, her net income will be only about £760. Since 1954 the husband has been living with a woman whom he wishes to marry. He has repeatedly asked his wife to divorce him, but she has refused. If she divorced him, the agreement would cease to be effective and she would receive a very much larger maintenance.

The argument for the wife was that the circumstances have changed because of the great increase in the husband's average income and the development of the wife's osteo-arthritis. It is conceded that the development of osteo-arthritis was to be expected, but her counsel argues that, when it is taken in conjunction with the increase of the husband's income to a greater extent than was expected, there is a sufficient change of circumstance to come within s. 1 (3) and justify an order. In our view, the question under the subsection cannot conveniently be divided up (as the husband has sought to do) by seeking first to see whether, as a matter of law, there is any change in the circumstances, and then discussing whether it would justify an alteration. The question for the court is one question, namely, whether, by reason of a change in the circumstances in the light of which the financial arrangements in the agreement were made, the agreement should be altered so as to make different financial arrangements. If so, the court is to make such financial arrangements as may be just "having regard to all the circumstances". The reference to "all the circumstances" comes at the stage when the court has decided that the agreement should be altered, and is considering what new financial provision should be inserted. It does not enlarge the field of inquiry in regard to the decision whether an alteration should be made. The question, therefore, is whether,

A "... by reason of a change in the circumstances in the light of which any financial arrangements ... were made ... the agreement should be altered ..."

The expression "circumstances in the light of which" means, in our judgment, circumstances which influenced the parties, and were within their contemplation. To that extent we are in accord with the learned judge. But that expression, B in our view, includes anticipated events. In bargaining about agreements for permanent maintenance in general (and in this case in particular), considerations in futuro have an important bearing on the agreement ultimately reached by the parties. A man's prospects are almost as important as his present performance.

C We cannot, with all respect, agree with the learned judge when he says that there is a change of circumstances for this purpose when an expectation is realised. If that were so, there would, in the case of a salaried husband with regular pre-arranged annual increases, be a change of circumstance in every year as each annual expectation was realised. We think that "a change in the circumstances in the light of which any financial arrangements ... were made" means something quite outside the realisation of expectations. The D parties make their bargain on certain basic facts and expectations. When those facts unexpectedly change or those expectations are not realised, there is then a change of circumstances which may produce unfairness. Had the legislature intended to give a power to the court to vary agreements as it may vary maintenance orders, it could have said so in terms similar to the sections which regulate variation of maintenance. It did not, we think, intend to remove E entirely the stability of agreements, but only to do so when injustice was caused by a change in certain circumstances.

When considering whether there has been a change in the circumstances in the light of which financial arrangements were made, we think that it is also relevant F to take into account the fact (if it be the case) that the parties, when bargaining, deliberately took a chance on an estimate of the future. If, for instance, a risk was contemplated and deliberately accepted in order to secure other benefits, we think that the court should be loth to regard the happening of that contemplated risk as a change of circumstance. So, too, where a party chooses a lower but consistent income in preference to a probably higher problematical income. The question is one of fact and degree, and it is not possible to lay down as a G matter of law what change should or should not satisfy the court that an agreement should be altered. Applying these principles to the present case, we do not feel satisfied on the facts, as they are at present, that the agreement should be altered. The wife knew that the husband's income fluctuated widely, and that it would probably increase. The amount of such increase was not specified, but in the context the increase in his income would, we think, have been within the H contemplation of the parties. She deliberately chose a fixed sum. Thus she got security by receiving a sum certain, however badly the husband might fare. That sum was larger than one-third of his income would then have been. She preferred those benefits to one-third of his income which would in the future provide a probably larger, but always a fluctuating income. One might describe I her as choosing gilt-edged stock instead of an equity. Now that the equity has more than doubled, she wishes to be entitled to share in the increase. But even now she is seeking to keep the gilt-edged nature of her maintenance, and not to take the risks of the equity, which may well be considerable, seeing that the capital position of the husband in his business is weak, and market conditions could be unfavourable. One may test the matter further by considering how the husband would have fared if he had applied for a reduction on the ground (without more) that his income had halved. We think that the court would have held him to the bargain which he had made. We are far from saying that in such circumstances a court could not be satisfied if the husband's increase

in income, or the wife's ill health, had been so great as to be outside the contemplation of the parties; but on the facts of this case, as they are at present, we are of opinion that no order should be made. The appeal, therefore, will be allowed.

Appeal allowed.

Solicitors: *Lewis W. Taylor & Co.* (for the husband); *W. Timothy Donovan* (for the wife).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

MARREN v. DAWSON BENTLEY & CO., LTD.

[LEEDS ASSIZES (Havers, J.), March 8, 9, 13, 1961.]

Limitation of Action—When time begins to run—Actions of tort—Personal injuries sustained on Nov. 8, 1954—Writ issued on Nov. 8, 1957—Whether day of event causing injuries excluded—Limitation Act, 1939 (2 & 3 Geo. 6 c. 21), s. 2 (1)—Law Reform (Limitation of Actions, etc.) Act, 1954 (2 & 3 Eliz. 2 c. 36), s. 2 (1).

Time—Computation—Period within which an act may be done.

At 1.30 p.m. on Nov. 8, 1954, an accident occurred whereby the plaintiff was injured in the course of his employment with the defendants. On Nov. 8, 1957, he issued a writ claiming damages for the injuries which he alleged were caused by the defendants' negligence. By their defence the defendants pleaded, inter alia, that the plaintiff's cause of action, if any, accrued on Nov. 8, 1954, and that proceedings had not been commenced within the period of three years thereof contrary to s. 2 (1) of the Limitation Act, 1939*. The injuries having been held to have been caused by the defendants' negligence, on the plea as to limitation,

Held: that the day of the accident was to be excluded from the computation of the period within which the action should be brought and that the defendants' plea therefore failed.

Radcliffe v. Bartholomew ([1892] 1 Q.B. 161) followed.

Gelmini v. Moriggia ([1913] 2 K.B. 549) not followed.

Per CURIAM: the principle established by *Radcliffe v. Bartholomew* ([1892] 1 Q.B. 161) [viz., that the day on which a cause of action arises or an offence is committed is to be excluded in computing a limitation period thereafter] is of general application to statutes whether they deal with civil or criminal matters (see p. 274, letter I, post).

[**Editorial Note.** The general principle referred to above is subject, of course, to the expressed terms of a particular enactment.

As to the computation of the period within which an act may be done, see 32 HALSBURY'S LAWS (2nd Edn.) 142, 143, paras. 207, 208; and for cases on the subject, see 42 DIGEST 946-951, 187-238.

As to when a limitation period begins to run, see 24 HALSBURY'S LAWS (3rd Edn.) 193-196, paras. 347, 348; and for cases on the subject, where the action is in tort, see 32 DIGEST 340-345, 236-272.]

Cases referred to:

Gelmini v. Moriggia, [1913] 2 K.B. 549; 82 L.J.K.B. 949; 109 L.T. 77; 32 Digest 330, 163.

Goldsmiths' Co. v. West Metropolitan Ry. Co., [1904] 1 K.B. 1; 72 L.J.K.B. 931; 89 L.T. 428; 68 J.P. 41; 42 Digest 686, 1005.

Hardy v. Ryle, (1829), 9 B. & C. 603; 7 L.J.O.S.M.C. 118; 109 E.R. 224; 42 Digest 948, 210.

Morris v. Richards, (1881), 45 L.T. 210; 46 J.P. 37; 32 Digest 330, 162.

* For the relevant terms of s. 2 (1), as amended, see p. 271, letters F and G, post.

- A *Pugh v. Leeds (Duke)*, (1777), 2 Cowp. 714; 98 E.R. 1323; 42 Digest 955, 276.
R. B. Policies at Lloyd's v. Butler, [1949] 2 All E.R. 226; [1950] 1 K.B. 76;
 2nd Digest Supp.
Radcliffe v. Bartholomew, [1892] 1 Q.B. 161; 61 L.J.M.C. 63; 65 L.T. 677;
 56 J.P. 262; 42 Digest 946, 188.
 Somers v. Erskine (No. 2), [1944] I.R. 368; 2nd Digest Supp.
 B *Williams v. Burgess*, (1840), 12 Ad. & El. 635; 9 Dowl. 544; 10 L.J.Q.B. 10;
 113 E.R. 955; 42 Digest 950, 234.
Young v. Higgon, (1840), 8 Dowl. 212; 6 M. & W. 49; 9 L.J.M.C. 29; 4 J.P. 88;
 151 E.R. 317; 42 Digest 947, 206.

Action.

C On Nov. 8, 1954, at 1.30 p.m., the plaintiff, Martin Marren, was injured in the course of his employment with the defendants. By writ of summons issued on Nov. 8, 1957, he claimed damages for his injuries which he alleged were caused by the negligence of the defendants, their servants or agents. By their defence the defendants denied negligence and said that the plaintiff's cause of action, if any, accrued on Nov. 8, 1954, and that proceedings were not commenced within the period of three years thereof contrary to the Limitation Act, 1939, as amended by the Law Reform (Limitation of Actions, etc.) Act, 1954, and that the said right of action was barred by effluxion of time. HAVERS, J., held that the injuries were caused by the negligence of the defendants and only that part of the judgment dealing with the plea under the Limitation Act, 1939, is reproduced in this report.

E *G. F. P. Mason* for the plaintiff.
H. C. Scott for the defendants.

Cur. adv. vult.

Mar. 13. HAVERS, J., after dealing with the issues of negligence and assessing damages, continued: I have now to deal with the point of law raised, viz., that the action is barred by the Limitation Act, 1939, s. 2 (1), which provides:

F "The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:—
 (a) actions founded on simple contract or on tort . . ."

This section has been amended by the Law Reform (Limitation of Actions, etc.) Act, 1954, s. 2 (1) of which provides:

G "At the end of s. 2 (1) of the Limitation Act, 1939 (which subsection provides, amongst other things, that there shall be a limitation period of six years for action founded on simple contract or on tort), the following proviso shall be inserted—'Provided that, in the case of actions for damages for negligence, nuisance or breach of duty . . . where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person, this subsection shall have effect as if for the reference to six years there were substituted a reference to three years'."

H This accident occurred at 1.30 p.m. on Nov. 8, 1954. The writ was issued on Nov. 8, 1957. Counsel for the defendants contends that, as the accident happened at 1.30 p.m. on Nov. 8, 1954, the plaintiff, if he liked, could have issued his writ that day and therefore the last day on which he would be entitled to bring his action would be Nov. 7, 1957, and that, as this writ was issued on Nov. 8, 1957, his action is barred by the statute. There is a rather remarkable lack of authority on this point. Indeed there has been no case which has directly decided the point under the Limitation Act, 1939, but there has been a number of authorities dealing with other Acts in which Parliament has made a statutory provision of a somewhat similar character. I refer to a passage in 32 HALSBURY'S LAWS OF ENGLAND (2nd Edn.), p. 142:

"207. The general rule in cases in which a period is fixed within which a person must act or take the consequences is that the day of the act or event from which the period runs should not be counted against him. This rule is especially reasonable in the case in which that person is not necessarily cognisant of the act or event; and further in support of it there is the consideration that, in case the period allowed was one day only, the consequence of including that day would be to reduce to a few hours or minutes the time within which the person affected should take action.

"208. In view of these considerations the general rule is that, as well in cases where the limitation of time is imposed by the act of a party as in those where it is imposed by statute, the day from which the time begins to run is excluded; thus, where a period is fixed within which a criminal prosecution or a civil action may be commenced, the day on which the offence is committed or the cause of action arises is excluded in the computation."

I was referred to a number of older authorities. The one to which I attach great importance is *Radcliffe v. Bartholomew* (1). This was a decision of the Divisional Court. It was concerned with the construction of s. 14 of the Act for the Prevention of Cruelty to Animals (12 & 13 Vict. c. 92) and under that section every complaint under the provisions of the Act was to be made "within one calendar month after the cause of such complaint shall arise". The headnote reads:

"On June 30 an information was laid against the appellant in respect of an act of cruelty alleged to have been committed by him on May 30. An objection to the jurisdiction of the justices having been taken, on the ground that the complaint had not been made within one calendar month after the cause of complaint had arisen:—*Held*, that the day on which the alleged offence was committed was to be excluded from the computation of the calendar month within which the complaint was to be made; that the complaint was therefore made in time, and the justices had jurisdiction to hear the case."

WILLS, J., said (2):

"I am of opinion that the decision of the justices was right. Unless there is something in the suggested distinction to the effect that the same words are to be construed differently in civil and criminal cases, I think that the case is really governed by authority, and that of a very cogent kind. In *Williams v. Burgess* (3) the language of the section was 'within twenty-one days after the execution', and it was held that the day of execution was there to be reckoned exclusively. In *Hardy v. Ryle* (4), which was an action against a justice for trespass and false imprisonment, the plaintiff had been discharged from custody on Dec. 14, and brought his action on June 14 following; s. 8 of 24 Geo. 2, c. 44, prescribed that 'no action shall be brought against any justice of the peace for anything done in the execution of his office unless commenced within six calendar months after the act committed'. Except as to the difference between one month and six months, those words are the same as those which we are now interpreting, and it is impossible to draw any distinction between the language of the two enactments. In that case the court held that an action brought on June 14 in respect of a cause of action which had arisen on Dec. 14 was in time, because the day on which the cause of action arose was excluded from the computation of the six months, while that on which the action was brought was included in it. It is true that the reasoning by which this decision was supported was criticised by PARKE, B., in *Young v. Higgon* (5) but that learned judge suggests no doubt as to the correctness of the conclusion. At the end of his judgment

(1) [1892] 1 Q.B. 161. (2) [1892] 1 Q.B. at p. 163. (3) (1840), 12 Ad. & El. 635.
(4) (1829), 9 B. & C. 603. (5) (1840), 6 M. & W. 49.

occur the cogent remarks: 'Apply the criterion which has been before suggested—reduce the time to one day, and then see what hardship and inconvenience must ensue if the principle I have stated is not to be adopted'; and these remarks are entirely applicable to the present case. The result of reducing the time to one day would be that an offence might be committed a few minutes before midnight, and there would only be those few minutes in which to lay the complaint, which would be to reduce the matter to an absurdity. Therefore, unless a distinction can be established between a statute dealing with criminal, and one dealing with civil, procedure, this case is concluded by authority. It is to be remarked that in *Hardy v. Ryle* (6) the enactment was not passed for the purpose of giving the plaintiff a right to sue, but in order to impose a limitation on his unrestricted right, and the authority of that and similar cases is therefore most direct and cogent.

"It has been suggested that there is a distinction between the construction to be placed on these words according as they occur in statutes dealing with civil or criminal matters, and that in the latter case the day on which the offence is committed ought to be included in the computation of the time allowed for laying the complaint; but no authority has been shown for the existence of such a rule, which would be most unsatisfactory in its operation if it really existed. Great mischief might, and almost certainly would, arise from altering the canon of construction of the same words, according to the subject-matter with which they dealt; and there being no authority in support of so broad a proposition, I am certainly not inclined to make one. The complaint was therefore in time, and the justices must proceed with the hearing of the summons."

LAWRANCE, J., stated that he was of the same opinion. This was a decision of the Divisional Court which followed *Williams v. Burgess* (7). It cited with approval *Hardy v. Ryle* (6) and it referred to the fact that, although the reasoning by which the decision was supported in *Hardy v. Ryle* (6) was criticised by PARKE, B., that learned judge suggested no doubt as to the correctness of the conclusion.

The learned authors of PRESTON AND NEWSOM'S LIMITATION OF ACTIONS (3rd Edn.), p. 12, referred to another case, an Irish case of *Somers v. Erskine* (No. 2) (8), in which it was held that, if the cause of action accrued on Jan. 30, 1934, a writ issued on Jan. 30, 1940, was in time. I have not had the advantage of seeing that report, but the learned authors say this:

"This decision was founded on the fact that there was no evidence at what time of day the cause of action was complete, so that 'the court is not satisfied that an action could have been instituted that day'."

If the decision is based on that, I should not be prepared myself to follow it. I think that the finding itself is consistent with the judgment to which I have just referred and is correct. The learned authors also refer to a more recent decision of CHANNELL, J., in *Gelmini v. Moriggia* (9). The headnote to that case states:

"By s. 3 of the Limitation Act, 1623, 'All actions . . . shall be commenced and sued within the time and limitation hereafter expressed, and not after (that is to say) . . . within six years next after the cause of such actions or suit'. The time for payment of a promissory note expired on Saturday, Sept. 22, 1906. The writ in an action upon the note against the makers was issued on Monday, Sept. 23, 1912:—*Held*, that inasmuch as the cause of action was complete at the commencement of Sept. 23, 1906, that day must be included in calculating the six years within which the action could be brought under the statute; that therefore the six years expired on Sunday, Sept. 22, 1912, and the writ was issued too late."

(6) (1829), 9 B. & C. 603.

(7) (1840), 12 Ad. & El. 635.

(8) [1944] I.R. 368.

(9) [1913] 2 K.B. 549.

CHANNELL, J., in his judgment in that case, says this (10): "Upon the point with regard to the Limitation Act, 1623, I have a very clear opinion". I need hardly say that that learned judge's very clear opinion does make me somewhat diffident in disagreeing with that opinion. A

"It is remarkable that there is no express decision upon the point after so many years, and the fact that it is now raised by Mr. Moresby [counsel for the plaintiff] for the first time is a proof of his ingenuity. In the text-books it is assumed that the action must be commenced within six years from the day on which the cause of action is complete, including that day. In *Morris v. Richards* (11), Mr. Commissioner (afterwards Mr. Justice) WILLS had two points to decide: first, whether the rule as to days of grace, which was then mercantile usage, but which has since become statutory, had the force of law. He decided that it had. But he held that that rule, being established as a matter of custom, must be construed with the custom that when the last day of grace expired on a Sunday the bill or note was payable on Saturday. That decision is not of great importance because in the following year the law became statutory, nor has the case much bearing on the present case, except that everybody then assumed that if a writ had been issued under the same circumstances as in the present case, namely, on the Monday, it would have been too late. The last day upon which the writ in that case could have been issued, on that assumption, happened to be a Sunday." B

He then deals with the Rules of the Supreme Court, and I do not think that affects it one way or the other. In the next paragraph he says (12): C

"The other point is, what is the true rule as to the computation of the six years under that statute? An action cannot be brought until the cause of action is complete, and in all cases of contract the person who has to pay has the whole of the day upon which payment is due in which to pay; therefore until the expiration of that day an action cannot be brought because until then there is no complete cause of action. The result is that an action cannot be brought until the next day; but it can be brought on that day because the cause of action is complete at the commencement of that day. If the cause of action is not complete, the action cannot be brought. It therefore follows that that day is one of the days upon which the action can be brought. The words of the statute are 'within six years next after the cause of such action or suit'. Now the day after that on which the debtor's time for paying expires is, in my opinion, the date on which the cause of action arises, and on that day an action can be brought, and that day is the first of all the days in the six years. Therefore, assuming that the day upon which the action can be brought to be a Thursday, and the period for bringing the action to be a week, the creditor can bring it at any time up to and including the following Wednesday, but not the Thursday. And the same rule applies where the period, as under the statute, is six years. I do not think that the day on which the cause of action arises is excluded. It is the previous day which is excluded, i.e., the day at the expiration of which the cause of action becomes complete. Any other construction would place upon the statute an interpretation which has not hitherto been accorded to it. Therefore, so far as the cause of action arises on the promissory note, the writ was issued too late." D

It is significant that none of the cases to which I have referred were cited to the learned judge in that case. Neither *Radcliffe v. Bartholomew* (13) nor *Hardy v. Ryle* (14) were cited to him. I think that the principle which was established by the Divisional Court in *Radcliffe v. Bartholomew* (13) is of general application to statutes whether they deal with civil or criminal matters and that the rule E

(10) [1913] 2 K.B. at p. 551.

(11) (1881), 45 L.T. 210.

(12) [1913] 2 K.B. at p. 552. (13) [1892] 1 Q.B. 161. (14) (1829), 9 B. & C. 603. F

which the Divisional Court in that case laid down is of general application. I think therefore that I am bound by that decision; but if I am not bound by it and it is on me to choose between *Radcliffe v. Bartholomew* (15) and the decision of CHANNELL, J., in *Gelmini v. Moriggia* (16), then I prefer the decision in *Radcliffe v. Bartholomew* (15) and the reasons on which it is based.

Therefore in my view the plea that the action is barred by the Limitation Act, 1939, is bad and there must be judgment for the plaintiff.

Judgment for the plaintiff.

Solicitors: *Turner & Wall*, Keighley (for the plaintiff); *A. V. Hammond & Co.*, Bradford (for the defendants).

[*Reported by G. M. SMAILES, Esq., Barrister-at-Law.*]

DUNN AND ANOTHER v. INLAND REVENUE COMMISSIONERS.

[CHANCERY DIVISION (Wilberforce, J.), March 16, 1961.]

Estate Duty—Aggregation—Advances—Subsequent determination of life interest within five years—Property to be included in property passing—Sums advanced out of capital of settled estate—Finance Act, 1940 (3 & 4 Geo. 6 c. 29), s. 43 (1) (a), as amended by Finance Act, 1950 (14 Geo. 6 c. 15), s. 43 (1) and Sch. 7, Part 1—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 16 (3), as substituted by Finance Act, 1954 (2 & 3 Eliz. 2 c. 44), s. 33 (1).

By his will dated Nov. 9, 1938, a testator who died on Feb. 28, 1940, directed his trustees to pay the income of a fund to T. during his life and on his death to hold the fund on trust for the issue of T. Between June and December, 1956, the trustees advanced out of the capital of the fund two sums amounting to £2,626 0s. 2d. to remaindermen under the Trustee Act, 1925, s. 32. On Dec. 7, 1956, T. died, and estate duty became exigible on the £2,626 0s. 2d. under the Finance Act, 1940, s. 43 (1) (a) (as amended)*. The question arose whether, by virtue of the Finance Act, 1894, s. 16 (3) (as substituted by the Finance Act, 1954, s. 33 (1)†), the £2,626 0s. 2d. should be treated as remaining property settled by the testator's will, so as to be aggregable with other property so settled passing on the death of T., or whether it formed a part of free property passing on T.'s death (thus escaping aggregation with the settled property).

Held: the £2,626 0s. 2d. was not settled property for the purposes of s. 16 (3) of the Act of 1894 (as substituted), and thus was not aggregable with the property settled by the testator's will, for the following reasons—

(i) at the relevant time, viz., the date of T.'s death, the £2,626 0s. 2d. was in fact no longer part of the property settled by the testator's will.

(ii) although by s. 43 (1) (a) of the Finance Act, 1940, the £2,626 0s. 2d. was deemed to be "included in the property passing on the death" of T., yet the enactment did not require the court to treat the property as notionally remaining, for the purposes of estate duty, part of the property settled by the testator's will, and in the absence of words deeming it to be property so settled the court would not be justified in attributing that character to it.

Re Iveagh Trusts ([1954] 1 All E.R. 609) distinguished.

Re Demarest's Settlement Trusts ([1940] Ch. 661) considered.

[As to aggregation and rates of estate duty where the property passing on

(15) [1892] 1 Q.B. 161.

(16) [1913] 2 K.B. 549.

* The relevant provisions of this section, as amended, are printed at p. 277, letter B, post.

† The relevant provisions of this section are printed at p. 277, letter D, post.

the death includes settled property, see 15 HALSBURY'S LAWS (3rd Edn.) 64, para. 127; and for cases on the subject, see 21 DIGEST 22, 23, 127-131 and DIGEST SUPPLEMENTS.

For s. 43 (1) of the Finance Act, 1940, as amended by the Finance Act, 1950, s. 43 (1), Sch. 7, Part 1, see 29 HALSBURY'S STATUTES (2nd Edn.) 183, and for s. 16 (3) of the Finance Act, 1894, as amended by s. 33 (1) of the Finance Act, 1954, see 34 HALSBURY'S STATUTES (2nd Edn.) 149.]

Cases referred to:

Demarest's Settlement Trusts, Re, Chase National Executors & Trustees Corpn., Ltd. v. A.-G., [1940] Ch. 661; 109 L.J.Ch. 136; 163 L.T. 122; 2nd Digest Supp.

Iveagh Trusts, Re, Iveagh (Earl) v. Inland Revenue Comrs., [1954] 1 All E.R. 609; [1954] Ch. 364; [1954] 2 W.L.R. 494; 3rd Digest Supp.

Sneddon v. Lord Advocate, [1954] 1 All E.R. 255; [1954] A.C. 257; [1954] 2 W.L.R. 211; 3rd Digest Supp.

Adjourned Summons.

The plaintiffs as trustees of the will dated Nov. 9, 1938, of the testator, Henry Dennis Readett-Bayley, deceased, issued this summons under s. 3 of the Administration of Justice (Miscellaneous Provisions) Act, 1933, to determine the question whether on the true construction of s. 16 (3) of the Finance Act, 1894, as substituted by s. 33 (1) of the Finance Act, 1954, and in the events which happened, sums totalling £2,626 0s. 2d. advanced by the trustees of the will between June and December, 1956, to Robin Readett-Bayley and Jane Readett-Bayley, the son and daughter, respectively, of Thomas Dennis Readett Readett-Bayley, deceased, tenant for life under the settlement made by the will, who died on Dec. 7, 1956 (hereinafter called "the deceased"), should be aggregated with the free estate of the deceased or with the funds settled by the will of the testator, Henry Dennis Readett-Bayley, and passing on the death of the deceased for the purpose of determining the duty for which the plaintiffs were accountable on the death of the deceased.

Hubert H. Monroe, Q.C., and *R. Buchanan-Dunlop* for the plaintiffs, the trustees.
E. Blanshard Stamp for the defendants, the Inland Revenue Commissioners.

WILBERFORCE, J.: In 1956 Mr. Thomas Dennis Readett Readett-Bayley was tenant for life under a settlement made by the will of Henry Dennis Readett-Bayley, who had died in 1940, and there was a gift after the death of the tenant for life in favour of his issue. Between June and December, 1956, the trustees of the will in question, acting under the statutory power conferred by the Trustee Act, 1925, s. 32, advanced out of the capital subject to the trusts of the will two sums, one of £2,500 to the son, and one of £126 0s. 2d. to the daughter of the tenant for life. The tenant for life having died within five years of those advances having been made, a charge for estate duty arose under the Finance Act, 1940, s. 43, as amended, and the question which I have to decide is the rather curious one—whether the sums in question are for purposes of aggregation to be treated as forming part of the property settled by the will, or whether they are to be treated together with other property than property so settled. On account of the very great disparity in quantity between the settled property and the other property, a considerable difference arises as to the rate and amount of duty which becomes payable; and it is enough to say that if the sums in question are to be treated as settled property an additional liability of approximately £2,000 arises.

The relevant sections which I have to consider are basically two. There is first of all s. 43 of the Finance Act, 1940, which is the section which imposes estate duty on property which has been the subject of dispositions such as that which we have in this case; and the other relevant section is s. 33 of the Finance Act, 1954, which, replacing s. 16 of the Finance Act, 1894, provides for an

A exemption from aggregation with settled property of property other than settled property below a certain amount. It seems to me that the question which I have to decide is fundamentally one of construction of those two sections.

The Finance Act, 1940, s. 43 (1), as amended by the Finance Act, 1950, s. 43 (1), Sch. 7, Part 1, provides so far as material:

B “Subject to the provisions of this section, where an interest limited to cease on a death has been disposed of or has determined, whether by surrender, assurance, divesting, forfeiture or in any other manner (except by the expiration of a fixed period at the expiration of which the interest was limited to cease), whether wholly or partly, and whether for value or not, after becoming an interest in possession . . . then—(a) if, had there been
C no disposition or determination as aforesaid of that interest and no disposition of any interest expectant upon or subject to that interest, the property in which the interest subsisted would have passed on the death under s. 1 of the Finance Act, 1894, that property shall be deemed by virtue of this section to be included as to the whole thereof in the property passing on the death.”

D The Finance Act, 1954, s. 33 (1), provides:

“For s. 16 (3) of the Finance Act, 1894, there shall be substituted the following subsection:—‘(3) Where the property passing on the deceased’s death includes any such settled property as is hereinafter mentioned, then—(a) if the other property passing on the death, exclusive of that
E settled property and exclusive also of any property in respect of which estate duty neither is payable on the death nor would be if the duty were payable on estates of however small a principal value, is of a net value not exceeding £10,000, it shall not be aggregated with that settled property, but shall be an estate by itself’ . . .”

F The sums with which I am directly concerned are the two sums totalling £2,626 0s. 2d., which in fact at the death of the tenant for life (that is the relevant date) were in the hands of the children of the tenant for life or of persons to whom they had been paid by or on behalf of those children, and it seems to me, in thinking first of the natural meaning of words, that it would not be appropriate to describe those sums as settled property. On the contrary, they were property which had been taken out of settlement, and they were in the absolute disposition
G of the person or persons in whose hands they were. If the Crown is to succeed in establishing that they are to be treated as settled property, it must do so either on the construction of s. 43 or of s. 33.

I take first s. 43 of the Act of 1940, and I see that sub-s. (1) (a) is divided into two parts. The first part lays down the conditions under which a charge can be made under that section, which briefly is that the property would have passed
H on the death, under s. 1, if there had been no disposition of the kind mentioned by the section. So that introduces a hypothesis which has to be super-imposed on the existing state of affairs, and it requires me to assume for this purpose that the advance had not been made. Making that assumption, I of course come to the conclusion that the property would have passed on the death under s. 1, and it seems to me that I am enabled thereby to identify the property which would have passed as the property which was the subject of the immediate disposition, viz., the two sums of money. That is the first step. Then, having established
I the condition of liability, I have to find out what is the nature of the liability which is imposed, and the section says that the property shall be deemed by virtue of the section “to be included as to the whole thereof in the property passing on the death”. Now it seems to me that although this is a deeming section, the effect of it is reasonably clear. It is simply to bring the property in question within the various categories of property which are included in the property which is to be charged under s. 1 of the Finance Act, 1894, in much the

same way as s. 2 of the Finance Act, 1894, brings in other categories of property, and it does not seem to me that it requires me to find that the property was to be treated precisely as if the disposition had not been made. I am not required under that section, it seems to me, to go further than to say that the property passes on the death; I am not obliged to assume that the property remains settled property. On the contrary I think that I have to deal with it on the basis that it is property taken out of settlement, not settled property, but that it is to be included in the property charged. Section 43 (1) (a) does not require me to treat these sums as notionally settled property for the purposes of estate duty.

I pass, then, to s. 33 of the Act of 1954, in order to ascertain whether under that section I should treat these sums of money as settled property. I find that sub-s. (3) refers to "any such settled property as is hereinafter mentioned", and looking to see what is thereafter mentioned I find the words "The settled property above referred to is any settled property", with certain exceptions, so that I do not derive much elucidation from the section itself. Then, it being provided by s. 35 (5) of the Act of 1954 that Part 4 of the Act is to be construed together with Part 1 of the Finance Act, 1894, I look back at the principal Act, s. 22, in order to see whether I can derive any assistance as to what is meant by settled property, and in s. 22 (1) (h) I find that the words "settled property" are defined as meaning "property comprised in a settlement". That seems to fit in with the wording of s. 33 of the Act of 1954, because immediately after the so-called definition in that section to which I have referred I find that one of the exceptions is of property comprised in a settlement made by the deceased. It seems to me that in reading that section in its natural meaning, in particular paying attention to the words "property comprised in the settlement", I am really called on to inquire what is the status of the property in question at the date when it is necessary to ascertain whether estate duty is payable or not, that is, at the relevant date. If it is at that date comprised in a settlement or is settled property, then it seems to be appropriate to deal with it as settled property, but, if it is not settled property, then I do not think that I am justified by this language in attributing to it the character of settled property simply because it has been at some time subject to a settlement.

Reliance was placed by the Crown, in supporting a rather extended interpretation of the expression "settled property", on the subsection which was replaced by s. 33, viz., s. 16 (3) of the Finance Act, 1894. That subsection, which provided a similar type of relieving provision, uses the expression "exclusive of property settled otherwise than by the will of the deceased". I compare that with the language in s. 33. I see that the exception has been to some extent altered by the later section, but I do not find any reason for attributing to the words in the earlier section "settled otherwise than by the will of the deceased" the meaning which the Crown wishes me to place on the later section. It seems to me that exactly the same problem would be raised under the earlier section of deciding what is the relevant date on which I have to ascertain the character of the property. Therefore, it seems to me that I get no guidance as to the problem which I have to solve from the superseded provision.

Certain authorities have been referred to, and I must mention two. The first, which is of importance and possibly of relevance, is the decision of UPJOHN, J., *Re Iveagh Trusts, Earl Iveagh v. Inland Revenue Comrs.* (1). That case was concerned, so far as respects the second point, with a question of identification of the property which was claimed to be subject to estate duty, and therefore the problem with which the court was faced was a somewhat different problem from that which I have to consider, but UPJOHN, J., did examine and analyse s. 43 of the Finance Act, 1940, and there are some expressions of his which have been invoked by either side in this case. He said, dealing with s. 43, that the section was a "deeming" section, and continued as follows (2):

(1) [1954] 1 All E.R. 609; [1954] Ch. 364.

(2) [1954] 1 All E.R. at p. 617; [1954] Ch. at p. 380.

A "It poses a hypothetical state of affairs because 'the property' mentioned in the section is property in which the interest would have passed on the death. Therefore, the sections appears to contemplate the continuance of a hypothetical state of affairs, i.e., a continuance of the trusts of the settlement until the death."

B And again, after quoting from *Sneddon v. Lord Advocate* (3), a case in the House of Lords, he says (4):

C "... in considering s. 43 of the Act of 1940, one must deal with it on the hypothesis that the property in that section which would have passed is the property that was the actual property that was transferred to the remainderman, and one must assume that it would have remained in the settlement down to the date of death."

D Those passages were invoked by the Crown as supporting an argument that one must treat the settlement as notionally continuing until the death, and therefore as to some extent affording support for the argument that property of this kind taken out of settlement is to be treated as notionally settled property. I do not think that the learned judge was dealing with or had in mind the particular problem which I have to consider. He was concerned with identifying the property which is to be the subject of the charge, and that, as I have already pointed out, seems to me to depend on the first part of the section in question, s. 43 (1) (a); whereas the problem I have to deal with seems to me to depend on the second part which says that the property is deemed to be included in the property passing on the death. It does not seem to me that the passages cited are concerned

E with the latter problem.

The trustees rely on the decision for a passage where the learned judge says (4):

F "Again, speaking for myself, I see nothing inconsistent between that interpretation of the word 'property' where the trust continues and the interpretation I have already given to that word where on the release the trust does not continue, for the simple reason that the conception of the trust property must necessarily come to an end when the property ceases to be trust property, and becomes the absolute property of the remainderman."

G So it is said here that, when the advances were made, the sums of money in question ceased to be settled property and became the absolute property of the remainderman, and that was their status at the relevant death, viz., the death of the tenant for life. While I would agree that that does seem to support to some extent the argument for the trustees, I feel that the problem which UPJOHN, J., had to consider in the *Iveagh* case (5) was different from that which I have to consider, and I would prefer to base my opinion on the wording of the section as related to the facts arising in this particular case.

H The other authority cited was *Re Demarest's Settlement Trusts, Chase National Executors & Trustees Corp'n., Ltd. v. A.-G.* (6), a case concerned with estate duty on exempt securities. I think that it is common ground that the actual decision in that case, depending as it did on the construction of s. 47 of the Finance (No. 2) Act, 1915, is not of assistance here, but it was cited on behalf of the trustees for the argument in the case, which was concerned with the effect of the provisions of the estate duty legislation dealing with gifts and in which two rival

I views were canvassed in relation to gifts inter vivos, either that the subject-matter of gifts inter vivos is to be treated as if they had not been made and remained in the hands of the donor, or, on the other hand, that the subject-matter of the gift is taxed on the precise footing that it is not property of the donor and requires to be taxed under a special provision. I appreciate the analogy of the argument, but I do not think that there is any basis in judicial

(3) [1954] 1 All E.R. 255; [1954] A.C. 257.

(4) [1954] 1 All E.R. at p. 618; [1954] Ch. at p. 382.

(5) [1954] 1 All E.R. 609; [1954] Ch. 364.

(6) [1940] Ch. 661.

decision for saying that one is more correct than the other, and I do not think that the decision assists me in the solution of the interpretation of s. 33. A

Certain anomalies have been urged as likely to arise from the construction which the trustees put on this provision. In particular it has been suggested that it is anomalous that the question of aggregation, and consequently of the rate of duty, should depend on action which may be taken by trustees of a settlement over whom the tenant for life has no control. It is, moreover, pointed out that the question into which compartment particular property may fall, whether settled property or non-settled property, may in certain cases depend on what the recipients of the property in question may decide to do with it. I appreciate these anomalies and feel great difficulty about them, but it seems to me that it is likely, or at any rate possible, that the section in question had not in mind the particular case where property is taken out of settlement by means of advancement and that it is justifiable to assume that not all the consequences which might flow from such an action have been taken into account. At any rate, I do not feel that the existence of these anomalies provides me with sufficient basis for doing what in effect the Crown asks me to do, and that is to treat these two sums of money, which de facto were not settled property at the death, as being for the purposes of this legislation settled property. If they were to be treated as settled property, it seems to me that I ought to find some section somewhere in the legislation which says they are to be treated as settled property, and I do not find that either in the Finance Act, 1940, or in the Finance Act, 1954. Therefore, I must give effect to the section as it stands, leaving the anomalies, if any, which may arise to be faced as and when they arise and to be cured, if necessary, by the legislature. B C D E

I therefore propose to declare that the property in question is not settled property and does not fall to be aggregated with property settled by the will of the testator; and that the sums mentioned in para. 1 of the summons form part of the other property (7) for the purposes of s. 16 (3) of the Finance Act, 1894, as substituted by s. 33 of the Finance Act, 1954.

Declaration accordingly.

Solicitors: *Johnson, Weatherall & Sturt*, agents for *Acton, Simpson & Hanson*, Nottingham (for the plaintiffs, the trustees); *Solicitor of Inland Revenue*.

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

(7) Viz., the free estate of the deceased.

YEOMAN CREDIT, LTD. v. APPS.

[COURT OF APPEAL (Holroyd Pearce, Harman and Davies, L.JJ.), March 14, 15, 16, 1961.]

Contract—Exception clause—Hire-purchase of car—“No warranty as to fitness for any purpose . . .”—Latent defects—Fundamental breach of implied condition of fitness—Whether lender protected by clause.

Hire-Purchase—Warranty—Fitness—Exception clause excluding warranty of fitness—Hire-purchase of car—Car when delivered not safe or roadworthy—Latent defects—Fundamental breach of contract—Whether exception clause effective.

On the hiring of a specific chattel there is an implied condition that it is reasonably fit for the purpose for which it is hired, except where it has at the time of the hiring a defect apparent to the hirer and the hirer did not rely on the skill and judgment of the owner; and this principle applies to a hiring on hire-purchase (see p. 287, letter E, p. 291, letters F and G, and p. 292, letter F, post).

Dictum of Parker, L.J., in *Karsales (Harrow), Ltd. v. Wallis* ([1956] 2 All E.R. at p. 870) approved.

Jones v. Page ((1867), 15 L.T. 619) and *Reed v. Dean* ([1949] 1 K.B. 188) applied.

Dicta in *Robertson v. Amazon Tug & Lighterage Co.* ((1881), 7 Q.B.D. 598) considered.

By a hire-purchase agreement, negotiated by G., a dealer, and dated Apr. 21, 1959, the defendant agreed to acquire on hire-purchase from the plaintiffs, a finance company, a second-hand 1954 Ford car. The defendant paid the initial payment of £125, and the agreement provided for thirty subsequent monthly payments of £14 19s. 1d. and an option to purchase for £1. The defendant was aware, before the agreement was signed, of certain minor apparent defects (e.g., cracked windows) and G. had promised to have the car overhauled and the windows replaced before delivery. The agreement provided for the hirer's keeping the car licensed and insured. Clause 8 of the agreement provided: “No warranty whatsoever is given by the owner as to the age state or quality of the goods or as to fitness for any purpose and any implied warranties and conditions are also hereby expressly excluded . . .” On May 5, 1959, the car was delivered by G. at night outside the defendant's house. The car as delivered had such an accumulation of defects, not being apparent defects, as to be unusable; it was neither safe nor roadworthy. Some £100 would have been required to put it into proper repair. The defendant made some complaints to the plaintiffs about the condition of the car but he kept it and paid three instalments due under the agreement in May, June and July, 1959, hoping that he could get G. to pay half the cost of repair. The defendant did not pay the August instalment and thereafter he rejected the car. As the August and September instalments were not paid, the plaintiffs determined the agreement under a provision therein, and had the car towed away from the defendant's house. In an action by the plaintiffs for arrears of instalments due under the agreement and damages, the defendant counterclaimed for the sum of £170 as money paid by him to the plaintiffs for a consideration which had wholly failed.

Held: (i) the plaintiffs were not entitled to rely on the exception clause (cl. 8) of the hire-purchase agreement, because, on the facts, there was such “a congeries of defects” in the car “as destroyed the workable character of the machine” and constituted a breach of a fundamental condition of the agreement, namely, to provide a car which could be used on the roads (see p. 290, letter B, p. 292, letter B, and p. 293, letter E, post).

Dictum of LORD DUNEDIN in *Pollock & Co. v. Macrae* (1922 S.C. (H.L.) at p. 200), and *Karsales (Harrow), Ltd. v. Wallis* ([1956] 2 All E.R. 866) applied.

(ii) since the defendant had not rejected the car immediately and treated the contract as rescinded, as he was entitled to do, but had kept it for some months and appropriated the contract by paying instalments, there had not been a total failure of consideration moving from the plaintiffs; and, accordingly, the plaintiffs were entitled to recover the instalment of £14 19s. 1d., because it fell due on Aug. 21, 1959, before the defendant rejected the car (see p. 291, letter A, p. 292, letters C and D, post).

(iii) after the August instalment fell due the plaintiffs were still in breach of the agreement, by reason of the defects in the car, and the defendant was entitled to refuse to continue the hiring and to damages, viz., £100, for breach of agreement (see p. 290, letter H, p. 292, letter D, and p. 293, letter F, post).

Appeal allowed in part.

[As to an implied condition or warranty, in a hire-purchase agreement outside the statutory control, of the fitness of the goods for the purpose for which they are hired, see 19 HALSBURY'S LAWS (3rd Edn.) 532, para. 858.]

As to an exception clause not giving protection against a fundamental breach of contract, see 11 HALSBURY'S LAWS (3rd Edn.) 393, para. 641, note (f).]

Cases referred to:

Alexander v. Railway Executive, [1951] 2 All E.R. 442; [1951] 2 K.B. 882; 3 Digest (Repl.) 93, 225.

Andrews Bros. (Bournemouth), Ltd. v. Singer & Co., Ltd., [1933] All E.R. Rep. 479; [1934] 1 K.B. 17; 103 L.J.K.B. 90; 150 L.T. 172; Digest Supp.

Cap Palos, The, [1921] All E.R. Rep. 249; [1921] P. 458; 91 L.J.P. 11; 126 L.T. 82; 15 Asp. M.L.C. 403; 41 Digest 683, 5126.

Davis v. Garrett, (1830), 6 Bing. 716; L. & Welsb. 276; 4 Moo. & P. 540; 8 L.J.O.S.C.P. 253; 130 E.R. 1456; 41 Digest 488, 3188.

Flight v. Booth, (1834), 1 Bing. N.C. 370; 1 Scott, 190; 4 L.J.C.P. 66; 131 E.R. 1160; 40 Digest (Repl.) 113, 870.

Gibaud v. Great Eastern Ry. Co., [1921] All E.R. Rep. 35; [1921] 2 K.B. 426; 90 L.J.K.B. 535; 125 L.T. 76; 3 Digest (Repl.) 91, 217.

Hyman v. Nye, (1881), 6 Q.B.D. 685; 44 L.T. 919; 45 J.P. 554; 3 Digest (Repl.) 96, 239.

Jones v. Page, (1867), 15 L.T. 619; 3 Digest (Repl.) 95, 234.

Karsales (Harrow), Ltd. v. Wallis, [1956] 2 All E.R. 866; [1956] 1 W.L.R. 936; 26 Digest (Repl.) 666, 35.

Lilley v. Doubleday, (1881), 7 Q.B.D. 510; 51 L.J.Q.B. 310; 44 L.T. 814; 46 J.P. 708; 3 Digest (Repl.) 82, 183.

Mallet v. Great Eastern Ry. Co., [1899] 1 Q.B. 309; 68 L.J.Q.B. 256; 80 L.T. 53; 8 Digest (Repl.) 47, 283.

Morrison (James) & Co., Ltd. v. Shaw, Savill & Albion Co., Ltd., [1916] 2 K.B. 783; 86 L.J.K.B. 97; 115 L.T. 508; 13 Asp. M.L.C. 504; 41 Digest 486, 3176.

Pinnock Brothers v. Lewis & Peat, Ltd., [1923] 1 K.B. 690; 92 L.J.K.B. 695; 129 L.T. 320; 2 Digest (Repl.) 450, 187.

Pollock & Co. v. Macrae, 1922 S.C. (H.L.) 192; [1922] S.L.T. 510; 60 Sc. L.R. 11; 39 Digest 468, q, 661, q.

Reed v. Dean, [1949] 1 K.B. 188; [1949] L.J.R. 852; 12 Digest (Repl.) 704, 5381.

Robertson v. Amazon Tug & Lighterage Co., (1881), 7 Q.B.D. 598; 51 L.J.Q.B. 68; 46 L.T. 146; 4 Asp. M.L.C. 496; 3 Digest (Repl.) 96, 242.

Rowland v. Divall, [1923] All E.R. Rep. 270; [1923] 2 K.B. 500; 92 L.J.K.B. 1041; 129 L.T. 757; 39 Digest 431, 608.

Smeaton Hanscomb & Co., Ltd. v. Sassoon I. Setty, Son & Co., [1953] 2 All E.R. 1471; [1953] 1 W.L.R. 1468; 3rd Digest Supp.

Smith v. Marrable, (1843), 11 M. & W. 5; Car. & M. 479; 12 L.J.Ex. 223; 152 E.R. 693; 31 Digest (Repl.) 195, 3266.

Spurling (J.), Ltd. v. Bradshaw, [1956] 2 All E.R. 121; [1956] 1 W.L.R. 461; 3 Digest (Repl.) 84, 196.

Sutton v. Temple, (1843), 12 M. & W. 52; 13 L.J.Ex. 17; 2 L.T.O.S. 102, 150; 152 E.R. 1108; 3 Digest (Repl.) 95, 231.

Sze Hai Tong Bank, Ltd. v. Rambler Cycle Co., Ltd., [1959] 3 All E.R. 182; [1959] A.C. 576; [1959] 2 Lloyd's Rep. 114; [1959] 3 W.L.R. 214; 3rd Digest Supp.

Appeal.

The plaintiffs, a hire-purchase finance company, appealed from part of the judgment of His Honour JUDGE BAXTER, given at Bow County Court on July 26, 1960, whereby (a) he dismissed the plaintiffs' claim against the defendant, who had entered into a hire-purchase agreement with them in regard to a second-hand motor car, and (b) he awarded £170 against the plaintiffs on a counterclaim by the defendant. By their amended particulars of claim, the plaintiffs had claimed against the defendant (i) £29 18s. 2d. for arrears of hire; (ii) £87 10s. 10d. liquidated damages for depreciation; (iii) £76 6s. 6d. damages for disrepair and loss of profit; and (iv), alternatively to (ii) and (iii), £163 17s. 4d. damages for breach of contract. The defendant, by his counterclaim, had claimed £170 as a sum paid by him to the plaintiffs for a consideration which had wholly failed. By their appeal the plaintiffs sought to set aside that part of the judgment whereby it was adjudged that their claims to arrears of hire and damages for depreciation were dismissed and that the defendant was entitled to the sum of £170 on the counterclaim.

The facts appear in the judgment of HOLROYD PEARCE, L.J.

Neil Lawson, Q.C., and *J. Lloyd-Eley* for the plaintiffs, the hire-purchase finance company.

Stephen Chapman, Q.C., and *G. E. Moriarty* for the defendant, the hirer.

HOLROYD PEARCE, L.J.: This is the plaintiffs' appeal from a judgment of His Honour JUDGE BAXTER at Bow County Court. He dismissed the plaintiffs' claim for arrears of instalments due under a hire-purchase agreement and for damages. He gave judgment for the defendant on the counterclaim for £170, being the first payment and three monthly instalments of hire paid by him under the agreement. The learned judge held that there had been a total failure of consideration for those payments.

The plaintiffs are a finance company. A hire-purchase agreement dated Apr. 21, 1959, was made between the plaintiffs and the defendant in respect of a 1954 Ford car. The car was sold by Goodbody Motors to the plaintiffs, and the plaintiffs hired it to the defendant. In April, 1959, the defendant, who wished to buy a second-hand motor car on hire-purchase, was introduced to Mr. Goodbody. Late at night when it was dark, Mr. Goodbody brought to his house a Ford motor car, and asked him to have a run in it. It being dark, the defendant was not able to examine the car. They went for a short ride. Mr. Goodbody drove the car at what the defendant described as a steady pace. The defendant noticed that the windows were cracked. He pointed this out. Mr. Goodbody said that he would have the car overhauled and the windows replaced and new tyres, or better tyres, exchanged for the defective tyres which were then on the car. They went to a house at which the defendant was introduced to a Mr. Marx, and Mr. Goodbody and Mr. Marx persuaded the defendant to agree to take the car at a cash price of £495 and to sign a hire-purchase agreement. That agreement sets out that the cash price of the car is £495; that the hire-purchase price was £574 12s. 6d.; that the initial instalment was £125; and that there were payable thirty monthly rentals of £14 19s. 1d. The defendant paid £125 then

and there to Mr. Goodbody. Unfortunately, Mr. Goodbody is now insolvent, and the loss which in the event was caused by him must fall on others. It is clear (and the judge so found) that the agreement between the defendant and Mr. Goodbody was not an agreement with Goodbody Motors as agent for the plaintiffs. The defendant relied on Mr. Goodbody himself. At the time of signing the hire-purchase agreement, the defendant signed a delivery receipt attached to the same document and addressed to the plaintiffs in these terms:

"I hereby acknowledge having examined and taken delivery of the goods described in the schedule to the within written hire-purchase agreement between us, and am satisfied as to their condition and their fitness for the purpose or purposes required."

On May 5 the car was delivered to the defendant. Mr. Goodbody brought it round at night and left it outside the house. No repairs at all had been done; it was in exactly the same condition as when the defendant signed the document. The learned judge said:

"I accept the evidence that the article delivered to [the defendant] was a 1954 Zephyr car in an unusable, unroadworthy and unsafe condition requiring an expenditure of at least £70 and possibly £100-£120 to put it into a reasonable roadworthy condition."

The defendant's account of what happened thereafter is this:

"That month I got copy of agreement. I had had the car by that time. I had been able to drive it—very poor. I telephoned [the plaintiffs] in West End. They said they would put me through to London office. Put through to a man. He said I would have to go to Goodbody. I rang up [the plaintiffs] over twenty times. I took car to Mr. Watson [the date was about the middle of May, 1959]. He did some work for me. I had not been able to use it. I had tried. Took me one and a half hours to get three to four miles. Brake, clutch, steering terrible. Watson repaired it so that I could get it back to Goodbody. I tried to return it to him. He was away. I took it home. Again rang the [plaintiffs]. They told me to take it to Goodbody. I paid some instalments. I hoped Goodbody would bear half the expense of repair."

The defendant in fact paid the three instalments due on May 21, June 21, and July 21, 1959. The judge found that he had made some complaints to the plaintiffs about the condition of the car, but not as many complaints as he claimed to have made. The defendant failed to pay instalments due on Aug. 21 and Sept. 21. Accordingly, on Oct. 9 the plaintiffs determined the hiring under cl. 4 of the agreement on the ground of the defendant's failure to pay the instalments. A collector went to the defendant's house, taking with him a notice of termination. He had a discussion with the defendant who told him that, as the car was not roadworthy, he could take it away. As the car would not go, the collector had it towed away. The car was re-sold by the plaintiffs just as it was for £210.

By letter to the defendant dated Nov. 5, 1959, the plaintiffs claimed various amounts, the total of which was £193 15s. 6d., which sum was claimed in the action. The learned judge found that, if the plaintiffs were entitled to anything, they were entitled to only £29 18s. 2d., being the two instalments in arrear, plus £30 damages for breach of the agreement. So much of the appeal as is against that finding has been abandoned, and the plaintiffs here ask for judgment for £59 18s. 2d. On that part of the case the defendant's counsel argues (rightly, I think) that there is no evidence on which the judge could find damages proved even to the extent of £30, since he had held that the sum payable, under cl. 7 (v) of the agreement, by way of liquidated damages for depreciation was a penalty, and, therefore, irrecoverable.

The learned judge has set out his reasons at length in a very clear and careful

A judgment. He deals with two main questions: (i) Were the plaintiffs in breach of a fundamental term of the contract that the car should be roadworthy, so that the exclusion, under cl. 8 of the agreement of any implied conditions and warranties did not protect them? (ii) If so, was there a total failure of consideration, so that the plaintiffs cannot recover anything and the defendant can recover the £170 which he has paid? The judge answered both those questions in the defendant's favour.

Clause 8 of the hire-purchase agreement reads:

"No warranty whatsoever is given by the owner as to the age state or quality of the goods or as to fitness for any purpose and any implied warranties and conditions are also hereby expressly excluded except such as are implied by s. 8 (1) of the Hire-Purchase Act, 1938 (if applicable)."

The Act is not applicable since the hire-purchase price in this case exceeded £300. Before considering the effect of that clause, the learned judge considered what the implied terms would be apart from it. He said:

"... there is an implied term of any hiring agreement that the goods hired should be as reasonably fit and suitable for the purpose for which they are expressly hired, or for which, from their character, the owner must be aware that they are intended to be used, as reasonable care and skill can make them."

He went on to hold that such a term was fundamental and, therefore, was not excluded by the exception clause.

The plaintiffs contend that there is no implied condition of fitness in a hiring agreement for a specific chattel, even though the object of the hiring is known or obvious to the owner. They rely on *Robertson v. Amazon Tug & Lighterage Co.* (1). There the plaintiff, a master mariner, contracted with the defendants for a lump sum to take a specified tug from Hull to the Brazils, paying the crew and providing provisions for all on board for seventy days. The engines of the tug were (unknown to the parties) out of repair, so that the time occupied on the voyage was increased, and the plaintiff suffered loss accordingly. LORD COLERIDGE, C.J., held that there was an implied warranty that the tug should be reasonably efficient for the purposes of the plaintiff. In the Court of Appeal BRAMWELL, L.J., agreed with that view, but the majority (BRETT and COTTON, L.J.J.) held otherwise. BRAMWELL, L.J., said (2):

"The case seems to me the same as a contract of hiring, and as all contracts when one man furnishes a specific thing to another which that other is to use. The man so letting and furnishing the thing does not, except in some cases, undertake for its goodness or fitness, but he does undertake for the condition being such that it can do what its means enable it to do. Thus, if a man hired a specific horse and said he intended to hunt with it next day, there would be no undertaking by the letter that it could leap or go fast; but there would be that it should have its shoes on, and that it should not have been excessively worked or unfed the day before. If I am asked where I find this rule in our law, I frankly own I cannot discover it plainly laid down anywhere. But it seems to me to exist as a matter of good sense and reason, and it is I think in accordance with the analogous authorities. I am afraid that the nearest is the dictum of LORD ABINGER in *Smith v. Marrable* (3): 'No authorities were wanted'; 'the case is one which common sense alone enables us to decide'. The subject is treated in STORY ON BAILMENTS, s. 383. And certainly according to what is said there if this had been a case of letting to hire the defendants would be liable."

BRETT, L.J., disagreed with that. He said (4):

(1) (1881), 7 Q.B.D. 598; 4 Asp. M.L.C. 496.

(2) (1881), 7 Q.B.D. at p. 603; 4 Asp. M.L.C. at p. 497.

(3) (1843), 11 M. & W. at p. 9.

(4) (1881), 7 Q.B.D. at p. 606; 4 Asp. M.L.C. at p. 498.

"When there is a specific thing, there is no implied contract that it shall be reasonably fit for the purpose for which it is hired or is to be used. That is the great distinction between a contract to supply a thing which is to be made and which is not specific, and a contract with regard to a specific thing. In the one case you take the thing as it is, in the other the person who undertakes to supply it is bound to supply a thing reasonably fit for the purpose for which it is made."

COTTON, L.J., put the matter on somewhat different grounds. He said (5):

"It has been suggested that the plaintiff is in the same position as the hirer of an ascertained chattel, and the defendants in the same position as the person who lets the chattel to hire. There is at least a doubt what warranty the law implies from the relation of hirer and letter to hire of an ascertained chattel. But, however this may be, in my opinion the relation of the parties here is different."

Therefore, BRAMWELL, L.J., was in favour of there being such a warranty in a contract for the hire of a specific article; BRETT, L.J., was against it, and COTTON, L.J., doubted it without deciding it. All the learned lords justices were in agreement that the owner was liable for any defect which his neglect might cause between the signing of the contract of hiring and the handing of the article to the hirer. The decision itself does not preclude us from holding that there is such a warranty in the ordinary hiring of a specific chattel, since, for the reasons given by COTTON, L.J., the contract in that case was not a contract of hire at all.

In *Karsales (Harrow), Ltd. v. Wallis* (6), PARKER, L.J., said:

"I think it is the duty of a hire-purchase finance company, which is letting out a chattel on hire-purchase, to ascertain that the chattel is reasonably fit for the purpose for which it is expressly hired."

I respectfully agree with that observation, which is supported by earlier authorities. STORY ON BAILMENTS (7th Edn.) (1863), p. 310, s. 383, in discussing the obligations entailed on the owner who hires out chattels, says:

"This [the hiring] implies an obligation . . . to warrant the thing free from any fault, inconsistent with the proper use or enjoyment of it."

In *Sutton v. Temple* (7) LORD ABINGER, C.B., in distinguishing between letting of land and letting of chattels, said obiter:

"So, if a party hire anything else of the nature of goods and chattels, can it be said that he is not to be furnished with the proper goods—such as are fit to be used for the purpose intended? Undoubtedly the party furnishing the goods is bound to furnish that which is fit to be used. In every point of view the nature of the contract is such, that an obligation is imposed upon the party letting for hire to furnish that which is proper for the hirer's accommodation. It is manifest from cases of every day occurrence, that such is the law."

In *Hyman v. Nye* (8) the Divisional Court held that a jobmaster who hired out a carriage was liable for injuries caused by a defect in it, since it was his duty to supply a carriage as fit for the purpose for which it was hired as care and skill could render it. Counsel for the plaintiffs in the present case argues that, since the claim there was in tort, that case is inapplicable to a case of contract. But LINDLEY, J., said (9):

"... whether the plaintiff sues the defendant in tort for negligence in not having supplied such a fit and proper carriage as he ought to have supplied, or whether the plaintiff sues him in contract for the breach of an implied

(5) (1881), 7 Q.B.D. at pp. 608, 609; 4 Asp. M.L.C. at p. 498.

(6) [1956] 2 All E.R. at p. 870.

(8) (1881), 8 Q.B.D. 685.

(7) (1843), 12 M. & W. at p. 60.

(9) (1881), 6 Q.B.D. at p. 680.

warranty that the carriage was as fit and proper as it ought to have been, appears to me wholly immaterial."

In *Jones v. Page* (10) KELLY, C.B., held that the defendant, who let out a carriage for hire, warranted that it should be reasonably fit for that purpose. He dealt also with the argument raised in the present case that no such warranty could be implied where the hirer selected a particular article to be hired. He said (11):

"Then . . . it has been said that the plaintiff selected this carriage himself. Now, we know that persons often hire carriages as they do houses, for a considerable length of time, in a state of non-repair. There they are, of course, aware of the defects, which are patent and known to them. But to say that, because a person hiring a carriage looks at and selects a vehicle, therefore the person letting it out to hire is to be relieved from all liability with respect to its safety, would, indeed, be a very dangerous doctrine. A man, as the plaintiff did here, selecting a carriage on account of its size and capability to carry a certain number of passengers, or for some like reason, has nothing whatever to do with the question of its safety, nor is it necessary that he should look to the state of the wheels, or the lynch-pin, or such like. It is enough that there appears to be no external visible defect."

In *Reed v. Dean* (12) LEWIS, J., held that the defendant, who hired to the plaintiffs a motor launch by name, was liable for personal injuries caused to the hirers from a fire that broke out owing to a defect. He distinguished *Robertson v. Amazon Tug & Lighterage Co.* (13), and held that, although the contract related to a specified launch, there was an implied undertaking by the defendant that the vessel should be as safe as care and skill could make it.

Those cases clearly establish that such a warranty, condition or undertaking exists in the hiring of a specific chattel except in the cases where defect is apparent to the hirer and he does not rely on the skill and judgment of the owner. It is argued that in the present case such a condition is excluded by the fact that the defendant was relying on Mr. Goodbody's assurance that he would make good such defects in the car as the defendant was aware of, in particular the three broken windows. But that reliance, in my view, does not absolve the plaintiffs from their duty under the contract. The serious defects were not apparent. Such an implied condition, therefore, is a part of this contract unless it is excluded by the express words of cl. 8.

In *Karsales (Harrow), Ltd. v. Wallis* (14) there was a similar clause. The Court of Appeal, however, held that the finance company could not rely on the exceptions clause, since, under the hire-purchase agreement, the delivery of the car in such a condition that it would not go was a breach of a fundamental term going to the root of the contract. Accordingly, the claim for unpaid hiring charges failed. DENNING, L.J., said (15):

"Notwithstanding earlier cases which might suggest the contrary, it is now settled that exempting clauses of this kind, no matter how widely they are expressed, only avail the party when he is carrying out his contract in its essential respects. He is not allowed to use them as a cover for misconduct or indifference or to enable him to turn a blind eye to his obligations. They do not avail him when he is guilty of a breach which goes to the root of the contract. It is necessary to look at the contract apart from the exempting clauses and see what are the terms, express or implied, which impose an obligation on the party. If he has been guilty of a breach of those obligations in a respect which goes to the very root of the contract, he cannot rely on the exempting clauses. I would refer in this regard to what was said by

(10) (1867), 15 L.T. 619. [(11) (1867), 15 L.T. at p. 620. (12) [1949] 1 K.B. 188.

(13) (1881), 7 Q.B.D. 598; 4 Asp. M.L.C. 496. (14) [1956] 2 All E.R. 866.

(15) [1956] 2 All E.R. at p. 868.

ROCHE, J., in *Pinnock Brothers v. Lewis & Peat, Ltd.* (16), to the judgments of DEVLIN, J., in *Alexander v. Railway Executive* (17) and *Smeaton Hanscomb & Co., Ltd. v. Sassoon I. Setty, Son & Co.* (18), and a recent case in this court, *J. Spurling, Ltd. v. Bradshaw* (19), and the cases there mentioned. The principle is sometimes said to be that the party cannot rely on an exempting clause when he delivers something 'different in kind' from that contracted for, or has broken a 'fundamental term' or a 'fundamental contractual obligation'. However, I think that these are all comprehended by the general principle that a breach which goes to the root of the contract disentitles the party from relying on the exempting clause."

BIRKETT, L.J., said (20):

"Clearly it was the duty of Mutual Finance, Ltd., to supply to the defendant a 'car', in the ordinary sense of that term, not something that needed towing, because in the true meaning of words a car that will not go is not a car at all."

PARKER, L.J., said (21):

"In my judgment, however extensive the exception clause may be, it has no application if there has been a breach of a fundamental term . . . I think the same result is achieved by saying, in effect, that what was delivered was not what was contracted for; and I think that *Andrews Bros. (Bournemouth), Ltd. v. Singer & Co., Ltd.* (22) might well have been decided on the basis that there had been a breach of a fundamental term. In that case the contract was for the sale of new Singer cars, and again there was an elaborate exception clause. SCRUTTON, L.J., held that, there being an express term that what was sold was a new Singer car, and there having been a breach of that express term, the exception clauses dealing with implied conditions and warranties had no application."

It was argued by the plaintiffs that the judgment of DENNING, L.J., was based only on the fundamental breach caused by the alteration of the car between the date of the contract of hiring and the date of delivery, and not on the fundamental breach by delivery of something that could not properly constitute compliance with a contract to hire a car; but the judgment of the Judicial Committee delivered by LORD DENNING in *Sze Hai Tong Bank, Ltd. v. Rambler Cycle Co., Ltd.* (23) would seem to indicate otherwise.

In *The Cap Palos* (24) ATKIN, L.J., said:

"The question that arises is whether, under the above circumstances, the defendant can rely on the exceptions. In my opinion, they have no application in the facts of this case. It is immaterial to discuss whether the true view is that the wide words of the exceptions, 'default', 'omission', and 'breach of duty', properly construed, do not extend to cases where the contracting party ceases altogether to perform the contract, or that the exceptions, construed in their widest sense, do not apply where the contract is not being performed at all. The principle appears to me to be common to all classes of contract, and is to be found applied in cases of marine insurance (Marine Insurance Act, 1906, s. 45 to s. 48); carriage by sea and river (*James Morrison & Co., Ltd. v. Shaw, Savill & Albion Co., Ltd.* (25), and *Davis v. Garrett* (26)); by land (*Mallet v. Great Eastern Ry. Co.* (27),

(16) [1923] 1 K.B. at p. 695.

(18) [1953] 2 All E.R. 1471.

(20) [1956] 2 All E.R. at p. 869.

(22) [1933] All E.R. Rep. 479; [1934] 1 K.B. 17.

(23) [1959] 3 All E.R. at p. 186; [1959] A.C. at p. 588.

(24) [1921] All E.R. Rep. at p. 254; [1921] P. at p. 470; 15 Asp. M.L.C. at p. 405.

(25) [1916] 2 K.B. 783; 13 Asp. M.L.C. 504.

(26) (1830), 6 Bing. 716.

(27) [1899] 1 Q.B. 309.

(17) [1951] 2 All E.R. 442; [1951] 2 K.B. 882.

(19) [1956] 2 All E.R. 121.

(21) [1956] 2 All E.R. at p. 871.

A and *Lilley v. Doubleday* (28)); and contracts of bailment. 'The principle is well known, and perhaps *Lilley v. Doubleday* (28) is the best illustration, that if one undertakes to do a thing in a certain way, or to keep a thing in a certain place, with certain conditions protecting it, and have broken the contract by not doing the thing contracted for in the way contracted for, or not keeping the article in the place in which you have contracted to keep it, you cannot rely on the conditions which were only intended to protect you if you carried out the contract in the way in which you had contracted to do it'—per SCRUTTON, L.J., in *Gibaud v. Great Eastern Ry. Co.* (29)."

In *Pollock & Co. v. Macrae* (30) the House of Lords considered the effect of a clause providing that the suppliers of a twin-screw set of motor engines for a boat would not be liable for "any direct or consequential damages arising from defective material or workmanship". LORD DUNEDIN, in an opinion with which VISCOUNT HALDANE, VISCOUNT CAVE, LORD PARMOOR and LORD WRENBURY agreed, held that on the facts of that case the exclusion did not protect the suppliers from liability for breach of contract. He dealt with various defects of the engines, and said (31):

"The remaining defects were such that, as LORD ORMIDALE says, the engines never worked satisfactorily. Now, when there is such a congeries of defects as to destroy the workable character of the machine, I think this amounts to a total breach of contract, and that each defect cannot be taken by itself separately so as to apply the provisions of the conditions of guarantee and make it impossible to claim damages. I am quite satisfied on the evidence that the engine never really did work as an engine should, and that in consequence the respondent lost much of his fishing season, besides losing the usefulness of his boat as a sailing boat.

"Holding, therefore, that no excuse can be found in the special terms of the conditions of tender and the guarantee, what is the law to be applied to the facts? I think it is settled by s. 11 of the Sale of Goods Act. The defects here are such that the respondent might have refused to accept the engine and repudiated the contract; he did not do so, but elected to keep the engine and claim damages."

In my judgment, those observations apply, mutatis mutandis, to the present case. The state of the car was not in dispute. Indeed, the plaintiffs pleaded it and relied on it in their original contention that the defendant was in breach of an obligation, not only to keep in repair, but to put in repair, a contention which the judge rightly rejected. The state of the car was substantially the same throughout. To use the defendant's words, "brakes, clutch and steering were terrible". It took one and a half hours to get three or four miles. It was not safe or roadworthy. In a car only five years old a performance so senile cannot be excused on the ground of age. It is wholly out of keeping with the price, the description of the car and the terms set out in the agreement. The nature and age of the car in question would have a bearing on the problem. The hire-purchase agreement clearly contemplated a car that would be usable on the road. It provides for the vehicle being licensed and insured, and the whole tenor of the contract is consistent only with the hiring of a functioning car which could be used on the roads.

Whether there has been a breach of a fundamental condition of the agreement is a question of degree depending on the facts. Such a breach is different in weight and gravity from breaches of condition which would come within the exemption. There may be, as in *Pollock & Co. v. Macrae* (30) and in the present case, an accumulation of defects which, taken singly, might well be within an exception clause, but which, taken en masse, constitute such a non-performance, or

(28) (1881), 7 Q.B.D. 510.

(29) [1921] All E.R. Rep. at p. 39; [1921] 2 K.B. at p. 435.

(30) 1922 S.C. (H.L.) 192.

(31) 1922 S.C. (H.L.) at p. 200.

repudiation, or breach going to the root of the contract, as disentitles a party to take refuge behind an exception clause intended to give protection only in regard to those breaches which are not inconsistent with and not destructive of the whole essence of the contract. One would not lightly come to the conclusion that mere defects in repair, even though numerous, amount to breach of a fundamental condition of the contract. In the present case, however, I accept the finding of the learned judge on the facts that:

“The plaintiffs were . . . in breach of a fundamental term of the contract to hire a motor car suitable for use on the highway and cannot rely on the exemption clause.”

There was, to use the words of LORD DUNEDIN (32), “such a congeries of defects as to destroy the workable character of the machine”.

I cannot, however, with all respect, agree with the judge that there was a total failure of consideration. The defendant was plainly entitled to reject the car, to accept the plaintiffs' repudiation of the contract by their delivery of such a car, and to rescind the contract. Had he done so, there would have been a total failure of consideration, and he would have recovered the sums paid. But, as the judge found, he made no serious effort to return the car. He kept it for five or six months, and approbated the contract by paying three instalments. He intended, to quote his evidence, “to keep the car, and hoped Goodbody would pay half the cost”. He tried to find out from the plaintiffs what he could do to make Mr. Goodbody carry out the work. In those circumstances, he was at that stage continuing with the agreement while protesting against the state of the car which was due to a breach of condition by the plaintiffs. This is not a case like *Rowland v. Divall* (33), where title was lacking and the defendant never had lawful possession. Here the defendant had the possession of the car and its use, such as it was. In evidence he said: “That month I got copy of agreement. I had had the car by that time. I had been able to drive it—very poor”. Admittedly, the use was of little, if any, value, but, in my view, that use, coupled with possession, and his continuance of the hiring agreement with the intention of keeping the car and getting Mr. Goodbody to pay half the repairs, debar the defendant from saying that there was a total failure of consideration.

On the amount of the defendant's damages, the learned judge said this:

“If I had thought the defendant was only entitled to set off or recover damages, I would have assessed these at £100. This would cover not only the cost of remedying the defects already discovered by Mr. Watson and putting the car in a condition which conformed with the plaintiffs' obligations, but also making some allowance for the possibility, indeed, even the likelihood, that further examinations might disclose a need for overhaul and further expense.”

The defendant, therefore, kept the car, and was entitled to £100 damages to make good the car, for the use of which he was paying, and which he had an ultimate right to buy—a right which he has now lost. In my view, that is damage which he has suffered, and in respect of which he is entitled to damages. On this point the learned judge said:

“Later, however, owing to the strong view he had formed about the condition of the vehicle and his inability to get satisfaction from either the dealer or the plaintiffs, the defendant declined to make further payments. Stereotyped formal reminders were sent, but he still failed to pay. The defendant tells me that he rang the [plaintiffs] telling them that the car was not roadworthy, that he was not going to pay any more, and that they could take the car away. The plaintiffs have no record of this, but I think some such remark was made to some officer of the plaintiffs. The defendant made no

A serious effort to return the car, and I do not think I can find that he terminated the hiring as he was entitled to do under cl. 5 of the agreement."

B That seems to show that the defendant allowed the August instalment to fall due before he sought to repudiate the agreement. In my view he is, therefore, liable for the August instalment. Thereafter he rejected the car. Was he entitled to do so? Had this been a sale of goods on instalment payments, he could not, of course, have done so after payment of instalments and acceptance of the goods. Had this been a simple hiring, say, of a gas stove which did not work at all, and which the owners, after frequent requests over some months, had declined to put in order, he would have been entitled to reject it and end the hiring, since the owner's breach was a continuing one. The owner's conduct would constitute a continuing repudiation. This hire-purchase agreement was, at the material time, more analogous to a simple hiring than to a purchase. It contained a contingent option to purchase of which the defendant might have availed himself in two years' time (34); but in September, 1959, the defendant could, as a hirer, refuse to go on with the transaction since the plaintiffs, in spite of repeated requests, were still consistently refusing to honour their obligations. The defendant, therefore, is entitled to £100 damages; but he must pay the instalment that fell due on Aug. 21, 1959, viz., £14 19s. 1d.

E **HARMAN, L.J.:** The difficulty and the artificiality about hire-purchase cases arise, I think, from the fact that the member of the public involved imagines himself to be buying the article by instalments from the dealer, whereas he is in law the hirer of the article from a finance company with whom he has been brought willy-nilly into contact, of whom he knows nothing, and which, on its part, has never seen the goods which are the subject-matter of the hire. The finance company trusts, I suppose, the dealer in regard to the condition of the goods. The member of the public does the like. If the finance company chooses to hire goods of which it has never seen the condition, nor decided the value, in reliance on the good faith of the dealer, it cannot complain if, there being a default on his part, it is called on to be answerable for it.

G I take it to be quite clearly the law that the hirer of a chattel does warrant that it is reasonably fit for the purpose for which he hires it—in this case that the motor car shall be a viable motor car. That is the contrast between the hire of a chattel and the hire of a piece of realty, or a chattel real: it is well known that the hire of an immovable involves no condition that it is fit or suitable for the purpose for which it is hired. A so-called exception is made in the case of furnished lettings because, the furniture being regarded as more important than the realty, the rule as to chattels was held to control the whole transaction. Therefore, the plaintiffs, in hiring this motor car to the defendant, were warranting that the car was reasonably fit for the purpose for which he wanted it, namely, to drive about on his own vocations. One sees well enough from the hire-purchase contract that the plaintiffs had that in mind because they tried to protect themselves by cl. 8, the exception clause. In a contract freely made, the contracting parties may, of course, put down what they like; but it has always been held, as I understand it, that an exception clause cannot be used to avoid what, in the case of chattels, seems to be called a fundamental condition.

I Looking into another branch of the law, namely, that of real property (and

(34) Clause 3 of the agreement was in these terms: "If the hirer shall duly make the said payments and strictly observe and perform all the terms and conditions on his part herein contained he shall thereupon have the option of purchasing the goods for the sum of £1 but until such option to purchase shall have been exercised the goods shall remain the absolute property of the owner and the hirer shall not have any right or interest in the same other than that of hirer under this agreement."

In the "Details of Payments", the hire charges were stated to be £78 12s. 6d., and the hire-purchase price was the "total of cash price and hire charges plus £1 purchase fee."

ATKIN, L.J., said (35), in the passage quoted by my Lord, that this principle A
 applied to all property, it was always the custom (and today it still is) to put
 into contracts for the sale of land an exception clause providing that errors of
 description and so forth should not annul the contract, but either be the subject of
 compensation or else not be so subject. It has always been the doctrine among
 real property lawyers that such a clause, though apparently covering the event, B
 never protected the vendor if the misdescription were of so grave a character
 as altogether to alter the bargain made, going, as was said, to the root of the
 bargain; that is the well-known doctrine of *Flight v. Booth* (36). Therefore,
 I see no difficulty in assenting to the view that, if this were a fundamental breach,
 as the common lawyers call it, the exception clause would not protect the vendor.
 That it is a fundamental breach is, I think, quite plain. I should rely on
 LORD DUNEDIN's speech in *Pollock & Co. v. Macrae* (37) for that purpose, and C
 the facts found by the learned judge below are not in dispute.

So far, then, I agree that there has been a breach of a fundamental condition
 that entitled the defendant to repudiate the contract and have his money back.
 But he did not take that course. Whether because he was easy going, or because
 he wished to go to the dealer and get what the dealer had promised him, I do
 not think really matters. That, I think, disentitles him to treat the matter as D
 if consideration had totally failed, and prevents him, therefore, from getting
 back the whole of the money which he has paid. On the issue of damages I
 have found great difficulty, but I am content to accept the reasoning that my
 Lord has expressed, and the result which he has reached. Therefore, I would
 vary the order of the county court judge to the extent of reducing the judgment
 on the counterclaim from £170 to £100 and allowing the plaintiffs the amount E
 of the instalment which fell due on Aug. 21, 1959.

DAVIES, L.J.: I agree, and I desire to add very little. One of the points
 relied on by counsel for the plaintiffs in support of his argument is that no such
 term of fitness and roadworthiness is to be implied in a contract such as this;
 and he points to the words of s. 8 of the Hire-Purchase Act, 1938, and to the
 statutory conditions and warranties which are to be implied under that section F
 in respect of all hire-purchase agreements to which the Act applies—that is to
 say, those not exceeding £300 (38). It was argued that, if the legislature found it
 necessary to impose those conditions and warranties as terms of contracts within
 the Act, no such term could be implied in hire-purchase agreements outside the
 Act. I think that the answer to that is a twofold one. In the first place (as is
 apparent from the judgment which my Lord has just delivered), it may well have
 been that there was room for doubt as to the law on the particular subject of
 implied conditions in contracts of hire and hire-purchase, and that, therefore, G
 it was desirable in these smaller contracts, for the protection of people who might
 enter into them, to put the matter beyond doubt by legislation. There is also, I
 think, a second answer to this point. Not every breach of condition, not every
 sort of unfitness, would amount to a breach of what has been called the funda- H
 mental condition; and it may, therefore, for that reason also, have been thought
 necessary to make it a condition that defects less than those which constitute
 a fundamental breach of the contract should give a right to the hirer in those cases.

The second point on which I would say a few words relates to the question
 whether or not there was a total failure of consideration. I was, I confess, for
 some time attracted by the argument of counsel for the defendant that, if there
 had been any consideration moving to the hirer (if "moving" is an apt word in
 connexion with this motor car at all), it was de minimis. But I think it is im- I
 possible to say that. The defendant actually had the vehicle in his possession
 for some months—the vehicle which, albeit on little or no inspection, he had

(35) In *The Cap Palos*, [1921] All E.R. Rep. at p. 254; [1921] P. at p. 471; 15 Asp.
 M.L.C. at p. 406. (36) (1834), 1 Bing. N.C. 370. (37) 1922 S.C. (H.L.) at p. 200.

(38) See the Hire-Purchase Act, 1938, s. 1, as amended by the Hire-Purchase Act,
 1954, s. 1.

A agreed to take—and he was hoping that Mr. Goodbody, the dealer, would remedy the defects. The vehicle was not worthless; it fetched £210 in the trade actually; it would go, though very badly indeed. The defendant retained it and paid three instalments. He had work done on the car by Mr. Watson in order to take it to Mr. Goodbody's premises; and it was not until at any rate August that eventually his patience became exhausted, and he told the plaintiffs: "I am not paying
B any more. You had better take it back".

One of the arguments strongly pressed on the court by counsel for the plaintiffs was based on the undoubted fact that the defendant was looking to Mr. Goodbody to put the car in running order; he said so over and over again in his evidence. It was argued that in those circumstances it would be wrong to imply any fundamental condition in the contract that the car should be a roadworthy
C car when, in fact, the hirer realised that it was not roadworthy, and was (as it were) accepting the car in that condition, though it is plain that when he entered into the agreement he had not the least idea of the extent of the defects. I find that argument difficult to accept. It seems to me impossible to see how an agreement to which the plaintiffs were not parties could affect the question what was their obligation to the defendant under the contract with him, or whether
D there was or was not a breach of that obligation. It was pointed out in reply by junior counsel for the plaintiffs that, in the amended defence and counter-claim, there was an allegation on behalf of the defendant that, by a collateral agreement made between the defendant and Mr. Goodbody or Mr. Marx as agents on behalf of the plaintiffs, Mr. Goodbody undertook to overhaul and repair the motor car. If such an agreement had been established, the liability of the
E plaintiffs under the written agreement might have been quite different. But the learned judge expressly negatived any agency in the matter, and that has not been pursued in this court. It seems to me, therefore, that the fact that the defendant looked to Mr. Goodbody to remedy the defects (which were, for the reasons indicated by my Lord, a fundamental breach of the contract) cannot affect the liability of the plaintiffs under the contract or their liability for its
F non-performance.

The only other matter on which I would add a few words is the question of damages. I have felt some difficulty about this matter, but in that regard I do not wish to add anything to what has fallen from my Lords. I merely say one thing about the plaintiffs' claim for £30 damages for depreciation, the amount which the learned judge provisionally assessed. That assessment was based, as
G I understand it, on the figures appearing in "Glass's Guide" which enabled the judge to come to the conclusion that, as between April, 1959, when the hire-purchase agreement was entered into, and October, 1959, when the plaintiffs repossessed themselves of the car, it had deteriorated to the tune of £30. That automatic depreciation by lapse of time (with which all owners or purchasers of motor cars are only too familiar) may be an excellent guide to the assessment
H of damages when the car is in normal average condition. If, however, a motor car is in such a disgraceful state as this motor car was in in April, 1959, when it came into the hands of the unfortunate defendant, it seems to me that any automatic depreciation by lapse of time has really no relation to the realities of the case. The car was so bad in April that it is impossible, in my view, to say that it was any worse by the time the plaintiffs retook it in October. Indeed, owing to the fact that the defendant had spent the sum of £20 on it, the car may very well have been a little better. For those reasons, in addition to what has been said in the other judgments, I agree with the order proposed.

Appeal allowed in part. Leave to appeal to the House of Lords refused.

Solicitors: Paisner & Co. (for the plaintiffs, the hire-purchase finance company); Breeze, Benton & Co. (for the defendant, the hirer).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

YEOMAN CREDIT, LTD. v. LATTE AND ANOTHER.

[COURT OF APPEAL (Holroyd Pearce, Harman and Davies, L.J.J.), March 21, 22, 23, 24, 1961.]

Hire-Purchase—Indemnity—Hire-purchase agreement by infant in respect of motor car—Agreement void—Document signed by third party undertaking to indemnify hire-purchase finance company against any loss arising out of hire-purchase agreement—Whether valid as a contract of indemnity or void as a guarantee of a void contract.

On Jan. 14, 1959, the first defendant, who was, as all parties concerned knew, then an infant, entered into a hire-purchase agreement with the plaintiffs in respect of a motor car, the hire-purchase price of which was £668 18s. At the end of the agreement was a form of guarantee and at the foot of this were printed the words: "Note—If the hirer is under twenty-one an adult must sign a special form of indemnity". The second defendant signed a document headed "Hire-Purchase Indemnity and Undertaking", and also dated Jan. 14, 1959, whereby he agreed to indemnify the plaintiffs against any loss resulting from the hire-purchase agreement. Under the terms of this document the second defendant, if called on to pay, would obtain only such rights of subrogation as the plaintiffs might choose to allow, and the plaintiffs' rights against him differed substantially from their rights against the first defendant under the hire-purchase agreement, for the hirer's liability would in some circumstances be greater and in other circumstances would be less than the second defendant's liability under his undertaking. Moreover the second defendant's agreement did not provide that he should make good the particular obligations of the hirer if he defaulted, so that none of them could be enforced against the second defendant, but the second defendant would be called on to pay only if the whole transaction produced less profit than the total hire-purchase price would have yielded. Under s. 1 of the Infants Relief Act, 1874, the hire-purchase agreement was void. On the question whether the agreement by the second defendant was a contract of guarantee and, if so, was void, as guaranteeing a void contract, or was a contract of indemnity,

Held (DAVIES, L.J., *dubitante*): the document signed by the second defendant was a valid contract of indemnity, not a contract of guarantee, for not only was it so styled but also its terms were consistent rather with an assumption of liability on the part of the second defendant as principal to secure to the plaintiffs their intended profit than with guaranteeing the performance of particular obligations which the hirer had purported to undertake.

Appeal allowed.

[As to the nature of a guarantee and of a contract of indemnity, see 18 HALSBURY'S LAWS (3rd Edn.) 411, para. 767, and 528, para. 973.]

As to the competence of an infant to enter into a hire-purchase transaction, see 19 HALSBURY'S LAWS (3rd Edn.) 524, para. 843, note (k); as to guarantees in relation to transactions of hire-purchase, see *ibid.*, p. 525, para. 844.]

Cases referred to:

Coutts & Co. v. Browne-Lecky, [1946] 2 All E.R. 207; [1947] K.B. 104; 115 L.J.K.B. 508; 26 Digest (Repl.) 100, 683.

Garrard v. James, [1925] Ch. 616; 94 L.J.Ch. 234; 133 L.T. 261; 26 Digest (Repl.) 100, 686.

Lakeman v. Mountstephen, (1874), L.R. 7 H.L. 17; 43 L.J.Q.B. 188; 30 L.T. 437; 38 J.P. 452; 26 Digest (Repl.) 38, 242.

Swan v. Bank of Scotland, (1836), 10 Bli. N.S. 627; 1 Deac. 746; 2 Mont. & A. 656; 6 E.R. 231; 26 Digest (Repl.) 99, 680.

Wauthier v. Wilson, (1911), 27 T.L.R. 582; *affd. on other grounds*, C.A., (1912), 28 T.L.R. 239; 26 Digest (Repl.) 99, 682.

A *Yorkshire Railway Wagon Co. v. Maclure*, (1882), 21 Ch.D. 309; 51 L.J.Ch. 857; 47 L.T. 290; 26 Digest (Repl.) 17, 55.

Appeal.

B The plaintiffs, a hire-purchase finance company, appealed from a decision given by His Honour JUDGE GAGE at Southend County Court on July 29, 1960, on a preliminary point of law. By their statement of claim in the action (which was brought in the High Court but transferred to the county court by an order dated Mar. 18, 1960), the plaintiffs claimed (i) £278 19s. against the first defendant, Terry Brian Robert Latter, and (ii) £182 8s. against the second defendant, Clifford Owen. The plaintiffs alleged that on Jan. 14, 1959, the first defendant had entered into a hire-purchase agreement with them in respect of a motor car and that he had failed to pay the monthly instalments of rent due under the agreement. Against the second defendant, the plaintiffs alleged that, by an indemnity in writing dated Jan. 14, 1959, in consideration of the plaintiffs entering into the hire-purchase agreement, the second defendant had agreed to indemnify them against any loss which they might sustain pursuant to the hire-purchase agreement. At the date of the hire-purchase agreement the first defendant was an infant. He had reached his majority before the proceedings were commenced, but the writ was not served on him and the action proceeded only against the second defendant. When the case came before the county court judge, counsel for the parties asked him to try as a preliminary issue the questions (i) whether, in the circumstances, the hire-purchase agreement between the plaintiffs and the first defendant was void under the Infants Relief Act, 1874; and (ii) if it were void, whether the second defendant could be held liable to the plaintiffs under the terms of his agreement with them dated Jan. 14, 1959. The learned county court judge held (i) that the hire-purchase agreement was void under s. 1 of the Act of 1874; and (ii) that the agreement signed by the second defendant was a contract of guarantee (i.e., a guarantee by the second defendant to the plaintiffs to answer for the first defendant's debt or default on the hire-purchase agreement), and that, therefore, as the principal agreement was void, this agreement was also void. The plaintiffs appealed from the learned judge's decision on point (ii).

F *Neil Lawson, Q.C.*, and *J. Lloyd-Eley* for the plaintiffs, the hire-purchase finance company.

E. H. Laughton-Scott for the second defendant.

Cur. adv. vult.

G Mar. 24. **HOLROYD PEARCE, L.J.**, read the following judgment: This is the plaintiffs' appeal from a judgment of His Honour JUDGE GAGE at Southend County Court dismissing, on a preliminary point of law, the plaintiffs' claim for £182 8s. against the second defendant. The plaintiffs are a finance company. By a hire-purchase agreement dated Jan. 14, 1959, they let a car on hire-purchase to the first defendant, who was then, as all the parties were aware, an infant. Printed at the end of the hire-purchase agreement is a form of guarantee securing the performance of all the terms by the hirer, and on his default accepting liability as if the guarantor had been the hirer. At the foot of the form are printed the words: "Note—If the hirer is under twenty-one an adult must sign a special form of indemnity". Since the hirer was in this case under twenty-one, the second defendant signed a more lengthy and complicated form headed: "Hire-Purchase Indemnity and Undertaking". The hire-purchase price of the car was £668 18s. The initial payment of £55 10s. was paid. Forty-eight monthly instalments of £12 15s. 2d. were payable, but the hirer never paid any of them. In May, 1959, the plaintiffs repossessed the car and sold it for £430. In June, 1959, the hirer went on military service to Hong Kong. In September, 1959, the plaintiffs demanded from the second defendant £182 8s., being the amount due under the indemnity. They then started these proceedings against him, claiming that sum. They also sued the hirer as first defendant since by

then he had reached his majority. But they never served him. The sum for which the first defendant would be liable under the terms of the hire-purchase agreement in the events which had happened was £278 19s., a sum which differs not only in amount, but also in its method of calculation, from the liability of the second defendant under his indemnity. It is admitted that the hire-purchase agreement was not a contract for necessities. Before the Infants Relief Act, 1874, the contract would have been voidable, and the contract of indemnity would, admittedly, have been enforceable. But s. 1 of that Act provides:

"All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessities), and all accounts stated with infants, shall be absolutely void: Provided always, that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable."

The hire-purchase agreement was, therefore, void under the Act.

In the county court it was argued by the second defendant as a preliminary point that the indemnity, though so called, was really a guarantee, and that, since it guaranteed a void contract, it was itself void on the reasoning and authority of *OLIVER, J.*, who held in *Coutts & Co. v. Browne-Lecky* (1) that, since a guarantee is by definition an obligation to answer for the debt, default or miscarriage of another, there cannot, in respect of a void contract, be any debt, default or miscarriage to answer for. There are, therefore, two questions raised by this appeal. First, is the document in question a guarantee, although styled an indemnity? And, if it is a guarantee, is it void? In its widest sense a contract of indemnity includes a contract of guarantee. But, in the more precise sense used in various cases dealing with s. 4 of the Statute of Frauds, 1677, and used in the arguments in this case, a contract of indemnity differs from a guarantee. An indemnity is a contract by one party to keep the other harmless against loss, but a contract of guarantee is a contract to answer for the debt, default or miscarriage of another who is to be primarily liable to the promisee. Counsel for the second defendant, in an able argument, admits that, if the so-called indemnity in this case is in truth a contract of indemnity, he cannot, on the authorities, claim that it was void. If, however, it is in essence a guarantee, then the judge was right in regarding himself as bound by *Coutts & Co. v. Browne-Lecky* (1) and this court should hold likewise unless it takes the view, for which counsel for the plaintiffs contends, that that case was wrongly decided. Counsel for the plaintiffs argues that it is out of accord with other authorities, and that we should accept the view taken in certain cases that the guarantor of a void contract may yet be liable, a view which is in accord with that taken by the civil law.

The document in question is headed and described as: "Hire-Purchase Indemnity and Undertaking". It is clear from the wording of the document and the surrounding circumstances that it was intended to be something more than a mere guarantee. This tells in favour of its being in truth an indemnity. However, I agree with counsel for the second defendant that we must have regard to its essential nature in order to decide whether or not it is really no more than a guarantee. Its ultimate object, of course, was to ensure that the plaintiffs received back with profit the money that they had laid out in the transaction; but that ultimate object is shared by guarantee and indemnity alike. It is the method by which that object is attained which decides the class to which the document belongs. Its material words are as follows:

"I undertake and agree as follows: 1. To indemnify you against any loss resulting from or arising out of the [hire-purchase] agreement and to pay

to you the amount of such loss on demand and whether or not at the time of demand you shall have exercised all or any of your remedies in respect of the hirer or the chattels but so that upon payment in full by me of my liabilities hereunder I shall obtain such of your rights as you may at your discretion assign to me."

Thus under cl. 1 the second defendant does not obtain the full rights of subrogation to which a guarantor is by law entitled, but obtains only such rights of subrogation as the plaintiffs may choose to allow. The second defendant does, however, under cl. 3 (as will be seen) get valuable rights of a nature different from subrogation. Clause 2 reads:

"The amount of your loss for the purpose of this indemnity whether or not the [hire-purchase] agreement . . . shall have been terminated by any party thereto shall be the total amount which the hirer would have had to pay under the agreement to entitle him to exercise the option of purchasing the chattels plus all expenses you may incur in the exercise or enforcement of your rights under the agreement . . . less the amount actually paid to you under the agreement by the hirer."

By that clause the second defendant is assuring to the plaintiffs such amount as will make up the sums paid by the hirer to the total amount of hire payable under the hire-purchase agreement and the price of the option, together with any expenses incurred by the plaintiffs in enforcing the agreement. Clause 3 provides that, if the car has come into the plaintiffs' possession, they shall either give to the second defendant credit for any amount which they realise on the sale of it, or shall, after payment in full by the second defendant of the full sum due, transfer the car to the second defendant so that he can sell it and keep the proceeds.

One may sum up the effect of the document in question as this: It protects the plaintiffs against any loss which they may suffer, since it assures to them the full sum of the hire-purchase price, plus any costs incurred by them in enforcing the hire-purchase agreement. Thus the rights of the second defendant (if called on to pay) are different from the rights of subrogation under a guarantee, rights which would, in such a case as this, be useless. Moreover, whereas the plaintiffs' rights against the hirer and the second defendant would, under a normal guarantee, be identical, the document in question gives to the plaintiffs wholly different rights from those which they have against the hirer under the hire-purchase agreement. In some circumstances the plaintiffs' rights against the hirer may be higher than those against the second defendant, and in some circumstances lower. If, as happened in the present case, the plaintiffs seize the car on default and sell it for a good price, the hirer's liability will be greater than that of the second defendant. Against the hirer, the plaintiffs can claim, under cl. 7 of the hire-purchase agreement, such sum as will make up the sums already paid by the hirer to half the purchase price, as agreed compensation for depreciation; but they need not give any credit for the value or proceeds of the car which they have seized. Against the second defendant, however, they can claim the total hire-purchase price plus expenses of enforcement, but they must give credit for the whole proceeds of a sale of the car. Hence the substantial difference between the respective sums claimed in this action against the first defendant and the second defendant. This difference is caused solely by the difference between the plaintiffs' rights under the indemnity and under the hire-purchase agreement. If, however, the hirer had determined the agreement himself when he had paid sums amounting to one-half the hire-purchase price, and if the car had failed to fetch as much as half the hire-purchase price, falling short of it by, say, £100 (which it might have done), then the hirer would have had to pay nothing under the hire-purchase agreement, while the second defendant would have had to pay £100. Moreover, in the latter instance the hirer would have been guilty of no debt,

default or miscarriage, yet the second defendant would have to pay £100 under the indemnity. Counsel for the second defendant argues that the mere fact that in occasional circumstances such a result may be produced does not destroy the essential nature of the agreement in question, which is to answer for the debt, default or miscarriage of another. Nevertheless, it raises a strong suspicion that that may not really be its essential nature. Further, the agreement signed by the second defendant does not provide that he shall make good the particular defaults of the hirer. If the hirer fails to pay the instalments, no recourse can be had to the second defendant for those instalments. None of the actual obligations of the hirer can, if he defaults, be enforced against the second defendant. Only if the totality of the transaction produces either a loss, or a profit less than that which the total hire-purchase price would have yielded, can the second defendant be asked to pay. And, if he is asked to pay, the fact that the hirer has made no default is no defence; for it is irrelevant to the calculations on which the second defendant's liability is based. And that liability may well arise from a lawful return of the car by the hirer coupled with a fall in the price of second-hand cars. The agreement is in truth (as cl. 1 states) an indemnity against "any loss resulting from or arising out of the agreement", and not a surety against loss resulting from particular breaches of the agreement.

All these considerations point strongly towards the agreement being what it claims to be, namely, an indemnity. The surrounding circumstances (so far as one can gather them in the absence of the evidence) also support that claim. The parties were, it would seem, all aware of the legal difficulty created by the hirer's infancy. Hence the necessity for this special form of indemnity. That circumstance, as well as the wording of the document, makes it improbable that the transaction was intended as a guarantee of particular obligations if, as appears, they were known not to be binding against the infant. These assumptions, however, may thereafter be shown by the evidence to be incorrect.

In the leading case, *Lakeman v. Mountstephen* (2), the plaintiff, a contractor, was failing to do certain sewage work because he was not sure that the board of health would pay for it, and the defendant, who wanted the work to be done, said to him: "Go on, Mountstephen, and do the work, and I will see you paid". The House held that these words did not constitute a promise to pay the debt of another, and that they were rightly left to the jury as evidence of a primary obligation on the defendant. LORD SELBORNE said (3):

"There can be no suretyship unless there be a principal debtor, who of course may be constituted in the course of the transaction by matters *ex post facto*, and need not be so at the time, but until there is a principal debtor there can be no suretyship. Nor can a man guarantee anybody else's debt unless there is a debt of some other person to be guaranteed. The tendency, therefore, of any view of this contract which would place it in the position of a guarantee for a future liability to be undertaken by the local board, would be absolutely to defeat the whole purpose of the communication, which was to remove a difficulty then pressing upon the mind of the contractor, as to whether or not he had sufficient authority from any one to go on with the work; and the answer was given in terms *de praesenti* for the express purpose of inducing him at once to go on."

In the present case, the agreement signed by the second defendant is more consistent with a primary obligation on the second defendant to secure the plaintiffs against loss if the transaction should turn out unremunerative, rather than a secondary obligation to make good the particular defaults of the hirer.

In *Warthier v. Wilson* (4) a father and an infant son signed a joint and several promissory note, the father joining as guarantor. PICKFORD, J., had held that the debt against the infant was void, but that nevertheless a guarantor of it

(2) (1874), L.R. 7 H.L. 17.

(3) (1874), L.R. 7 H.L. at p. 24.

(4) (1911), 27 T.L.R. 582; *affd. on other grounds*, C.A., (1912), 28 T.L.R. 239.

A remained liable on the authority of a decision of KAY, J., in *Yorkshire Railway Wagon Co. v. Machure* (5). The Court of Appeal (without expressly disagreeing with the trial judge) preferred to take a different view. FARWELL, L.J., said (6):

B "... if Mr. Newbolt's contention that this was a case of a guarantee were to prevail it would follow that these three parties deliberately sat down to enter into an arrangement under which money was to be advanced on a promissory note on which no one was liable at all, there being no one liable as principal and therefore no one liable as surety."

Later the learned lord justice said (6):

C "That seemed to him [the lord justice] to be the plain meaning of the transaction, on the assumption that the plaintiff knew that the son was under age; and it followed that, in [his Lordship's] opinion, the father acted as principal and incurred liability as principal."

D I would take a somewhat similar view of the transaction in the present case in the absence of any evidence to the contrary. The second defendant was, in effect, saying to the plaintiffs: "Go on with the transaction, and I will see that you make your profit and suffer no loss". No doubt, it was hoped that the hirer would fulfil his obligations, although not legally bound by them. But the second defendant was not purporting to guarantee or make good any particular obligation of the hirer. Under the terms of his agreement he had no liability to do so. His liability was to see that the plaintiffs made their intended profit even though the hirer lawfully, without any default, terminated the hiring. He was underwriting the profitable success of the transaction; he was not insuring against contractual breaches of it by the hirer. For those reasons, the agreement signed by the second defendant was not a contract of guarantee, but a contract of indemnity. It is, therefore, unnecessary to decide whether *Coutts & Co. v. Browne-Lecky* (7) was rightly decided. That matter has been well argued on both sides, and is clearly not free from difficulty, but I need express no view on it.

F In my judgment the second defendant's preliminary point of law fails, and the case must go back to be heard on the facts.

G HARMAN, L.J.: I cannot help feeling that in this case the joint and well-meant persuasions of counsel led the learned county court judge up the garden path to this preliminary point of law. He was unwilling, as he said, to decide it, and, in my judgment, rightly so, for it is only when a preliminary point of law will decide the substantial question at issue between the parties either way it be decided that such an expedient can ever be really useful. The way in which the learned county court judge decided the point, of course, put an end to the suit; but, this court taking a different view, the case will resume its meandering course, which it might well have finished by now, if the straight road had been taken in the first place. However that may be, I cannot but admire the courage with which the learned judge faced the real difficulties of the present situation. He preferred to let himself decide the question whether this contract was one of guarantee or indemnity. It seems to me a most barren controversy. It dates back, of course, to the Statute of Frauds, 1677, and has raised many hair-splitting distinctions of exactly that kind which brings the law into hatred, ridicule and contempt by the public. Nevertheless, this difficulty persists, and the decided cases on the subject are hardly to be reconciled.

I Where all concerned know that the first promisor is an infant, so that, as against him, the promise cannot be enforced, the court should incline to construe the document signed by the adult (the second promisor) as an indemnity, for that must have been the intention of the promisee and the second promisor. Both know that the first promise has no legal validity; it may be that both hope that

(5) (1882), 21 Ch.D. 309.

(6) (1912), 28 T.L.R. at p. 239.

(7) [1946] 2 All E.R. 207; [1947] K.B. 104.

the first promisor will honour his engagement, but, with the knowledge that he cannot be obliged to do so, it must have been their intention that the promise of the adult promisor should have an independent validity. Otherwise the whole transaction is a sham. This is what led the Court of Appeal in *Wauthier v. Wilson* (8) to decide as it did. That case is inadequately reported, and we do not know the form of document involved. PICKFORD, J., at first instance (9), treated the position of the father as that of guarantor, and was, therefore, troubled with the difficulties involved in the division of opinion apparent from the cases—*Swan v. Bank of Scotland* (10), on the one side, and the decision of KAY, J., in *Yorkshire Railway Wagon Co. v. Maclure* (11) and, later, of P. O. LAWRENCE, J., in *Garrard v. James* (12), on the other side. The Court of Appeal cut the knot by holding that the father's promise was an independent contract enforceable without regard to the invalidity of that of the infant. If OLIVER, J., had felt free to take a like course in *Coutts & Co. v. Browne-Lecky* (13), he would not have been troubled with the same doubts as afflicted PICKFORD, J.

Starting from this premise, I approach the document between the plaintiffs and the second defendant in the present case, and I find that, on its true construction, this is clearly a document of indemnity. It so styles itself. It was clearly meant so to be by the plaintiffs, as the note at the foot of the hire-purchase form shows (14). Had it been otherwise, an ordinary guarantee such as that included in the hire-purchase form itself would have been used. Apart from that, the object of the document appears on its face to be to protect the plaintiffs against loss—to see them harmless—rather than to make good the infant's liability. The satisfying of the infant's liability might (indeed, would, in this case) have resulted in a profit to the plaintiffs, as appears from the writ itself, where a much larger sum is claimed against the infant than against the second defendant. My Lord has shown clearly that in other circumstances the second defendant's liability might have been heavier than the infant's, and not have arisen out of his default; for, if the infant, without making any default, had (as the hire-purchase contract expressly allowed him to do) put an end to the hiring by returning the car after paying half its price, he would have gone scot-free, while the second defendant would still be under liability for the balance of the hire-purchase price. This alone shows that the second defendant's contract was not one of guarantee for the infant, but of indemnity to the plaintiffs. Again, the second defendant lacked one of the essential qualities of a guarantor, namely, the right of subrogation given by law to the guarantor against the principal debtor. Everyone, of course, was aware that the second defendant could not enforce any such right against the infant, for the latter promise was void. Taking this view, as I do, of the second defendant's promise, I find it unnecessary to enter on the vexed question whether the decision of OLIVER, J., which applies only to a guarantee properly so called, was right. I would allow the appeal.

DAVIES, L.J.: All through this case I have found myself in considerable doubt as to the true meaning of the contract with which we are concerned; and, despite the powerful reasons which have been given in the opinions by my Lords, I find myself still in that unhappy position. As, however, the case involves no question of general law but concerns merely the transaction recorded in this particular document, I think that probably the less I say about it the better. I content myself, therefore, by saying that I am still extremely concerned whether the real meaning of this document is not that it sets up machinery to secure to the plaintiffs in any event the receipt of the full amount of the money due under the hire-purchase agreement plus any expenses incurred—whether the contract is terminated by the plaintiffs under cl. 4 of the hire-purchase agreement in the event therein provided, or whether it is terminated by the hirer at his option

(8) (1912), 28 T.L.R. 239.

(9) (1911), 27 T.L.R. 582.

(10) (1836), 10 Bli. N.S. 627.

(11) (1882), 21 Ch.D. 309.

(12) [1925] Ch. 616.

(13) [1946] 2 All E.R. 207; [1947] K.B. 104.

(14) See p. 295, letter H, ante.

A under cl. 5—but that, throughout, the primary liability under the whole transaction, taken together, falls on the hirer. My Lords have, however, formed a firm view about it. I need, therefore, say no more than that I am wholly unconvinced in this case by the argument that was expressed by FARWELL, L.J., in *Wauthier v. Wilson* (15) and was one of the arguments that have found favour with my Lords, namely, that all the parties to the transaction knew that the hirer in this case was an infant; for it is manifest on the facts of this case that, despite that fact, the plaintiffs, both by correspondence and by the writ in this action, were pursuing the infant in order to try to recover moneys due under the agreement. That argument, therefore, does not prevail with me.

Appeal allowed.

C Solicitors: *Paisner & Co.* (for the plaintiffs); *Drysdale, Lamb & Jackson* (for the second defendant).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

D T. K. WORGAN & SON, LTD. v. GLOUCESTERSHIRE COUNTY COUNCIL.

H. LANCASTER & CO., LTD. v. GLOUCESTERSHIRE COUNTY COUNCIL.

E [COURT OF APPEAL (Lord Evershed, M.R., Upjohn and Pearson, L.JJ.), March 1, 2, 1961.]

Road Traffic—Licence—Rate of duty—Haulage vehicle—Tractor used for hauling timber loaded on trailer—Equipment fitted to tractor for loading felled timber on to trailer—Whether goods vehicle or haulage vehicle—Vehicles (Excise) Act, 1949 (12, 13 & 14 Geo. 6 c. 89), s. 4 (2) (f) (as amended by Finance Act, 1950 (14 Geo. 6 c. 15), s. 13 (2) (d)), s. 5 (1), (2), s. 27 (1).

F The plaintiffs, who were merchants in and hauliers of home-grown timber, owned some tractors which they used for the haulage of felled timber, the timber being loaded on trailers attached to the tractors. In order to load the felled timber on to the trailer, a winch and a jib were fitted to each of the tractors. By means of the winch, which was connected to the motor power of the tractor, tree-trunks were dragged to the side of the trailer, and the jib was used for lifting the trunks on to the trailer. Some of the tractors were also fitted with a device to keep them stable during the dragging operations. The tractors had no floor boards and were, therefore, incapable of carrying goods apart from the equipment necessary for loading the trailers. On the question whether the tractors were chargeable to duty under the Vehicles (Excise) Act, 1949, in accordance with the rate prescribed by s. 4 (2) (f)* of the Act, or in accordance with the higher rates prescribed by s. 5 (1) and (2)† for goods vehicles drawing trailers,

H **Held:** the tractors fell fairly and squarely within s. 4 (2) (f) of the Act of 1949 for they were “constructed and used . . . for haulage solely”, their equipment being merely for operations that were essential ancillaries to haulage; and, as the tractors so fell within s. 4 (2) (f), they were not “goods vehicles” within the definition in s. 27 (1)‡, being constructed for the haulage but not for the conveyance of goods, and duty was not chargeable

(15) (1912), 28 T.L.R. at p. 239.

* The terms of s. 4 (2) (f) are printed at p. 303, letter E, post.

† By s. 5 (1), the duty chargeable in respect of a goods vehicle is set out in Part 1 of Sch. 4 to the Act, and by s. 5 (2) an additional duty, as set out in Part 2 of Sch. 4, is chargeable in respect of a goods vehicle used for drawing a trailer.

‡ The definition of “goods vehicle” in s. 27 (1) is printed at p. 303, letter H, post.

in respect of them at the higher rate prescribed by s. 5 for goods vehicles.

James v. Davies ([1952] 2 All E.R. 758) and *R. v. Berkshire County Council, Ex p. Berkshire Lime Co. (Childrey), Ltd.* ([1953] 2 All E.R. 779) distinguished.

Appeals dismissed.

[As to licence duty on haulage vehicles and on goods vehicles, see 33 HALSBURY'S LAWS (3rd Edn.) 203, 204, paras. 346, 347.

For the Vehicles (Excise) Act, 1949, s. 4. s. 5 and s. 27 (1), see 21 HALSBURY'S STATUTES (2nd Edn.) 1435, 1436 and 1453; for the Finance Act, 1950, s. 13, see 29 HALSBURY'S STATUTES (2nd Edn.) 678.]

Cases referred to:

James v. Davies, [1952] 2 All E.R. 758; [1953] 1 Q.B. 8; 116 J.P. 603; 3rd Digest Supp.

Pearson v. Boyes, [1953] 1 All E.R. 492; 117 J.P. 131; [1953] 1 W.L.R. 384; 3rd Digest Supp.

R. v. Berkshire County Council, Ex p. Berkshire Lime Co. (Childrey), Ltd., [1953] 2 All E.R. 779; 117 J.P. 505; [1953] 1 W.L.R. 1146; 3rd Digest Supp.

Appeals.

The defendants, Gloucestershire County Council, appealed from a judgment given by His Honour JUDGE LLOYD, Q.C., at Gloucester County Court on May 13, 1960, in two actions which were heard together by consent as the issues were identical. The plaintiffs in one of the actions were T. K. Worgan & Son, Ltd., who were home-grown timber hauliers, carrying on business at Ashelworth, Gloucestershire, and were the owners of two tractors, known as Matadors, which they used for the haulage of timber. In the other action the plaintiffs were H. Lancaster & Co., Ltd., who were home-grown timber merchants, carrying on business at Newent, Gloucestershire, and were the owners of three similar tractors, used for the haulage of timber. The question in each case was whether a tractor of the kind used on the public road by timber hauliers should be chargeable to duty under the Vehicles (Excise) Act, 1949, in accordance with the rate imposed by s. 4 (2) (f), or in accordance with the higher rates imposed by s. 5 (1) and (2). The plaintiffs alleged that, in respect of the period from Jan. 1 to Dec. 31, 1959, they were wrongfully compelled by the defendants to pay the higher duties in respect of their vehicles, and they claimed (a) a declaration that the tractors were chargeable to duty under s. 4 (2) (f) of the Act of 1949, and (b) repayment of excess duty paid by them, under protest, to the defendants. The learned county court judge, in a reserved judgment, held that the tractors were chargeable to duty under s. 4 (2) (f), and not under s. 5 (1) and (2). He made the declaration which was sought and gave judgment for the plaintiffs for the amount claimed in each case.

J. E. M. Irvine for the defendants, Gloucestershire County Council.

F. Blennerhassett for the plaintiffs.

LORD EVERSHERD, M.R.: The question raised by these appeals falls within a small compass and, at first sight, might be said not to appear very difficult. It relates to the proper rates of taxation for certain vehicles used by the plaintiffs, the two respondents to the two appeals, in their respective businesses of sawmillers in Gloucestershire. The photographs which I have in my hand show the nature of the vehicles. It appears that they were formerly military vehicles and were acquired by the two plaintiffs for their business purposes. The learned judge in a careful judgment, has stated what in fact the functions of these vehicles are, and I cannot do better than refer to what he says:

"In view of a submission by counsel for the defendants [the county council] that the tractors in these cases are used, not for haulage solely, but also for the operations of dragging timber along the ground and lifting it and loading it on to the trailer, it is perhaps desirable that I should

briefly describe the loading operation, although Mr. Gardner (1) in his evidence took the view, not very surprisingly, that the process of loading is an essential preliminary, and an integral part, of the process of haulage. What happens in practice is that sometimes tree-trunks lying some little way from the tractor or its trailer, are dragged along the ground to where the trailer is standing by means of a wire rope worked from the winch on the tractor, and passing below the base of the jib. The winch itself is connected through to the motor power of the tractor. In the process of lifting tree-trunks or branches on to the trailer, the jib is used, the wire rope passing from the winch over the pulley at the top of the jib, and being placed round the timber, lifting it from the ground, and finally lowering it on to the trailer."

I add to that description that the vehicles, or some of them at any rate, are also fitted with what have been described as anchors, so that during the dragging operations the vehicles will remain stable. Apart, however, from those preliminary operations described in the passage which I have read, it has not been disputed by counsel for the county council that, for the rest, what these vehicles do, and particularly what they do on public roads, is that they haul the felled timber, such felled timber being loaded on the trailers attached to the tractors.

I turn at this stage to make some references to the Vehicles (Excise) Act, 1949. The Act has in certain respects been amended (2), and, though we have noted the amendments, they do not affect the questions now before us. I turn at once to s. 4 (2):

"This section applies to the following mechanically propelled vehicles, that is to say . . . (f) vehicles (other than vehicles mentioned in para. (a) to para. (d) of this subsection) which are constructed and used on public roads for haulage solely and not for the purpose of carrying or having superimposed upon them any load except such as is necessary for their propulsion or equipment."

If the vehicle is within that category, then, as provided by s. 4 (1), the duty chargeable in respect of it is to be ascertained by reference to Sch. 3 to the Act. I pass to s. 5, which provides, in sub-s. (1) for the duty chargeable in respect of "goods vehicles" as specified in Part 1 of Sch. 4 to the Act, and, in sub-s. (2):

"Subject to the provisions of this Act, if a goods vehicle is used for drawing a trailer there shall be chargeable in respect thereof . . ."

a rather higher duty.

Reverting to the subject-matter of this appeal, we are here undoubtedly concerned with a vehicle drawing a trailer, and the real question in the end is this: Are these tractors "vehicles . . . constructed and used . . . for haulage solely" within s. 4 (2) (f), or are they "goods vehicles" drawing trailers, as defined in s. 5 (2)? One step which must be taken in answering that problem is to see what is meant by "goods vehicle" according to the definition section, s. 27. Section 27 (1) provides this attempted solution of the problem (3):

"... 'goods vehicle' means a mechanically propelled vehicle . . . constructed or adapted for use and used for the conveyance of goods or burden of any description, whether in the course of trade or otherwise."

I have emphasised in reading that definition the words "used for the conveyance of goods", and it will be borne in mind that s. 4 (2) (f) speaks of "carrying"

(1) A director of the plaintiffs H. Lancaster & Co., Ltd.

(2) Amendments to this Act have been made by, among other Acts, the Finance Act, 1950, the Finance Act, 1952, and the Finance Act, 1959. By the Finance Act, 1950. s. 13 (2) (d), the words "para. (a) to para. (d)" were substituted for the words "the foregoing paragraphs", in s. 4 (2) (f) of the Act of 1949 as originally enacted.

(3) By the Finance Act, 1952, s. 7 (2), certain vehicles which would otherwise come within the definition of "goods vehicle" in s. 27 (1) of the Act of 1949 are not to be treated as goods vehicles: see 32 HALSBURY'S STATUTES (2nd Edn.) 679.

a load. Counsel for the county council, in a most ingenious and gallant argument, submitted, first, that the problem was a matter of fact. He said that, as the learned judge held and as is admittedly true, the operations with which these vehicles were concerned could not be properly described as operations of haulage solely, and that was a reference to the operations described in the passage which I have read from the judgment of the learned judge. The operations of dragging the felled timbers to the trailer, sometimes trimming the trees, and thereafter placing or stacking them in the trailer, are operations which, says counsel, are not, strictly speaking, haulage and which involve (and this portion of his argument is important) the presence on these vehicles, of the winches, the jibs and the anchors. Counsel, in summarising his argument, contended that these vehicles were not fairly within the description in s. 4 (2) (f), for two reasons, which were complementary the one to the other: (i) because they were neither constructed nor used for haulage solely, and (ii) because they carried or had superimposed on them a load other than such as was necessary for their propulsion or equipment, that is, for their equipment within the meaning of s. 4 (2) (f), videlicet, equipment for haulage purposes only. Accordingly, counsel for the county council said that the presence on these vehicles of the winch, the jib and the anchor constituted a load outside the scope of s. 4 (2) (f), or, alternatively, constituted "goods" or possibly a "burden" which, not being within the strict limitation of s. 4 (2) (f), brought the case within s. 5.

In the course of the argument, counsel for the county council referred us to a number of cases which have come before the Divisional Court, and also to a case (4) which came before GORMAN, J. I shall not, I hope, be thought disrespectful of counsel's argument if I do not narrate all those cases and do not attempt to make glosses on what they decided. I must, however, make a brief reference to two. The first is *James v. Davies* (5), in which a land rover, a vehicle which is constructed for carrying goods, and which is sufficiently familiar nowadays to everyone, was found to be drawing a trailer. In the land rover itself no goods were loaded, but goods were loaded in the trailer. It was contended by the proprietor of the land rover that the vehicle did not fall within s. 5 of the Act because it was not a goods vehicle within the meaning of the definition section. That argument was rejected. LORD GODDARD, C.J., said (6):

"If the view which commended itself to the justices [namely, that the vehicle was not a goods vehicle within the definition in s. 27 (1)] was right, it would follow that furniture removers could move furniture in large pantehcon trailers, and if they drew them by a vehicle which, though constructed to carry goods, had no furniture in it, it could be said that they were not liable to pay the heavier rate of duty for goods vehicles. I think that once a mechanically propelled vehicle is conveying goods, as this vehicle was conveying the goods, although by means of a trailer, the question becomes easy. The vehicle was adapted for use, and it was being used, for the conveying of goods or burden because it was moving potato trays from one place to another."

The second case, *R. v. Berkshire County Council, Ex p. Berkshire Lime Co. (Childrey), Ltd.* (7), related to agricultural engines which were, at the relevant time, being used for the purpose of conveying lime from one place to another. The owners of the vehicles carried on business as dealers in lime, and the vehicles were lime-spreading vehicles. The question arose whether the vehicles fell within s. 4 (2) (a) or s. 5, or possibly both. The court consisted of LORD GODDARD, C.J., PARKER and DONOVAN, JJ. The relevant language of s. 4 (2) (a), as amended (8), is:

(4) *London County Council v. Hays Wharf Cartage Co., Ltd.*, [1953] 2 All E.R. 34.

(5) [1952] 2 All E.R. 758; [1953] 1 Q.B. 8.

(6) [1952] 2 All E.R. at p. 759; [1953] 1 Q.B. at p. 12.

(7) [1953] 2 All E.R. 779.

(8) By s. 13 (2) (a) of the Finance Act, 1950.

"... agricultural tractors and other agricultural engines, which are not used on public roads for hauling any objects except... (i) for hauling their own necessary gear, threshing appliances, farming implements... or supplies of water or fuel required for the purposes of the vehicle or for agricultural purposes; (ii) for hauling from one part of a farm to another part of that farm, agricultural or woodland produce..."

Bearing in mind that language, I turn to what LORD GODDARD, C.J., said. He drew attention to the broad purpose exemplified by s. 1 of the Act, namely, to make a distinction between classes of vehicles for tax purposes, first, vehicles used on public roads, and then other kinds of vehicles; and to the fact that as regards the former, a heavier rate of tax was payable unless the vehicle came within one or other of what LORD GODDARD called the exemptions. He said (9):

"Once it comes on a road it becomes liable to tax unless it can be brought within an exemption. Section 4 (2) is dealing with mechanically-propelled agricultural vehicles which may, from time to time, come on to the public roads. They will remain taxable at the lower rate so long as they only are used on the roads for the purpose of hauling, but, if they are on the roads and are used for carrying goods, I can find no ground for saying that they are not taxable as goods-carrying vehicles. They must not be used on public roads for hauling any objects except those set out specifically in s. 4 (2), and that subsection, so far as it relates to agricultural vehicles, is dealing with haulage and nothing but haulage. The Act clearly distinguishes between haulage and carriage."

PARKER, J., agreed with that judgment. DONOVAN, J., also came to the same conclusion, but in his judgment (9) he expressed the view that these sections might overlap, and he gave some reasons for thinking that the sections might have to be construed so that one would get from time to time vehicles which fell both within s. 4 and s. 5. So far as the vehicles before him were concerned, he was satisfied that they were, at any rate, within s. 5.

I have referred to those two cases because one of the problems of difficulty which the present case and those other cases have presented turns on the language of the definition of "goods vehicle" in s. 27 (1), and, in particular, on the words which I emphasised in reading, "used for the conveyance of goods". The difficulty is of this nature. If one takes the decisions which I have mentioned as examples, and in particular *James v. Davies* (10), the Divisional Court there said that a vehicle is no less conveying goods or used for the conveyance of goods because it does so, as it were, at one remove—because it does so, not by having them loaded on its own back, but by having them loaded on a trailer which it is itself drawing, being itself unloaded. Thus one is faced with the difficulty that, if that be right, then how can a sensible distinction be made between a conveyance of goods such as was exemplified in *James v. Davies* (10) and a conveyance of goods by a vehicle, such as those with which we are concerned, dragging a trailer on which is loaded felled timber?

I do not find it necessary to attempt any exposition of all the interactions of the various sections of this complicated piece of legislation, and certainly nothing that I am saying should be taken as casting any doubt on the correctness of the Divisional Court's decisions to which I have alluded, decisions which I should have thought, if I may respectfully say so, were plainly in accordance with the common sense and justice of the cases which came before the court. But, whether or not DONOVAN, J., was right in saying that the sections might possibly overlap, I think that, to the formula "used for the conveyance of goods", there should, at any rate, be understood the limitation that, if a vehicle is plainly within the four corners of s. 4 (2) (f), that is, if it is a vehicle constructed and used, not itself for carrying goods, but for haulage solely, then that vehicle

is outside the scope and intended scope of the formula "goods vehicle". In other words, however wide the natural sense of "conveyance of goods" may be, it does, by necessary interaction of the various sections, stop short of covering an operation which is properly within the words of s. 4 (2) (f), namely, "haulage solely". That view, I think, involves no inconsistency with *James v. Davies* (11), having regard to the facts of that case. I recall that there the court was dealing with a land rover, a vehicle constructed for the carriage of goods, and the court was saying that it was no less performing the functions for which it had been constructed when the goods which it was conveying were being conveyed, as I ventured to put it earlier, at one remove. The day and age in which we live is one of complexity and there are undoubtedly problems which these sections present by way of construction which are not entirely easy. It is tempting to ask (but not tempting to answer when it is not necessary to do so): Why, for example, has s. 4 (3) expressly excluded from s. 5 vehicles to which one only of the paragraphs of the preceding subsection applies? Similarly, when one comes to s. 5, why does only sub-s. (3) contain the proviso excluding from that subsection vehicles which are chargeable with duty under another section? But the subject-matter is a difficult one and, in the age of the internal combustion engine, the ingenuity, no doubt, of manufacturers of vehicles presents a problem for those who are concerned with drafting the statutes imposing duties on those vehicles.

It is, however, proper to apply, as far as one can, common sense to the construction of these provisions, and I would start, at any rate, with the view that something which is quite clearly brought within one section to which one rate of duty is applicable ought not easily to be said to attract some other rate of duty because one might, by some construction of the language, bring it also into another section. I do not want to involve myself further with possible overlapping. I found my judgment on this: if a vehicle is brought fairly and squarely within s. 4 (2) (f), that is, because it is being used, as it was constructed, for haulage solely, then it is outside the scope of the definition of "goods vehicle", and the phrase, "conveyance of goods", in the definition, does not extend to purely haulage operations. The problem of the interaction of s. 4 and s. 5 was not before the court in *James v. Davies* (11) and LORD GODDARD, C.J., had not, in that case, to consider the matter which is now before us. The interaction of the two sections was, however, before the court in *R. v. Berkshire County Council* (12), and the passage which I have quoted from LORD GODDARD's judgment in that case included the phrase (13): "The Act clearly distinguishes between haulage and carriage".

The sole remaining question is whether, on the facts as I have stated them, it is correct to say, as the learned judge held, that the vehicles in this case are fairly and squarely within s. 4 (2) (f). I agree with the learned judge in thinking that that question must be affirmatively answered. I follow the point taken by counsel for the county council that, in so far as these vehicles are constructed to enable work to be done other than hauling pure and simple, namely, to enable to be done the operations essentially preliminary to the hauling, they might be said to go beyond s. 4 (2) (f). But I think that so to hold would be to make an unnecessarily fine distinction between one kind of vehicle and another, the main and real purpose of which is haulage and haulage properly so called. I would find it irrational to disqualify the vehicle from the scope of s. 4 (2) (f) merely because its construction enables the essential preliminaries to be performed, namely, dragging the timber up to the trailer, trimming it where necessary, and putting it on the trailer by means of the jib. I think that the whole operation is, in substance, and in truth, haulage and that these added operations are merely essential ancillaries. One might, no doubt, reach a point where one

(11) [1952] 2 All E.R. 758; [1953] 1 Q.B. 8.

(12) [1953] 2 All E.R. 779.

(13) [1953] 2 All E.R. at p. 781.

A would say that the other operations which the tractors are designed to perform have got too far removed from haulage; but I do not think in this case that that stage has been reached.

Taking that view, I would hold that these vehicles fall fairly and squarely within s. 4 (2) (f). I am not forgetting other points which counsel for the county council indicated, including his reference to the use of the word "burden" in the definition in s. 27 (1), but I have not found that those other points further assist. The real question, once the interaction of the two sections is determined, is that which I have last stated and attempted to answer: having regard to the operations which these vehicles are designed to perform or to enable to be performed, are they or are they not vehicles "constructed and used on public roads for haulage solely . . ." ? I think that they are, and, that being the view expounded by the learned county court judge, I would dismiss the appeals.

UPJOHN, L.J.: I agree. The first question to be answered is whether the vehicles in question fall within the Vehicles (Excise) Act, 1949, s. 4 (2) (f), which has been read and which I will not re-read. It seems to me that the haulage vehicles referred to in that subsection are in contrast to the goods vehicles referred to in s. 5. As a matter of commercial common sense, a haulage vehicle must have the necessary mechanism to drag the load from wherever it is situate to the trailer, to load it and arrange it on the trailer, and to unload it at the other end; and it is quite clear from the terms of the learned county court judge's judgment that all the equipment, fixed and movable, on these vehicles was necessary for that purpose. Apart from such equipment, they had no floor boards and were incapable of carrying goods. The argument to the contrary, which was put very attractively by counsel for the county council, involves the proposition that, to obtain the benefit of taxation by falling within s. 4 (2) (f), the vehicle can only haul a fully loaded trailer, and, having towed it to the other end, it cannot unload it. That seems to me to be extravagant. It seems to me, therefore, that these vehicles plainly fall fairly and squarely within s. 4 (2) (f).

The other question to be answered is whether these vehicles are "goods vehicles" within s. 27 (1). My answer to that is that these vehicles are not, because they are not "constructed or adapted for use [or] used for the conveyance of goods"; they are constructed and used for the haulage of goods, and that is the fundamental distinction between s. 4 and s. 5. *James v. Davies* (14) and *Pearson v. Boyes* (15) were both cases dealing with vehicles constructed themselves to carry goods. Those cases show that, where a vehicle is constructed itself to carry goods, the vehicle does not escape liability for the higher rate of duty under s. 5 by hauling the goods rather than carrying them itself, but they do not, in my judgment, bear on the problem which we have to decide. For those reasons and for the reasons given by LORD EVERSLED, M.R., and by the learned county court judge, I agree that the appeals should be dismissed.

PEARSON, L.J.: I also agree and have nothing to add.

Appeals dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Field, Roscoe & Co.*, agents for Clerk to Gloucestershire County Council (for the defendants, the county council); *J. Foley Egginton & Co.*, Sutton Coldfield (for the plaintiffs).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

Re P.C. (an infant).

[CHANCERY DIVISION (Buckley, J.), March 20, 23, 1961.]

Costs—Infant—Guardian ad litem—Wardship application—Injunction against infant's association or marriage with named man—Marriage of infant and named man in foreign jurisdiction—Whether Official Solicitor entitled to his costs incurred as guardian ad litem—Supreme Court Costs Rules, 1959, r. 2 (5), r. 3 (2).

The father of an infant applied by originating summons to have her made a ward of court and for an injunction restraining a named young man from marrying, associating, or having any intercourse or communication with her, and an injunction was granted ex parte until further order. Two days later two motions were launched, one to commit the young man to prison for his contempt of court in associating with the infant in disregard of the ex parte injunction and the other for an order restraining him and the infant from intermarrying or associating, etc. The infant was not respondent to the motion for committal. When these motions came before the court the infant was not represented and had no independent legal advice and so the court appointed the Official Solicitor to be her guardian ad litem and stood over the motions. The originating summons was amended to make the mother (who had at first been the respondent) an applicant with the father, and the infant and the young man were made respondents. Another motion was launched by the applicants and served on the Official Solicitor as the infant's guardian ad litem asking for directions as to the infant's residence. Appearance was entered to the originating summons by the Official Solicitor on behalf of the infant. The two motions came before the court again and were stood over for further evidence to be brought in but they were not proceeded with because the infant and the young man left the country and married in a foreign jurisdiction. The Official Solicitor asked for an order that his costs incurred in performing his duties as guardian ad litem including his costs relating to the three motions and the present application might be taxed and paid to him by the applicants.

Held: when a case was a proper one for an infant to be made a party and, it being necessary for the infant to be represented by a guardian ad litem, the infant was so represented by the Official Solicitor, his costs of so acting were payable by the applicants as if the infant had succeeded; therefore the Official Solicitor was entitled to be paid his costs by the applicants, except the costs of the motion to which the infant was not a respondent.

Eady v. Elsdon ([1901] 2 K.B. 460) applied.

[As to costs of Official Solicitor as guardian ad litem, see 21 HALSBURY'S LAWS (3rd Edn.) 325, para. 685; and for cases on the subject, see 28 DIGEST (Repl.) 698, 2076-2082.]

For the Guardianship of Infants Acts, 1886 and 1925, see 12 HALSBURY'S STATUTES (2nd Edn.) 942, 954.

For the Law Reform (Miscellaneous Provisions) Act, 1949, s. 9, see 28 HALSBURY'S STATUTES (2nd Edn.) 777.]

Cases referred to:

Eady v. Elsdon, [1901] 2 K.B. 460; 70 L.J.K.B. 701; 84 L.T. 615; 28 Digest (Repl.) 698, 2080.

Gillette Safety Razor Co. & Gillette Safety Razor, Ltd. v. Franks, (1924), 40 T.L.R. 606; 41 R.P.C. 499; 43 Digest 315, 1367.

Goatly v. Jones, [1907] W.N. 161; 28 Digest (Repl.) 698, 2081.

Jackson v. Jackson, [1908] P. 308; 77 L.J.P. 147; 33 Digest 138, 151.

Adjourned Summons.

This was an application by summons dated Dec. 13, 1960, by the Official

A Solicitor to the Supreme Court for an order that the costs incurred by him in the performance of his duties as guardian ad litem of an infant, including therein his costs relating to three motions, two dated Apr. 22, 1960, and one dated May 25, 1960, and the costs of the present application, might be taxed and the certified amount thereof be paid to the Official Solicitor by the applicants in the proceedings, the father and mother of the infant. The facts appear in the judgment.

B *W. J. C. Tonge* for the Official Solicitor.

M. Essayan for the applicants.

C **BUCKLEY, J.:** The proceedings were commenced by originating summons on Apr. 20, 1960, and originally they were constituted with the father of the infant as the applicant and her mother as respondent, and no other parties. The originating summons asked that the infant be made a ward of court, and that a certain young man named therein should be restrained from marrying her, and other associated relief. On Apr. 20, 1960, an ex parte injunction was granted by the vacation judge restraining the young man in question and the infant until Apr. 26, 1960, or further order from marrying, associating, or having any intercourse or otherwise communicating with one another. On Apr. 22, 1960, two motions were launched, one of which was to commit the young man for his contempt of the ex parte injunction, and the other a motion for an order restraining him and the infant from intermarrying, associating or having any intercourse or communication until further order. Those motions came before the court first on Apr. 26, 1960 (when they were stood over), and secondly on May 6, 1960, and on that occasion the infant, not being represented in the proceedings or having any independent legal advice, but being some eighteen or nineteen years of age, I took the view that it would be right that she should be advised and represented in the proceedings by the Official Solicitor as her guardian ad litem.

F The motions came on again on May 20, 1960, when the Official Solicitor attended on behalf of the infant, but at that stage, I think, he had not instructed counsel. I then intimated that in the circumstances I thought that the originating summons should be amended to make the infant and the young man respondents. That was done in due course, the amendment being actually made on June 3, 1960. When the summons was amended, the infant's mother was converted from being a respondent to being one of the applicants. So from that date forward G the father and mother were the applicants, and the respondents to the summons were the infant and the young man.

H On May 25, 1960, another motion was launched, this time by the applicants, and served on the infant and the Official Solicitor as her guardian ad litem asking that directions should be given as to the residence of the infant. At that time the infant was not living with her parents, and the Official Solicitor had not thought it desirable to disclose to her parents where she was without the direction of the court; and as a result of that motion I gave directions which resulted in the parents being told where she was, and in her continuing to live where she was, on certain terms and conditions.

I Appearance was entered by the Official Solicitor on behalf of the infant as a respondent to the originating summons on June 9, 1960. The motions relating to the committal of the young man and the injunction which was sought against the young man and the infant were not finally disposed of. On June 15 and 16, 1960, the matter came before me again on those motions, and I was then disposed to think that the case was one in which, if the court were satisfied that the young man would be able to provide financially for the infant, the court might give its consent to their marriage; and the proceedings were stood over to enable the young man to bring in evidence directed to that point. He said that he had good prospects of obtaining employment abroad, and I was not prepared to make any order consenting to the infant's marriage

until I was satisfied as to the reality of those prospects. The matter was stood over, but never came back again to the court because, before anything further happened, the infant and the young man left the country, and have ever since been living abroad, and have in fact married, without the consent of the court, in a foreign jurisdiction. In those circumstances the Official Solicitor says that he wants to have his costs provided by the applicants. It is submitted on his behalf that any plaintiff who starts proceedings against an infant, or proceedings relating to an infant, in which it is right that the infant should be made a party, cannot proceed therein without a guardian ad litem being appointed for the infant; and that if no one else is prepared to act as guardian ad litem, and it is necessary to seek the assistance of the Official Solicitor, the plaintiff must pay for the privilege of having the assistance of the Official Solicitor to act as guardian ad litem of the infant defendant, and I have been referred to certain authorities in that connexion which I shall mention.

First I should perhaps refer to Ord. 65, r. 13, as it stood in the Rules of the Supreme Court published in the ANNUAL PRACTICE, 1960, at p. 1899. This rule has since been rescinded. It provided:

"Where the court or a judge appoints one of the solicitors of the court to be guardian ad litem of an infant or person of unsound mind, the court or judge may direct that the costs to be incurred in the performance of the duties of such office shall be borne and paid either by the parties or some one or more of the parties to the cause or matter in which such appointment is made, or out of any fund in court in which such infant or person of unsound mind may be interested, and may give directions for the repayment or allowance of such costs as the justice and circumstances of the case may require."

Broadly speaking, that rule left the question of the Official Solicitor's costs in the discretion of the court.

That rule, as I say, has now been rescinded, and the position is now governed by the Supreme Court Costs Rules, 1959, which are to be found in the ANNUAL PRACTICE, 1961, at p. 1832. Rule 2, sub-r. (5) provides (see p. 1839):

"The powers and discretion of the court as to costs under s. 50 of the Supreme Court of Judicature (Consolidation) Act, 1925 (which provides that the costs of and incidental to proceedings in the Supreme Court shall be in the discretion of the court and that the court shall have full power to determine by whom and to what extent the costs are to be paid), and under the enactments relating to the costs of criminal proceedings to which these rules apply, shall be exercised subject to and in accordance with these rules (r. 3)."

Rule 3, sub-r. (2), provides (see p. 1868):

"If the court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the court shall, subject to these rules, order the costs to follow the event, except when it appears to the court that in the circumstances of the case some other order should be made as to the whole or any part of the costs."

There is no rule corresponding to the old rule (R.S.C., Ord. 65, r. 13) specifically dealing with the costs of the Official Solicitor when he is appointed guardian ad litem. The new rules leave the question of costs as freely in the discretion of the court as they were under the old rules.

I will now refer shortly to the authorities to which my attention has been drawn. In *Eady v. Elsdon* (1) a plaintiff had sued an infant defendant for damages. No appearance had been entered for the infant, and on the plaintiff's application the Official Solicitor had been appointed guardian ad litem of the infant defendant. The plaintiff had succeeded in the action, and had been ordered to

(1) [1901] 2 K.B. 460.

A pay the costs of the Official Solicitor as guardian ad litem which were to be taxed by the taxing master. The order had not specified whether the costs so to be taxed were to be taxed as between solicitor and client or party and party. On the taxing master taxing the costs on the party and party basis, the Official Solicitor had objected to the taxation. That objection had eventually come before GRANTHAM, J., who had allowed the Official Solicitor's objections; that is to say, he had intimated that by reason of the peculiar position of the Official Solicitor, he was entitled to an indemnity, and that he ought to have his costs on a solicitor and client basis. On appeal against that order of GRANTHAM, J., the Court of Appeal pointed out that where the court ordered any party to pay costs, without saying on what basis those costs were to be taxed, they ought to be taxed on a party and party basis. There was another point in the case, however, which was this: some evidence had been called by the Official Solicitor on behalf of the infant defendant which had not persuaded the judge to the view of the facts which the evidence was directed to establish, and the taxing master had disallowed the Official Solicitor's costs relating to that issue because, he said, the Official Solicitor had failed on that part of the case. On that point the Court of Appeal said that the Official Solicitor was entitled to be paid his costs as though he were a successful party. So that this case establishes the proposition that where a plaintiff secures the appointment of the Official Solicitor as guardian ad litem of an infant defendant whom he (the plaintiff) is suing, the plaintiff is liable to be ordered to pay the Official Solicitor's costs as though the Official Solicitor had succeeded, even though in the event the plaintiff succeeds in the action. The Court of Appeal did not seek to criticise in any way the order originally made at the trial which did not require the Official Solicitor's costs to be taxed on a solicitor and client basis. In the result, therefore, the Official Solicitor received his costs on a party and party basis as though he had been a successful party, although in fact the infant whose guardian ad litem he was, had not been successful.

F The next case I should mention is *Goatly v. Jones* (2). That was an action to set aside a settlement executed by a certain Mr. and Mrs. Jones. The plaintiff was the trustee in bankruptcy of Mr. Jones, and the infant children of the marriage had been made defendants in the action. At the trial the court held that the settlement was void against the plaintiff so far as it comprised the property of the bankrupt, but valid so far as it comprised the property of Mrs. Jones. The costs of the Official Solicitor as guardian ad litem of the infant defendants, were ordered to be taxed and paid by the plaintiff, who was to add them to the costs which Mr. and Mrs. Jones were ordered to pay. There was then some discussion as to precisely what should be the form of the order in respect of the Official Solicitor's costs; and it was said on behalf of the plaintiff that it was the settled practice to tax them as between party and party unless a special direction was given to the contrary. Counsel for the plaintiff then said that the plaintiff was a trustee in bankruptcy, and could not consent to a solicitor and client taxation, but would not object to the order being in the terms of R.S.C., Ord. 65, r. 13; viz., that the guardian ad litem should be paid the costs incurred in the performance of the duties of the office (of guardian ad litem). Counsel for the Official Solicitor accepted that, and accordingly the judge directed that the order should be made in that form.

I That was followed by *Jackson v. Jackson* (3). In the more recent case of *Gillette Safety Razor Co. & Gillette Safety Razor, Ltd. v. Franks* (4), where the defendant was an infant, ASTBURY, J., whose attention had not been drawn to either of the two last mentioned cases, gave the Official Solicitor his costs on a solicitor and client basis.

It seems to me that when the parent of an infant whom he or she is unable to control to his or her own satisfaction comes to the court to obtain the assistance of the court, and the case is a proper one for the infant to be made a party to

the proceedings, the applicant is really in the position of a plaintiff in an action who sues an infant defendant. More particularly is this so, when, as in the present case, one of the earliest steps in the proceedings is an application by motion for an injunction restraining the infant from doing some act. It is quite true that it is common practice in these cases in the first instance not to make the infant a respondent to the summons. It is also very commonly the practice that at an early stage in the case the infant becomes a respondent to the summons; and in the present case the infant was from the beginning a respondent to the motion for an injunction. It is also true that in the present case the suggestion that the Official Solicitor should act as guardian ad litem of the infant originated not from the applicant, but from the court. However, I do not think that that really makes any difference. It was necessary that the infant should be represented by a guardian ad litem for the purpose of these proceedings. It appeared that there was no one else suitable to fill that office, and the only person suitable and available was the Official Solicitor. The appointment of the Official Solicitor as guardian ad litem was, therefore, a *sine qua non* to the proceedings going on and being effectively disposed of. In those circumstances it appears to me that the principle which is indicated by such cases as *Eady v. Elsdon* (5) is applicable to cases of this kind.

The way in which the merits of the case lie, whether the parents are right in their view, or whether the infant is justified in whatever view he or she may have adopted in regard to the matter which is under discussion in the proceedings, does not really affect the question. If the parents are not justified in their attitude, of course, that is all the more reason for saying that they should pay the costs incurred by other people in proceedings which they have commenced. Even if they were quite justified in their attitude, as the plaintiff in *Eady v. Elsdon* (5) was justified in his attitude, in my view they must bear the costs incidental to the infant respondent being properly advised and represented.

It has been suggested by counsel, who appears on behalf of the applicants in the proceedings (the parents) that I ought to indicate that the costs of the Official Solicitor should be borne in the first instance by the young man in question and only to the extent that they are not satisfied from that source by the applicants. I do not think that I could do that, partly because he is not before me at all on this summons, and therefore he is not in a position to debate the matter before me; partly because I understand (I have no detailed information about this) that he is legally aided; and partly because it seems to me that this principle proceeds on the basis that if somebody sues an infant he is *prima facie* the person who is responsible for costs of this kind. He may have a right to recover them over against someone else, but I do not think that I could throw the burden of these costs on the young man in the first instance, and to the extent only that that order might turn out to be inadequate, on the applicants.

In these circumstances I propose to direct that the costs of the Official Solicitor incurred in the performance of his duties as guardian ad litem of the infant, including his costs relating to the motion of Apr. 22, 1960, which asked for an injunction against the infant, and his costs of the motion of May 25, 1960, relating to the residence of the infant, be taxed and paid by the applicants. That does not include the costs of the motion of Apr. 22, 1960, which related to the motion for committal of the young man because the infant was not a respondent to that motion; and I do not think that even if I did order the Official Solicitor's costs relating to that motion to be taxed, there could be any such costs; the taxing master must necessarily disallow them because he was not a party to that motion.

Order accordingly.

Solicitors: *Official Solicitor* (as guardian ad litem of the infant); *Donald Silk & Co.* (for the applicants). [Reported by JENIFER SANDELL, Barrister-at-Law.]

Re GILBERT'S APPLICATION.

[CHANCERY DIVISION (Russell, J.), March 28, 29, 1961.]

Land Registration—Appeal—Procedure—Appeal to nominated judge of Chancery Division from decision of registrar—Whether re-hearing or trial de novo—R.S.C., Ord. 54D, r. 6.

An appeal by originating summons pursuant to R.S.C., Ord. 54D, r. 6*, from a decision of the registrar under the Land Registration Act, 1925, to a single nominated judge of the Chancery Division, is by way of a re-hearing, as in the case of an appeal to the Court of Appeal, and is not a trial de novo at which fresh evidence may be adduced; but this does not prevent the court from admitting additional affidavit or oral evidence in a proper case (see p. 317, letter B, post).

For the purposes of the appeal, there should be available to the parties either a shorthand note, by an official of the Land Registry, of the evidence before the registrar, or a note of the evidence made by the registrar and similar to a judge's note of the evidence; and the registrar should state, in his decision, his view of the facts. The appellant's affidavit should state the general nature of the case and should exhibit (a) any notes of evidence required to supplement the official note and (b) any documents which are not marked as exhibits by the registrar or which do not prove themselves or are not agreed documents. Where all the documents and facts are agreed, no affidavit is necessary but copies of the agreed statement of facts and the relevant documents should be produced (see p. 317, letters D to H, post).

[As to appeals to the High Court from the Chief Land Registrar, see 23 HALSBURY'S LAWS (3rd Edn.) 352, para. 882.

For the Land Registration Rules, 1925, r. 298 and r. 299, see 18 HALSBURY'S STATUTORY INSTRUMENTS 203.

For R.S.C., Ord. 54D, see the ANNUAL PRACTICE, 1961, p. 1442.]

Cases referred to:

Allender v. Royal College of Veterinary Surgeons Council, [1951] 2 All E.R. 859; 2nd Digest Supp.

Henderson's Conveyance, Re, [1940] 4 All E.R. 1; [1940] Ch. 835; 109 L.J.Ch. 332; 2nd Digest Supp.

J.S. (an infant), Re, [1959] 3 All E.R. 856; [1959] 1 W.L.R. 1218; 3rd Digest Supp.

Procedure Summons.

On Nov. 23, 1960, on an application by the respondent, Edward Opotiki Mousley, the Chief Land Registrar ordered the rectification of the register at the Land Registry by cancelling a note in the property register with respect to freehold land in Dances Way, West Town, Hayling Island, Hampshire, comprised in registered title No. H.P. 16391, on the ground that a conveyance of the land made on June 20, 1939, by the appellant, Ernest William Gilbert, to the respondent, did not reserve to the appellant a valid and subsisting right of way for the benefit of land retained by him adjacent to the land thereby conveyed.

On Dec. 13, 1960, the appellant issued an originating summons pursuant to R.S.C., Ord. 54D, r. 6, appealing under the Land Registration Act, 1925, from the decision of the Chief Land Registrar. By a procedure summons, dated Mar. 23, 1961, the appellant now asked (i) whether certain affidavits filed in the matter on Mar. 13, 1961, were proper evidence to be adduced before the court on the hearing of the originating summons, and (ii) for further or other directions concerning the evidence to be adduced.

G. B. Parker for the appellant.

Charles Sparrow for the respondent.

* The terms of r. 6 are printed at p. 315, letter A, post.

Mar. 29. **RUSSELL, J.**, read the following judgment: This is a procedure summons in an appeal under the Land Registration Act, 1925, from the decision of the Chief Land Registrar. He decided that a purported exception or reservation of a way in a conveyance of land by the appellant to the respondent to the appeal, as noted on the register, should be expunged, and that an indication on the plan of such a way should be removed. It was a decision of law on the facts before him. The fundamental question on this procedure summons is whether, on appeal from that decision to a single nominated Chancery judge, evidence is taken *de novo* or whether it is a re-hearing in the limited sense in which that word is applied to an appeal to the Court of Appeal. B

I read the relevant rules of the Land Registration Rules, 1925 (1), which, in effect, reproduce the relevant provisions of the statute and have statutory force. C
Rule 298 is in the following terms:

"(1) If any question, doubt, dispute, difficulty or complaint arises before the registrar upon any application or during any investigation of title . . . (b) as to . . . any matter entered or noted in or omitted from the register . . . (whether such questions relate to the construction, validity, D
or effect of any instrument, or the persons interested, or the nature or extent of their respective interests or powers, or as to order of priority, or the mode in which any entry should be made or dealt with in the register or otherwise), the registrar shall hear and determine the matter and, subject to appeal to the court, make such order in the matter as he shall think just.

"(2) But the registrar may, if he thinks fit, instead of deciding the question himself, refer the matter at any stage, or any question thereon, for the decision of the court." E

Rule 299 is:

"Any person aggrieved by an order or decision of the registrar may appeal to the court." F

Provision is made in the rules for evidence to be given on oath (2); that, indeed, was done in this case, and there were speeches by the legal representatives of the parties.

The relevant order under the Rules of the Supreme Court is Ord. 54D. R.S.C., Ord. 54D, deals with "Appeals and References under the under-mentioned Acts", namely, the Law of Property Act, 1922, the Law of Property Act, 1925—it used to deal with the Settled Land Act, 1925—the Land Registration Act, 1925. Under r. 1 it is provided that there shall be a right of appeal from decisions of the Minister of Agriculture and Fisheries made under the Law of Property Act, 1922, in respect of certain matters, and r. 2 says: G

"Every appeal from the Minister under that Act shall be instituted in the Chancery Division of the High Court of Justice by originating notice of motion and shall be heard and determined by a single judge nominated from time to time either generally or in any particular instance by the Lord Chancellor." H

Rule 3 deals with appeals under the Law of Property Act, 1925, and says:

"There shall be a right of appeal from (a) any order under s. 84 of the Law of Property Act, 1925, of the authority therein referred to; and I
(b) any decision of the Minister under s. 191 of that Act."

Rule 4 says that r. 2 shall apply *mutatis mutandis* to every appeal under r. 3. So far as s. 84 of the Law of Property Act, 1925, is concerned, those matters are now dealt with by the Lands Tribunal (3), from which an appeal lies to the Court of Appeal.

(1) S.R. & O. 1925 No. 1093.

(2) By r. 316 (4).

(3) Under the Lands Tribunal Act, 1949; 28 HALSBURY'S STATUTES (2nd Edn.) 317.

A Rule 6 deals with appeals and references under the Land Registration Act, 1925, and reads:

B "Every reference by or appeal from the registrar under the Land Registration Act, 1925, shall be instituted in the Chancery Division of the High Court of Justice by originating summons, complying in form with the requirements of Ord. 55, r. 14A (3), and shall be heard and determined by a single judge of that Division nominated from time to time either generally or in any particular instance for that purpose by the Lord Chancellor."

Rule 7 provides:

C "Every appeal to the High Court of Justice from an order of a county court made under [the Land Registration Act, 1925] shall be instituted in the Chancery Division by originating notice of motion, and shall be heard and determined by a Divisional Court constituted by two judges of that Division nominated from time to time either generally or in any particular instance for that purpose by the Lord Chancellor."

Rule 8 provides:

D "The determination of every appeal under this order shall be final unless leave to appeal is given by the court determining the same or the Court of Appeal."

Rule 9 provides:

E "Every notice of motion or summons originating an appeal under this order shall state the grounds of appeal. No grounds other than those so stated shall (except with the leave of the court hearing the appeal and on such terms as such court may think just) be allowed to be taken by the appellant at the hearing of the appeal."

Rule 10 provides:

F "Every appeal under this order shall be brought within twenty-one days of the order, decision or award appealed against or within such extended time as the court hearing the appeal may think fit to allow."

Rule 11 provides:

G "The ordinary practice and rules in the Chancery Division shall in so far as the same are not inconsistent with this order apply to proceedings under this order."

H For the appellant it was submitted that evidence should be taken de novo. It was said that r. 11 applies the ordinary practice and rules of the Chancery Division save in so far as they are not inconsistent with the order, and that the ordinary practice is for any hearing of an originating summons to be supported by affidavit evidence filed thereon to which alone regard was had, supplemented (if need be) by cross-examination or other oral evidence given before the court; the fact that the proceeding is described as an appeal from a hearing and determination by the Chief Land Registrar is not, it was said, inconsistent with this; the proceedings and evidence are the same whether it is a reference by the Chief Land Registrar without a hearing or an appeal, except that in the latter case regard may be had to the reasons of the Chief Land Registrar and evidence given before him may be used in cross-examination.

I For the respondent to the appeal, the following points were made: This is, in terms, an appeal, as distinct from a reference; there has been a full hearing, with evidence on oath, before the Chief Land Registrar; the originating summons must, under R.S.C., Ord. 54D, state the grounds of appeal, which might well be based on the evidence taken before the Chief Land Registrar. There is ample scope, it is said, for the application of r. 11 without requiring in such a case a trial de novo; there is no ordinary practice or rule of the Chancery Division requiring that an appeal to a single judge be a trial de novo; so far as examination

of the Rules of the Supreme Court reveals, it is usual to provide for a re-hearing of the type in the Court of Appeal; by R.S.C., Ord. 55A, r. 6 (6), which deals with appeals to a single judge from inferior courts in guardianship matters, r. 35 and r. 36 of R.S.C., Ord. 59 are expressly made applicable; similarly, under R.S.C., Ord. 55A, r. 9, in adoption appeals, as to which see *Re J.S. (an infant)* (4); R.S.C., Ord. 59, r. 35 and r. 36, in effect, require that the appeal shall be a re-hearing on the basis of evidence adduced below, as in the Court of Appeal. Bankruptcy appeals to a Divisional Court of the Chancery Division from county courts are similarly dealt with by R.S.C., Ord. 59, r. 36A. By R.S.C., Ord. 59, r. 38 (1), which deals with certain statutory rights of appeal from tribunals to the High Court, it is provided that the appeal shall be commenced by notice of motion and that:

“Every such appeal shall be supported by affidavit and, if the court so directs at the hearing, by oral evidence.”

In *Allender v. Royal College of Veterinary Surgeons Council* (5) a Divisional Court of the Queen's Bench Division plainly took the view that such an appeal was a re-hearing in the Court of Appeal sense and not a trial de novo. I observe that r. 47 of R.S.C., Ord. 59, contains equally the general phrase:

“Subject to the provisions of this order, the Rules of the Supreme Court, 1883, shall apply, so far as applicable, to proceedings to which this order relates, in like manner as they apply to other proceedings in the Supreme Court.”

It was submitted that the comments of FARWELL, J., in *Re Henderson's Conveyance* (6), reflected in other words the language of R.S.C., Ord. 59, r. 38, which I have just quoted, when he said:

“The position of this court in dealing with these matters is that it is re-hearing the matter to a very large extent. Under the rules, if the court thought it necessary, it could require witnesses to attend and give oral evidence. Generally speaking, the matter is dealt with upon such facts as were brought to the attention of the Official Arbitrator.”

That was a decision under s. 84 of the Law of Property Act, 1925, and, therefore, under r. 3 and r. 4 of R.S.C., Ord. 54D; and I think, on the whole, that the approach of FARWELL, J., in that case is similar to the approach of the language which I have quoted from R.S.C., Ord. 59, r. 38, which the Divisional Court in *Allender v. Royal College of Veterinary Surgeons Council* (5) took to be a reference not necessarily for a trial de novo. It was, moreover, urged that R.S.C., Ord. 54D, r. 7, provided for appeals from county court decisions under the Land Registration Act, 1925, by originating notice of motion to a Divisional Court of the Chancery Division. It was said (rightly, I think) that to such appeals R.S.C., Ord. 59, r. 35 and r. 36, would apply, and it was said that a re-hearing in the Court of Appeal sense in that case would contrast oddly with a trial de novo in the case of an appeal from the Chief Land Registrar to a single judge, under R.S.C., Ord. 54D, r. 6.

It was urged for the appellant that the true view should be that, since in other instances there was express provision in the Rules of the Supreme Court for a re-hearing as distinct from a trial de novo, that was all the more reason for holding that these proceedings, initiated by originating summons, should be regarded as entirely fresh proceedings. I think that there is danger in using that approach to the construction of one of a body of rules which cover very varying subjects, which have been added to bit by bit as occasion requires without necessarily any close inspection by the draftsman of the whole of the

(4) [1959] 3 All E.R. 856.

(5) [1951] 2 All E.R. 859.

(6) [1940] 4 All E.R. at p. 3; [1940] Ch. at p. 839.

A existing corpus of the rules, and which are rules of procedure which, as a whole, reveal, in connexion with appeals from decisions arrived at on sworn evidence, the general attitude that the whole procedure should not be repeated on appeal. It was also urged that the remarks of FARWELL, J., in *Re Henderson's Conveyance* (7) showed that he considered the appeal to be a trial de novo. As indicated, I think that those remarks tend in the other direction.

B I accept the arguments for the respondent to the appeal and I hold, on the question of principle, that appeals under R.S.C., Ord. 54D, r. 6, are by way of re-hearing and not a trial de novo. This, of course, in no way prevents the court on appeal from admitting additional evidence, whether affidavit or oral, in a proper case.

C The practice in these cases before the Chief Land Registrar is that an official of the Land Registry attends and takes notes of the proceedings. In the present case, the result is a report prepared by that official which is rather like a law report. It sets out a number of facts and a summary of the argument on each side, and a verbatim report of the decision of the Chief Land Registrar. I do not know whether the facts are based on a shorthand note by the official, or on the sort of note of evidence which is taken by a judge. If I am correct in my view of the nature of the appeal, it seems to me that there should be a system at the hearing by which the Chief Land Registrar makes the equivalent of a judge's note of the evidence, which will be made available to the parties for purposes of an appeal. The alternative is a shorthand note by the official referred to, available to the parties. In either event, the Chief Land Registrar should, in his decision, state his view of the facts. This system will, in my view, give full scope to the requirement that the originating summons shall state all grounds of appeal. In so far as documents are produced in evidence, the Chief Land Registrar can, of course, authenticate them by marking if necessary. Generally, however, they can be exhibited to an affidavit on the appeal. Some registry documents prove themselves. On the appeal, the appellant's evidence by affidavit will state the general nature of the case, and will exhibit any notes of evidence which may be suggested to be required to supplement the official Land Registry transcript or note of evidence, and any documents which are not officially marked as exhibits by the Chief Land Registrar, or which do not prove themselves, or which are not agreed documents. If additional evidence is sought to be given by leave, it should be in affidavit form. In many cases, of course, the whole of the documents and facts will be common ground. In such case, on appeal, no affidavit will be necessary, but copies of the agreed statement of facts and relevant documents will be produced in chambers on the first appointment before the master under the originating summons. I have dealt with this at some length in an endeavour to give some general guidance in these matters both to the Chief Land Registrar and to the parties, bearing in mind that this is the first such appeal.

H In the present case, the appellant filed an affidavit by the appellant (who gave oral evidence before the Chief Land Registrar) and by a land agent, who did not. The master was minded to exclude the latter affidavit on the ground that the deponent had not given evidence below. The respondent to the appeal also suggested that the appellant's affidavit went beyond the evidence below. I have not gone into the details of the case. There was, in fact, a shorthand note taken at the instance of the respondent to this appeal. The proper way in which this should be dealt with, in the particular circumstances, is that the two affidavits filed by the appellant should go forward to the hearing, the respondent to the appeal being entitled at the hearing to object to any part as new matter not to be admitted save by leave of the court. The respondent to the appeal should

exhibit the transcript of the shorthand note taken at his instance, the appellant having an opportunity to challenge its accuracy by affidavit in reply. The official's report should be available to the court. The other documents are already in evidence.

Order accordingly.

Solicitors: *George & George* (for the appellant); *Woodham Smith, Borradaile & Martin* (for the respondent).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

NEWBERRY v. SIMMONDS.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Winn and Widgery, JJ.), March 1, 28, 1961.]

Road Traffic—Motor vehicle—"Mechanically propelled vehicle"—Car with no engine—Possibility that engine might shortly be replaced and motive power restored—Vehicles (Excise) Act, 1949 (12, 13 & 14 Geo. 6 c. 89), s. 1, s. 15.

A motorist kept his apparently normal motor car, on which the annual duty charged by the Vehicles (Excise) Act, 1949, s. 1 (a)*, in respect of mechanically propelled vehicles used on public roads in Great Britain had not been paid, and which therefore had no current licence, on a public road. In answer to an information before justices charging the motorist that he had used on a public road a "mechanically propelled vehicle" for which a licence under the Act was not in force, contrary to s. 15 of the Act†, he gave evidence that the engine of the car had been stolen by a person unknown, and contended that the car was therefore not a "mechanically propelled vehicle". There was no other evidence whether or not the car in fact had an engine and it was not clear whether the justices had accepted the evidence that the engine had been stolen.

Held: a motor car did not cease to be a "mechanically propelled vehicle" on the mere removal of the engine if the evidence admitted the possibility that the engine might shortly be replaced and the motive power restored; the evidence concerning the absence of the engine from the car in the present case was not sufficient to show that the car had ceased to be a mechanically propelled vehicle, and the case would be remitted to the justices with a direction to convict.

Laurence v. Howlett ([1952] 2 All E.R. 74) distinguished, and dictum of *DEVLIN, J.*, at p. 75, and *Floyd v. Bush* ([1953] 1 All E.R. 265) applied.

QUAERE whether different considerations apply to a vehicle which has had its mechanical means of propulsion permanently removed (see p. 320, letter D, post).

Per CURIAM: "mechanically propelled vehicle" has prima facie the same meaning in the Vehicles (Excise) Act, 1949, as it had in the Road Traffic Act, 1930 (see p. 320, letter A, post).

[As to the meaning of mechanically propelled vehicle in the road traffic legislation, see 33 HALSBURY'S LAWS (3rd Edn.) 417, 418, para. 680; and as to the offence of keeping a vehicle without a licence, see *ibid.*, p. 449, para. 762.

* By the Vehicles (Excise) Act, 1949, s. 1 (a): "there shall be charged in respect of mechanically propelled vehicles used on public roads in Great Britain the duties of excise provided by . . . this Act."

† By s. 15 (1): "If any person uses on a public road any mechanically propelled vehicle for which a licence under this Act is not in force . . . he shall be liable to [certain penalties]".

A For the Vehicles (Excise) Act, 1949, s. 1, s. 15, see 21 HALSBURY'S STATUTES (2nd Edn.) 1434, 1446.]

Cases referred to:

Floyd v. Bush, [1953] 1 All E.R. 265; 117 J.P. 88; [1953] 1 W.L.R. 242; 3rd Digest Supp.

B *Lawrence v. Howlett*, [1952] 2 All E.R. 74; 116 J.P. 391; 3rd Digest Supp.

Case Stated.

The prosecutor appealed by way of Case Stated from the dismissal by a magistrates' court on Sept. 16, 1960, of his information laid against a motor car owner under the Vehicles (Excise) Act, 1949, s. 15. The facts are stated in the judgment.

C *Paul Wrightson* for the appellant, the prosecutor.

The respondent did not appear and was not represented.

Cur. adv. vult.

Mar. 28. **WIDGERY, J.**, read the following judgment of the court at the request of LORD PARKER, C.J.: This is an appeal by way of Case Stated by justices for the Park Petty Sessional Division of the County of London arising out of the hearing of an information laid by the appellant and alleging that on Nov. 7, 1959, at Courtfield Gardens, Kensington, the respondent did keep on a public road a mechanically propelled vehicle bearing registration mark BBD 423 for which a licence under the Vehicles (Excise) Act, 1949, as amended, was not in force, whereby the respondent became liable to the excise penalty provided by s. 15 of the said Act.

E The justices heard this information on Sept. 16, 1960, and found the following facts:—(a) Between Nov. 7, 1959, and Dec. 3, 1959, the respondent kept a Ford motor car No. BBD 423 in the road in Courtfield Gardens aforesaid. (b) During the period aforesaid the said car bore an expired road fund licence. (c) The respondent admitted that he had no current road fund licence for the said car. (d) By appearance (that is to say, without lifting the bonnet), the said car was an ordinary motor car.

G At the hearing before the justices the respondent stated that at some time prior to Nov. 7, 1959, the engine of the said car had been stolen by some person unknown, and the respondent contended that because the car had no engine at the material time it was not a mechanically propelled vehicle and that, accordingly, he had not committed the offence charged. It does not appear that the justices affirmatively accepted the respondent's statement about the theft of the car's engine. They have stated that they were of the opinion that if there were no engine in the said car it was not a mechanically propelled vehicle and that the onus was on the appellant to prove affirmatively that the car had an engine. The appellant having failed to prove this fact the justices dismissed the information.

H The Vehicles (Excise) Act, 1949, contains no definition of the expression "mechanically propelled vehicle", but counsel for the appellant contends that this expression should have the same meaning in the Act of 1949 as it has in the Road Traffic Acts and, in particular, as it had in s. 1 of the Road Traffic Act, 1930 (1). Founding himself on authority under the Act of 1930, he submits that the words are words of classification and not of definition so that a vehicle does not cease to be "mechanically propelled" merely because some part of its propelling mechanism has been removed, and he invites us to say that a motor car remains within the classification of a mechanically propelled vehicle until it finally reaches the breaker's yard and its registration book is surrendered. Accordingly, he contends that the motor car in this case remained a mechanically propelled vehicle even if its engine had been stolen. We have not had the advantage of hearing argument on the other side.

I (1) See now the Road Traffic Act, 1960, s. 253.

We accept the submission that, *prima facie*, the words in question have the same meaning in the Act of 1949 as in the Act of 1930 and have accordingly considered the authorities under the latter Act cited by counsel for the appellant.

It appears from the judgment of this court in *Floyd v. Bush* (2), that a vehicle may still be "mechanically propelled" for this purpose even though mechanical power was not in use at the material time, and in the somewhat unusual case of *Lawrence v. Howlett* (3) DEVLIN, J., said:

"A motor car is a mechanically propelled vehicle. It is designed so that it has only a mechanical means of propulsion, and, therefore, I should hold that, whatever its use might be at any given moment, whether it was in working order or whether it was being driven on a free-wheel or driven downhill with the engine disengaged, it still was being used as a mechanically propelled vehicle."

In the last-mentioned case the vehicle was a pedal cycle with an auxiliary motor from which the cylinder piston and connecting rod had been removed and, although there were indications that the removal of those parts was only temporary, the justices found as a fact that it was in use at the material time only as a pedal cycle, but we think that it may be necessary to consider hereafter whether different considerations apply to a vehicle which has had its mechanical means of propulsion permanently removed. Such a question may be one of fact and degree in which both the extent to which the power unit and transmission have been removed and the permanence of such removal are matters for consideration. We are, however, satisfied that a motor car does not cease to be a mechanically propelled vehicle on the mere removal of the engine if the evidence admits the possibility that the engine may shortly be replaced and the motive power restored.

In the present case, therefore, the fact that the appellant had not proved that there was an engine in the car was of no significance because the absence of an engine would not be conclusive. Further, even if the justices accepted the evidence of the respondent, that evidence was not in itself sufficient to take a vehicle which was in other respects an "ordinary motor car" out of the classification of a mechanically propelled vehicle. On the totality of the evidence in this case, the justices had no alternative but to find the charge proved, and the case will be sent back to them with a direction to convict.

That being, as the court thinks, the position with regard to the point of law raised by the Case Stated, it is not necessary to decide where, in such a state of facts as these justices partially investigated, the onus of proof would rest. It may perhaps arise some time for consideration whether, because the owner of a vehicle would normally have peculiarly within his own knowledge all the relevant facts, the onus of proof should be regarded as shifting to him, once his vehicle has been shown to be by appearance a motor car, to establish that it was at the material time no longer a "mechanically propelled vehicle".

Appeal allowed: case remitted to the justices with a direction to convict.

Solicitor: *Solicitor, London County Council* (for the prosecutor, the appellant).

[Reported by HENRY SUMMERFIELD, ESQ., Barrister-at-Law.]

Re A SOLICITOR.

[CHANCERY DIVISION (Cross, J.), March 14, 15, 17, 20, 29, 1961.]

Costs—Taxation—Solicitor and own client costs—Paid bill—Bill paid less than twelve months before application for taxation but more than twelve months before hearing—Inherent jurisdiction of court—Special circumstances—Taxation of one item directed under inherent jurisdiction—Solicitors Act, 1957 (5 & 6 Eliz. 2 c. 27), s. 69 (2), proviso (ii).

On the application of a client for taxation of his solicitor's bill of costs under s. 69 of the Solicitors Act, 1957, after payment of the bill, there is by virtue of sub-s. (2) proviso (ii) no jurisdiction to order taxation if twelve months since payment have expired before the order is made, notwithstanding that the application originated within the twelve months and that there are such special circumstances as would justify an order for taxation being made within the twelve months; but, in such a case, the court may, under its inherent jurisdiction over solicitors as officers of the court, deal with the bill by ordering a taxation or "moderation", independently of the statute, either of the whole bill or of some items in it: and, on the facts in the present case, the taxation of an item of 3,500 guineas in a solicitor's bill, described as "Fee by way of general instructions, care and responsibility", followed by particulars, would be ordered under the inherent jurisdiction at the instance of his client, although the bill had been paid more than twelve months before the date of the hearing (see p. 327, letter D, p. 328, letter B, and p. 330, letter A, post).

Ex p. Arrowsmith ((1806), 13 Ves. 124) and *Storer & Co. v. Johnson* ((1890), 15 App. Cas. 203) applied.

[**Editorial Note.** In this case the court was satisfied that special circumstances, such as would have satisfied s. 69 (2) proviso (i) of the Solicitors Act, 1957, existed and the proposition stated above is framed accordingly; but the need for establishing such special circumstances as a basis of exercising the inherent jurisdiction was in fact conceded (see p. 328, letter D, post), and the decision should not, it is thought, be regarded as deciding that the special circumstances required by that enactment must be established if the inherent jurisdiction is to be exercised.

As to the jurisdiction of the court to order taxation of a solicitor's bill of costs, see 31 HALSBURY'S LAWS (2nd Edn.) 182, para. 214; and for cases on the subject, see 42 DIGEST 159, 160, 1596-1609.

As to moderation of costs, see 31 HALSBURY'S LAWS (2nd Edn.) 225, para. 250.

For the Solicitors Act, 1957, s. 69, see 37 HALSBURY'S STATUTES (2nd Edn.) 1111.]

Cases referred to:

Arrowsmith, Ex p., (1806), 13 Ves. 124; 33 E.R. 241; 42 Digest 160, 1600.

Boycott, Re, (1885), 29 Ch.D. 571; 55 L.J.Ch. 835; 52 L.T. 482; 42 Digest 187, 2014.

Grey v. Inland Revenue Comrs., [1959] 3 All E.R. 603; [1960] A.C. 1; [1959] 3 W.L.R. 759; 3rd Digest Supp.

Harman & Son, Re, [1912] W.N. 111; 42 Digest 186, 2000.

Norman, Re, (1886), 16 Q.B.D. 673; 55 L.J.Q.B. 202; 54 L.T. 143; 42 Digest 187, 2015.

Storer & Co. v. Johnson, (1890), 15 App. Cas. 203; 60 L.J.Ch. 31; 62 L.T. 710; 42 Digest 160, 1609.

Summons for taxation of bill of costs.

By an originating summons dated May 12, 1960, the applicant asked for a bill of fees and disbursements, amounting to £3,805 10s. 4d., delivered to him by the respondent, a solicitor, to be referred to the taxing master to tax and settle. The

bill, which was in respect of an action brought against the applicant, was delivered to him by the respondent on Nov. 25, 1959, and was paid by him on Dec. 22, 1959. The facts appear in the judgment.

S. L. Newcombe for the applicant.

G. B. H. Dillon for the respondent.

Cur. adv. vult.

Mar. 29. **CROSS, J.**, read the following judgment: This is a summons taken out under the Solicitors Act, 1957, by the applicant against his former solicitor, the respondent, asking for taxation of a bill of fees and disbursements amounting to £3,805 10s. 4d., delivered to him by the respondent on Nov. 25, 1959, and paid by him on Dec. 22, 1959. Section 69, which is the relevant section of the Solicitors Act, 1957, is, so far as material, as follows:

"(1) On the application, made within one month of the delivery of a solicitor's bill, of the party chargeable therewith, the High Court shall, without requiring any sum to be paid into court, order that the bill shall be taxed and that no action shall be commenced thereon until the taxation is completed.

"(2) If no such application is made within the period mentioned in the last foregoing subsection, then, on the application either of the solicitor or of the party chargeable with the bill, the court may, upon such terms, if any, as they think fit (not being terms as to the costs of the taxation), order—(a) that the bill shall be taxed; (b) that, until the taxation is completed, no action shall be commenced on the bill, and any action already commenced be stayed:

"Provided that—(i) if twelve months have expired from the delivery of the bill, or if the bill has been paid, or if a verdict has been obtained or a writ of inquiry executed in an action for the recovery of the costs covered thereby, no order shall be made on the application of the party chargeable with the bill except in special circumstances and, if an order is made, it may contain such terms as regards the costs of the taxation as the court may think fit; (ii) in no event shall any such order be made after the expiration of twelve months from the payment of the bill."

This summons was taken out on May 12, 1960, which was within twelve months of the date of payment of the bill, but it has not come before the court for decision until after the expiry of the twelve months. The points which arise and have been argued before me are: (i) Has the court jurisdiction under the Act to order taxation of this bill, having regard to the fact that more than twelve months have now passed since it was paid? (ii) If not, has the court power under its inherent jurisdiction over solicitors, as officers of the court, to make an order dealing with these costs? (iii) Assuming that there is jurisdiction under one or other head, ought an order to be made?

The facts of the case are as follows. The applicant, who was the managing director of a company called Bowmaker, Ltd., fraudulently converted large sums belonging to it to his own use. For this he was sentenced in April, 1957, to imprisonment for seven years. For some years previously he had been concerned with others in substantial purchases of shares in Bowmaker, Ltd., and shortly before his conviction an action was started by a Mr. Bentley against him and a number of other defendants raising the question of the beneficial ownership of those shares. The action proceeded in a leisurely way, the statement of claim being amended and further claimants to some of the shares added as defendants, but by May, 1959, the position had been reached that the applicant would have to put in a defence if the action was not to go against him by default. To add to his difficulties, Bowmaker, Ltd., who had themselves brought an action against him, were threatening him with bankruptcy. Further, several other people who had claims against him were pressing them. The applicant had solicitors acting for

A him in the Bentley action, but in May, 1959, on the advice of Mr. Coleman, the solicitor who had acted for him in his prosecution, he decided to leave them and employ the respondent to act for him in the Bentley action, the threatened bankruptcy proceedings, and the other claims. On May 19, 1959, the respondent had an interview with the applicant in Wormwood Scrubs Prison at which the
B respondent's charges were likely to amount to. At this point there is some conflict of evidence. It is common ground that a figure of £5,000 was mentioned, but, whereas the respondent says that that was his rough estimate of his costs of the Bentley action, the applicant says that he understood it to be an estimate of all that he would have to pay to the respondent. It does not, I think, matter whose recollection on this point is right. The figure of £5,000 must, on any view,
C have been a mere guess since no one could say for certain whether the Bentley action was going to be fought or settled or what other work would have to be done. The only relevance of the matter is that the applicant got it into his head that £5,000 was roughly the maximum which he would have to pay to the respondent for getting him out of his difficulties.

D The respondent next proceeded to look into the applicant's affairs. There was a chest full of papers which he had to go through, necessarily without the assistance of the applicant, and there is no doubt that he put in many hours of hard work. The applicant had heavy liabilities amounting possibly to as much as £250,000. On the other hand, if he could establish his title to a sufficient number of the shares in dispute in the Bentley action, he might emerge not only solvent but a comparatively wealthy man. By May 25, 1959, the respondent was able
E to submit papers to chancery counsel for advice on the position, and a few weeks later he instructed bankruptcy counsel to settle the applicant's affidavit in opposition to the petition, which had been presented on May 27. The two counsel had a joint conference attended by the respondent on June 26. The next day, June 27, chancery counsel and the respondent had an interview with the applicant in prison and on July 25, the respondent visited him in prison again,
F in company with bankruptcy counsel. An application had to be made to the court for leave to extend the time for the applicant's defence in the Bentley action, but that was given and a defence was put in on July 31. The respondent visited the applicant again in prison on Aug. 25 and Oct. 4. In that month the bankruptcy petition, which had been adjourned, was dismissed by agreement with the petitioning creditors, who were made to realise that they stood a better chance
G of being paid if they allowed the applicant to settle the Bentley action on advantageous terms than if they made him bankrupt. On Nov. 5 the respondent and the solicitors acting for the other parties in the Bentley action visited Wormwood Scrubs and terms of settlement were agreed. The settlement was very satisfactory from the applicant's point of view, for under it he became entitled to a sufficient number of the shares, which had meanwhile risen greatly in value, to enable him to pay off all his liabilities and be left with some £90,000.

H On Oct. 19, 1959, the respondent had sent to the applicant his bill of costs in the bankruptcy proceedings, pointing out in the covering letter that this bill did not cover his costs in the Bentley action, which was then still on foot. The bankruptcy bill was for a total of £503 5s. 9d., made up of counsel's fees, £92 odd, other disbursements, £17 odd, and a fee of £387 7s. 3d. for the respondent. The
I bill contained a general description of the work done by the respondent of which the following are the most material parts:

"Instructions for affidavit in support of notice to dispute necessitating going through very large chest of papers left with me, sorting same and extracting therefrom those papers and documents which appeared to be relevant for the purposes of your affidavit, perusing and considering these documents, the pleadings and voluminous documents relating to the action commenced by Harry Geoffrey Bentley, the pleadings and documents in the

action brought against you by Bowmaker, Ltd., the pleadings and documents in the action brought by Bowmaker, Ltd. against Coutts & Co., examination of all these documents for the purpose of ascertaining the issues between the parties and the points involved with a view to finding out your general and financial position for the purpose of disputing the petition, preparing from such information a statement showing your financial position and a schedule of assets and liabilities, making various inquiries regarding the various actions and from the result of my research and investigation giving careful consideration to the position to enable me to deal with the question of solvency. Drawing affidavit and instructions to counsel to settle and attending him therewith."

Then there is a reference to two conferences attended by counsel which were stated to have been both at Wormwood Scrubs, though one was in fact in Lincoln's Inn. Then: "Preparing application to abridge the time for the hearing of the petition . . ." The bill went on:

"The work involved necessitated the perusal of documents comprising many thousands of folios and occupied the attention of principal for approximately twenty-two hours. The attendances at Wormwood Scrubs Prison were each of three and a half hours' duration. The attendances upon the petitioning creditors' solicitors as to a compromise occupied approximately five hours. The matter was one of great importance, was of perplexity and required exceptional care and skill in its conduct, the whole of the work being done exclusively by principal."

With the applicant's approval, the bankruptcy bill was debited by the respondent against funds in his hands belonging to the applicant, and the applicant does not now seek to have that bill taxed. On Nov. 25, 1959, the respondent sent to the applicant his bill of costs in the Bentley action saying that he and Mr. Coleman would visit the applicant in prison on Nov. 29, to discuss any matters which the applicant might wish to discuss. The Bentley bill was for a total of £3,805 10s. 4d., made up of counsel's fees, £82 odd, other disbursements, £47 odd, and a fee of 3,500 guineas for the respondent. The work covered by that fee was described in the bill as follows:

"Fee by way of general instructions, care and responsibility involving: Journeys to Wormwood Scrubs Prison for interviews with you on May 19, 1959, June 27, 1959, Aug. 25, 1959, Oct. 4, 1959, and Nov. 5, 1959—engaged in all thirty-three hours. Going through large chest of papers handed to me and sorting out those required for the purpose of ascertaining the position—engaged seven hours. Perusing and considering papers sorted out for the purposes of ascertaining the position of various matters, the allegations made against you and your general and financial position—engaged fourteen hours. Perusing and considering pleadings and documents relating to this action—engaged seven hours. Time engaged in drafting instructions to counsel to advise and settle pleadings—engaged six hours. Attendances at conferences with counsel and with papers. Giving consideration to the possibility of a settlement of the action and the terms upon which such a settlement could take place to your advantage and the documents necessary for carrying into effect any terms of settlement agreed. The matter was one of extreme difficulty owing to the nature of the pleadings and the number of parties involved, and required exceptional care and skill in its handling and attention; the amount involved was some hundreds of thousands of pounds and was of great importance to the client. The ultimate terms of settlement effected resulted in the whole of the debts of the client to the extent of approximately £200,000 being cleared and leaving him with a surplus of some £60,000."

That sum, I think, is an understatement. Then, after reference to the number of letters and documents involved and telephone discussions, the bill concludes:

“The degree of care and responsibility was very great, having regard to the matters mentioned. (3,500 guineas).”

At the interview in prison on Nov. 29, the applicant and the respondent discussed what remained to be done. That fell into two parts, (i) the sale of the shares or of a sufficient number of them to discharge the applicant's liabilities, and (ii) the settlement of the other outstanding claims which were comparatively small. The applicant certainly knew that he would be called on to pay the respondent's other fees beyond the bankruptcy bill which he had paid and the Bentley bill which had been sent to him, but he says, and I see no reason for not accepting his evidence, that he did not expect the respondent's further charges to exceed about £1,000 though he did not discuss their amount with him. The applicant wrote at the foot of the Bentley bill: “I agree and approve and will settle as soon as possible”. When he handed back the bill to the respondent, he said that it was “Shocking”. The respondent says that this was said laughingly, but the applicant disagrees. The applicant does not, however, suggest that the respondent put any pressure on him to agree the bill or to pay it. On Dec. 22 the respondent paid himself the Bentley bill out of funds in his hands belonging to the applicant, and the applicant admits that he had authority to do this. Meanwhile the respondent proceeded to arrange for the sale of such of the shares as the applicant desired to have sold and to settle the outstanding claims. On Feb. 28, 1960, he came to see the applicant in prison once more and presented him with ten further bills totalling £4,609 1s. The largest of these was a bill for £3,517 10s. in respect of “your affairs” which related almost entirely to the sale of the shares. The other bills were in connexion with the various relatively small outstanding claims and in each case included charges for some work done before November, 1959. The total of the bills submitted by the respondent was, therefore, nearly £9,000 of which only some £330 was for disbursements, the balance of some £8,600 being the respondent's fees. The applicant refused to agree the bills presented on Feb. 28, and changed his solicitors. On the advice of the new solicitors, the bill of £3,517 10s., headed “Re your affairs”, was referred to the Law Society under proviso (a) to Sch. 2 to the Solicitors' Remuneration Rules, 1883 (as amended (1)), and on Nov. 14, 1960, the Law Society certified that a sum of £2,100 was a reasonable charge for the work done. The respondent, who had meanwhile paid this bill out of funds of the applicant in his hands, at once repaid him £1,417. On Mar. 23, 1960, an order of course was made to tax the four largest of the remaining bills. These taxations are still pending. The other bills were relatively small and have been paid by the applicant. On May 12, 1960, this summons was issued asking for the taxation of the Bentley bill. The applicant's solicitors did not realise that, as the bill had been paid, they had to show special circumstances to justify an order for taxation, and they did not file an affidavit in the first instance. At the first appointment before the master on June 1, he directed the applicant to file evidence in fourteen days and the respondent to file evidence in reply fourteen days thereafter. On June 27 the applicant's affidavit was filed. On July 11, when his time for reply was about to expire, the respondent asked the applicant's solicitors for a further fourteen days in which to file his evidence, which they granted him. In fact, however, the respondent did not put in his evidence before the long vacation. On Aug. 6 the applicant was released from prison and went to Australia, and on Aug. 12 he took out another originating summons (P.1909) against the respondent asking for the handing over of certain documents and other relief. On Aug. 24, BUCKLEY, J., as a term of making an order with regard to the

(1) Schedule 2 was substituted for the original Sch. 2 by the Solicitors' Remuneration Order, 1953 (S.I. 1953 No. 117); see 20 HALSBURY'S STATUTORY INSTRUMENTS (First Re-issue) 224.

documents, directed the applicant to give security in the sum of £400 for the costs of both summonses, and on Sept. 8 this sum was paid into court. On Oct. 11 the applicant's solicitors wrote to the respondent reminding him that his evidence in answer in this summons had not been filed and saying that, if it was not filed within seven days, they would have to restore the summons for hearing before the master. This letter appears to have been unanswered, and on Oct. 19 the solicitors wrote to the respondent again, saying that they had restored the summons for Nov. 8. On Nov. 1 the respondent took out a summons asking for security for the costs of this summons. That application was entirely misconceived, since the sum of £400 paid in under the order of BUCKLEY, J., related to the costs of both proceedings. On Nov. 4 the respondent wrote to the applicant's solicitors stating that in his view it would be premature for him to file any affidavit in answer in this summons until the question of security was disposed of. On Nov. 8, when the summons again came before him, the master made a peremptory order that the respondent file his affidavit within ten days, and in fact he filed it on Nov. 18. On Dec. 12 the applicant filed an affidavit in reply and the evidence was closed. Meanwhile it had dawned on the applicant's solicitors that, having regard to the wording of proviso (ii) to s. 69 (2) of the Solicitors Act, 1957, they might be in difficulty if they did not get the summons heard before Dec. 22. An application was accordingly made to me on Dec. 9 to fix a day for a hearing of the summons that term, but the state of my list was such that I was unable to give a day, nor could they get a day from any other judge. On Dec. 21 the summons came again before the master, who adjourned it into court. It is not perhaps surprising in the circumstances that the applicant and his advisers suspected that the respondent had realised earlier than they did that the court might have no jurisdiction to make an order under the Solicitors Act, 1957, if the summons was not heard before Dec. 22, and that he had been playing for time. But, having heard the respondent give evidence on the point, I am satisfied that the first time that he realised that there might be such a point was on Dec. 8, when the applicant's advisers raised it before the master during an appointment on summons P.1909.

I turn now to the points at issue and first the construction of the proviso in question. Section 69 of the Solicitors Act, 1957, is a repetition of s. 66 of the Solicitors Act, 1932. That Act was expressed to be

"An Act to consolidate the Solicitors Acts, 1839 to 1928, and other enactments relating to solicitors of the Supreme Court."

One of the Acts repealed was the Solicitors Act, 1843. Section 37 of the Act of 1843 dealt (inter alia) with applications for taxation of solicitors' bills twelve months after their delivery, or after a judgment had been recovered on them, in the following terms:

"... Provided always, that no such reference as aforesaid shall be directed upon an application made by the party chargeable with such bill after a verdict shall have been obtained . . . or after the expiration of twelve months after such bill shall have been delivered . . . except under special circumstances, to be proved to the satisfaction of the court or judge to whom the application for such reference shall be made . . ."

Section 41 of the Act of 1843 dealt with applications for taxation of bills after payment as follows:

"The payment of any such bill as aforesaid shall in no case preclude the court or judge to whom application shall be made from referring such bill for taxation, if the special circumstances of the case shall in the opinion of such court or judge appear to require the same, upon such terms and conditions and subject to such directions as to such court or judge shall seem right, provided the application for such reference be made within twelve calendar months after payment."

It will be observed that, in the case both of the delivery of a bill and of the payment of a bill, the twelve months' period is twelve months before the application to tax is made and not twelve months before the order on that application is made. Did the Act of 1932 make a change in this respect? If it did, I think that the change extended not only to the taxation of paid bills but also to the taxation of bills which have been delivered but not yet paid. The Act of 1932 was, as I have said, a consolidating Act, and there is a presumption that such an Act does not change the law, though that presumption will yield to plain words to the contrary: see per VISCOUNT SIMONDS in *Grey v. Inland Revenue Comrs.* (2). The presumption against any change is strengthened in this case by the character of the change which, it is said, has been made. So far as I can see, there is nothing whatever to be said in favour of making the relevant date the date of the order instead of the date of the application, and everything to be said against doing so. To make the date of the order the relevant date is to encourage an unscrupulous respondent to delay the proceedings and, as happened in this case, is liable to give rise to suspicions that the respondent is playing for time, even when he is not. Further, even if both sides have the point in mind and co-operate in pressing on with the case, they may both be defeated by the state of the list or the illness of a judge. It is altogether wrong that the rights of the parties should depend on accidents of this sort, but, however sure I may be that Parliament did not intend the change, my duty is simply to construe the language of the Act. I have no power to rectify it, and with the best will in the world I cannot escape the conclusion that proviso (ii) to s. 66 (2) of the Act of 1932, contained an unintentional change in the law. To read in, after the word "made" in proviso (ii), the words "on an application made", which is what counsel for the applicant invited me to do, would, I think, be to rectify the Act, not to construe it. All that I can do on this branch of the case is to express the hope that the point may be considered by the appropriate authority, and that, when opportunity offers, the position as it was under the Act of 1843 may be restored.

I turn now to the question of the inherent jurisdiction. From the earliest times the various courts of law and equity exercised control over the attorneys or solicitors who practised in them. In time the profession of attorney and solicitor came to be regulated by statute, but the inherent jurisdiction of the court over its officers continued to exist as a supplement to the statutory regulation. Thus in 1806, in *Ex p. Arrowsmith* (3), LORD ERSKINE, L.C., held that the court had a general jurisdiction to order taxation of a solicitor's bill independently of the Act of 1729 (2 Geo. 2 c. 23), which was the predecessor of the Act of 1843, and in *Storer & Co. v. Johnson* (4), the House of Lords held that, though there was no power under the Act of 1843 to order taxation of part of a solicitor's bill, such an order could be made under the inherent jurisdiction.

Counsel for the respondent, however, argues that, though the court has power under its inherent jurisdiction to make orders for taxation which are not within the scope of the current provisions of the Solicitors Acts, s. 41 of the Act of 1843 (which had no counterpart in the Act of 1729) prohibited the court from dealing in any way with a bill which had been paid twelve months before the application to tax was made. Similarly, he submits that since 1932 the court has had no power to deal in any way with a bill paid more than twelve months before the application to tax it comes before the court. I cannot accept that submission. In *Storer & Co. v. Johnson* (5), LORD HALSBURY, L.C., said:

"... I think it is quite clear that the Solicitors Act [1843,] did not deprive the court of the jurisdiction which they always possessed to do justice in the premises when dealing with one of their officers, and that they might

(2) [1959] 3 All E.R. at p. 606; [1960] A.C. at p. 13. (3) (1806), 13 Ves. 124.
 (4) (1890), 15 App. Cas. 203. (5) (1890), 15 App. Cas. at p. 206.

therefore order that the costs should be taxed, although not in terms of the Solicitors Act . . .”

It is true that the precise point was not before him, but I do not see why I should qualify his language and read s. 41 of the Act of 1843 as impliedly curtailing the inherent jurisdiction in any way. The presumption should, I think, be against any such curtailment. Further, it is to be remembered that to deal with a solicitor's costs under the inherent jurisdiction is not at all the same thing as to order a taxation of them under the Solicitors Act. In the first place, the one-sixth rule (6) as to the costs of the taxation does not apply. Again, some, and not all, of the items in the bill can be dealt with. Finally, the standard applied will not necessarily be the same. In acting under the inherent jurisdiction the court could, I think, in a suitable case, order a “moderation” of the bill rather than a taxation of it. The only authority to which counsel for the respondent referred me as supporting his contention was *Re Harman & Son* (7), but the question at issue in that case was whether or not a bill more than twelve months old had been paid. *Evre, J.*, decided that it had been, and there may have been no ground for contending that there were any special circumstances which would justify the invocation of the inherent jurisdiction after the twelve months had expired.

On the footing that I have power to deal with this bill under the inherent jurisdiction, counsel for the applicant conceded that he had to show special circumstances such as would have justified me in making an order for taxation under the Act, (8), if the matter had come before me before Dec. 22, 1960. On the other hand, counsel for the respondent admitted that, if there were such special circumstances in this case, I should be justified in exercising the inherent jurisdiction, assuming it to exist, since neither party realised the effect of proviso (ii) to s. 69 (2) of the Act of 1957 until it was too late for the court to hear the case within the year, and the respondent had innocently caused considerable delay by failing to file his evidence in proper time. It remains for me, therefore, to consider whether the applicant has shown the existence of special circumstances such as would have entitled him to an order for taxation under the Act if the case had been heard before Dec. 22, 1960. At one time it was thought that the only circumstances which could justify an order to tax a paid bill were pressure accompanied with overcharges, or overcharges so gross as to be evidence of fraud, but in *Re Norman* (9) the Court of Appeal rejected the idea that there were any hard and fast rules on the subject. That does not, of course, mean that a judge can properly send a paid bill for taxation, without regard to the state of mind of the client when he paid it, simply because he thinks that it contains or may contain some overcharges. He must take into account the circumstances of the payment, on the one hand, and the size of the overcharges or possible overcharges, on the other hand. Broadly speaking, I think that it would be true to say that, the more pressure or protest there was at the time of payment, the smaller the overcharges need be to justify an order to tax, while, conversely, the less pressure or protest there was, the larger the overcharges or possible overcharges might be.

Counsel for the respondent argues that the applicant was subject to no pressure, that he paid the bill without any serious protest, and that the bill itself—though at first sight it may seem high—was really not unreasonable. The amount at stake was very large and the matter was of the utmost importance to the client. He was facing utter ruin and, largely through the respondent's efforts, he emerged not only solvent but comparatively wealthy. The matter was very complex, and the fact that the applicant was in prison and that the other claimants to the shares were by no means favourably disposed towards him added to the difficulty of the respondent's task in effecting a settlement of the

(6) See s. 69 (5) of the Act of 1957.

(8) Under proviso (i) to s. 69 (2).

(7) [1912] W.N. 111.

(9) (1886), 16 Q.B.D. 673.

action. All in all, it is said, a charge of 3,500 guineas cannot be said to be altogether out of the way in the circumstances.

I will deal first with the amount of the bill. I do not say that it is inconceivable that the respondent might be able to justify it if it were taxed. But, after giving what I hope is due weight to everything that was argued in its defence, I consider that the bill is, to use the words of BOWEN, L.J., in *Re Boycott* (10), "redolent of overcharge". The action did not even reach the stage of discovery, and the pleadings do not suggest to me that the litigation was (as Chancery actions go) exceptionally complicated. This impression accords with the fact that Chancery counsel of standing wrote an opinion for twenty guineas. I recognise, of course, that a comparison between solicitors' charges and counsel's fees may be very unfair to the solicitor. A solicitor's overheads are far higher than those of counsel. The respondent had all the labour of going through the raw material, digesting it, and setting out the relevant matter in his instructions. Again, he had the arduous and very responsible task of negotiating the settlement in the light of the advice which he had received. Obviously, the remuneration to which he was fairly entitled was many times greater than the fees charged by counsel. All the same, making every allowance, I think that the discrepancy between twenty guineas and 3,500 guineas is not without significance. Yet again, if one tests the matter from the point of view of hours worked, one reaches the same conclusion. For his services as regards the bankruptcy petition, which, he says, was a matter of great importance and perplexity requiring exceptional care and skill, the respondent charged £387 for twenty-two hours' work, that is £18 an hour. For the Bentley action, which in part covered the same ground as the bankruptcy bill, he charged £3,675 for sixty-seven hours' work, i.e., about £55 an hour. Finally, the fact that his bill "Re your affairs" was reduced by the Law Society from £3,517 to £2,100 shows that the respondent's idea of what constitutes reasonable remuneration for his services does not always accord with those of the governing body of his profession.

I am not, of course, deciding that this bill was too high. Possibly it could be justified. What I do say is that it is a bill which I should not be surprised to see substantially—even drastically—reduced on taxation. "Well, so be it", says counsel for the respondent, "the applicant paid the bill without any real protest and without any pressure from the respondent. By doing so he waived once and for all any right to inquire into its propriety". There would be force in this argument if the Bentley action had been the only matter in which the respondent was acting for the applicant. If the applicant's state of mind when he paid it had been, "Well, this is a very heavy bill but I suppose I must pay it; after all, the respondent has served me very well and this will be an end of the matter"—and if his change of mind was simply due to the fact that another solicitor later told him that the bill could and probably would be substantially reduced on taxation, it may be that the size of the bill would not itself be sufficient to establish "special circumstances", but I have not to decide that question for the applicant's state of mind was quite different. He had paid the bankruptcy bill of about £500. He had received the Bentley bill of £3,805 10s. 4d., and he anticipated further bills of, say, £1,000 for the comparatively small minor matters which still remained to be done. He did not judge the Bentley bill in isolation on its merits as a bill for the respondent's services in the Bentley action. He viewed it as a step—a big step—in the build-up of the sum of about £5,000 which he expected to have to pay to the respondent. What made him subsequently wish to have the bill taxed was not simply the fact that he had been told that it was too high, but the fact that the respondent had meanwhile presented him with further bills for £4,609 and so shown that the total which he intended to extract from him was not £5,000 but nearly £10,000. It is true that in paying the Bentley bill the applicant did not tell the respondent that he was

paying it on the footing that the further bills were not to be more than about £1,000 or so. But what I am concerned with at this point is the applicant's state of mind, not the respondent's. On the whole, having regard to the size of the bill and his state of mind when he paid it, I think that the applicant has established such "special circumstances" as would have justified an order for taxation of this fee of 3,500 guineas if the matter had come before me last term. I propose, therefore, to direct the taxation of that fee under the inherent jurisdiction. I shall reserve all questions of costs, both of this summons and of the taxation.

[HIS LORDSHIP directed that the respondent, if so advised, could make an application to the master for further security for costs of the forthcoming taxation.]

Order accordingly.

Solicitors: *Foyer, White & Prescott* (for the applicant); *Sidney Pearlman* (for the respondent).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

Re PILKINGTON'S WILL TRUSTS. PILKINGTON AND OTHERS *v.* PILKINGTON AND OTHERS.

[COURT OF APPEAL (Lord Evershed, M.R., Upjohn and Pearson, L.JJ.), March 21, 22, 23, 24, 1961.]

Trust and Trustee—Powers of trustee—Advancement—Statutory power—Exercise in favour of infant by way of settlement—Trustee Act, 1925 (15 & 16 Geo. 5 c. 19), s. 32 (1).

Perpetuities—Rule against perpetuities—Power of advancement—Resettlement of lump sum proposed to be advanced.

The power of advancement conferred by the Trustee Act, 1925, s. 32, is not validly exercised unless it is exercised in reference to particular circumstances existing at the time in relation to the object of the power who is to be benefited (see p. 339, letter I, p. 337, letter H, and p. 341, letter G, post).

By his will made in 1934 a testator who died in 1935 constituted a trust fund part of which he settled for the benefit of a nephew (son of the testator's brother G.) during his life and after his death in trust for such children or issue of the nephew and in such manner as the nephew should by deed or will appoint, and in default of appointment for the nephew's children equally. The power of advancement conferred by the Trustee Act, 1925, s. 32, was by implication applicable. In 1959 G. (the testator's brother) proposed to execute a settlement for the benefit of Penelope, then aged two years, who was a daughter of his son, the testator's nephew. Under this settlement if Penelope attained the age of thirty years she would take the settled fund absolutely, but if she should have died under that age leaving a child or children who attained the age of twenty-one years such child or children would take the fund absolutely and equally if more than one. Subject to these trusts, the proposed settlement provided that the settled fund should be held in trust for all the children of the testator's nephew (other than Penelope) who being male attained the age of twenty-one years or being female attained that age or married equally. The statutory powers of maintenance and advancement would be applicable to the settlement. It was desired that the trustees of the testator's will should exercise the power of advancement applicable under the will and raise a sum of money out of the testator's trust fund and pay it to the trustees of the proposed settlement on the trusts of that settlement. The advancement would be beneficial in that estate duty would be saved in certain events.

Held: the trustees had no power to make the advancement because the

A proposed transaction was a resettlement of the capital to which it related on trusts and with and subject to powers and directions not contained in or contemplated by the testator's will and not authorised by the statutory power of advancement, and because it was irrelevant that the trustees thought that it was for Penelope's benefit that the capital should be so resettled (see p. 338, letter A, and p. 340, letter C, post).

B Per UPJOHN, L.J.: the power of advancement conferred by s. 32 of the Trustee Act, 1925, is a special power that must be exercised within limits permitted by the rule against perpetuities; where the exercise of the power is for the purpose of paying a lump sum to be held on existing trusts of another settlement, the new trusts so created must, for the purposes of the rule against perpetuities, be read into the instrument creating the power, and the consequence in the present case would be that the limits of the rule would be infringed to an extent fatal to the proposed exercise of the power (compare p. 340, letter D, and p. 341, letters A to E, post).

C Decision of DANCKWERTS, J. ([1959] 2 All E.R. 623) reversed.

[As to the statutory power of advancement, see 21 HALSBURY'S LAWS (3rd Edn.) 177, para. 385; and for cases on the subject, see 28 DIGEST (Repl.) 599-602, 1111-1129, and 43 DIGEST 789, 790, 2274-2285.]

D Cases referred to:

Collard's Will Trusts, Re, Lloyds Bank, Ltd. v. Rees, [1961] 1 All E.R. 821; [1961] 2 W.L.R. 415.

Fane, Re, Fane v. Fane, [1913] 1 Ch. 404; 82 L.J.Ch. 225; 108 L.T. 288; 37 Digest 113, 452.

E *Fox, Re, Wodehouse v. Fox*, [1904] 1 Ch. 480; 73 L.J.Ch. 314; 90 L.T. 477; 40 Digest (Repl.) 616, 1122.

Halsted's Will Trusts, Re, Halsted v. Halsted, [1937] 2 All E.R. 570; Digest Supp.

Joicey, Re, Joicey v. Elliott, [1915] 2 Ch. 115; 84 L.J.Ch. 613; 113 L.T. 437; 37 Digest 408, 186.

F *Kershaw's Trusts, Re*, (1868), L.R. 6 Eq. 322; 37 L.J.Ch. 751; 18 L.T. 899; 37 Digest 499, 916.

Laurie v. Bankes, (1858), 4 K. & J. 142; 27 L.J.Ch. 265; 32 L.T.O.S. 18; 70 E.R. 59; 32 Digest 265, 477.

Lowther v. Bentinck, (1874), L.R. 19 Eq. 166; 44 L.J.Ch. 197; 31 L.T. 719; 37 Digest 499, 919.

Mewburn's Settlement, Re, Perks v. Wood, [1933] All E.R. Rep. 663; [1934] Ch. 112; 103 L.J.Ch. 37; 150 L.T. 76; Digest Supp.

Roper-Curzon v. Roper-Curzon, (1871), L.R. 11 Eq. 452; 24 L.T. 406; 37 Digest 498, 915.

Ropner's Settlement Trusts, Re, Ropner v. Ropner, [1956] 3 All E.R. 332; [1956] 1 W.L.R. 902; 3rd Digest Supp.

H *Wills' Will Trusts, Re, Wills v. Wills*, [1958] 2 All E.R. 472; [1959] Ch. 1; [1958] 3 W.L.R. 101; 3rd Digest Supp.

Appeal.

This was an appeal by the third defendants, the Commissioners of Inland Revenue, from an order of DANCKWERTS, J., dated May 14, 1959, and reported [1959] 2 All E.R. 623. By their originating summons dated Apr. 24, 1959, the plaintiffs, the trustees of the will of William Norman Pilkington, deceased, asked for the determination, among others, of the question whether they could lawfully exercise the power conferred on them by s. 32 of the Trustee Act, 1925, in relation to the expectant interest of the defendant, Penelope Margaret Pilkington, in the testator's residuary trust fund by applying (with the consent of the defendant, Richard Godfrey Pilkington, her father) some part not exceeding one equal moiety of the capital of such interest in such manner as to make it subject to the trusts, powers and provisions of a new settlement to be executed in the

form of a draft intended to be exhibited to an affidavit to be filed herein or whether such application would be improper and unauthorised. The beneficial trusts of the proposed new settlement were as follows:

" 5. (i) Until Penelope shall attain the age of twenty-one years or die under that age the trustees shall have power at their discretion to pay or apply the whole or any part of the income of the trust fund to or for the maintenance education or benefit of Penelope in such manner as they may think fit and may either themselves so apply the same or pay the same to the parent or guardian of Penelope without seeing to the application thereof and in so doing shall not be bound to consider whether there is any other income available or any person bound by law to provide for her maintenance or education and shall accumulate all the residue of such income by investing the same and the resulting income thereof in some form of investment hereby authorised as an addition to the capital of the trust fund with power from time to time to apply all or any part of such accumulations as if they were income of the current year

" (ii) If Penelope shall attain the age of twenty-one years then until she shall attain the age of thirty years or die under that age the trustees shall pay the income of the trust fund to her

" (iii) The trustees shall hold the capital of the trust fund upon trust for Penelope if she shall attain the age of thirty years absolutely

" (iv) If Penelope shall die under the age of thirty years leaving children or a child living at her death the trustees shall hold the trust fund and the income thereof in trust for all or any of her children or child who shall attain the age of twenty-one years and if more than one in equal shares and in such event the provisions of para. (i) of this clause shall apply mutatis mutandis to any such child and the income of his or her expectant share of the trust fund

" 6. Subject as aforesaid the trustees shall hold the trust fund in trust for all or any of the children or child of the said Richard Godfrey Pilkington (other than Penelope) who being male attain the age of twenty-one years or being female attain that age or marry if more than one in equal shares

" 7. If the foregoing trusts shall fail or determine the trustees shall (subject to such trusts and to the powers hereby or by law made applicable to the trust fund and to every or any exercise of such respective powers) as from the date of such failure or determination hold the trust fund upon the same trusts and with and subject to the same powers and provisions as under the will of the said William Norman Pilkington would be applicable to the settled share of the said Richard Godfrey Pilkington in the residuary trust fund in such will referred to as if he had died without having been married upon the said date "

By cl. 8 of the proposed settlement the Trustee Act, 1925, s. 31, was expressly applied with some amendments, and by cl. 9, s. 32 of the Act of 1925 was applied. DANCKWERTS, J., held that the proposed advancement and settlement were within the powers of the trustees. By an order of the Court of Appeal dated July 18, 1960, the Commissioners of Inland Revenue were added as third defendants to the summons and leave was granted to appeal against the said order out of time.

Peter Foster, Q.C., and *E. Blanshard Stamp* for the defendants, the Inland Revenue Commissioners.

B. L. Bathurst, Q.C., and *J. Cunliffe* for the plaintiffs, the trustees.

Sir Milner Holland, Q.C., and *E. W. Griffith* for the defendants, two beneficiaries under the trust.

Our. adv. vult.

Mar. 24. **LORD EVERSHED, M.R.:** The problem raised by this appeal is, so far as reported authority goes, in large degree novel, as it is novel in form.

A The Crown has been added as a party for the purposes of this appeal and has, therefore, argued the case before us for the view that what is intended is something outside the scope of the statutory power of advancement contained in the relevant will. That will was made some two months before his death in February, 1935, by Mr. William Norman Pilkington. It is a will of considerable elaboration, and, after a number of legacies and other provisions, the residue of his estate was left on trust in equal shares if more than one for all or any of his nephews and nieces, being children of three named brothers, living at his death who should attain the age of twenty-one years or marry under that age. The gift of residue so expressed was followed by a number of other clauses of considerable elaboration which had the effect of qualifying what appeared to be the absolute gift to these nephews and nieces so that their interests, though remaining contingent on attaining twenty-one, became life interests with final gifts in favour of their children, i.e., to the testator's grand-nephews and grand-nieces. There were included the usual powers of appointment, of applying income for maintenance and the like. The power of advancement, as it is commonly and briefly called, was incorporated into the will from s. 32 of the Trustee Act, 1925, and it is, therefore, essential that I should refer at once to the language of sub-s. (1):

D "Trustees may at any time or times pay or apply any capital money subject to a trust, for the advancement or benefit, in such manner as they may, in their absolute discretion, think fit, of any person entitled to the capital of the trust property or of any share thereof, whether absolutely or contingently on his attaining any specified age or on the occurrence of any other event, or subject to a gift over on his death under any specified age or on the occurrence of any other event, and whether in possession or in remainder or reversion, and such payment or application may be made notwithstanding that the interest of such person is liable to be defeated by the exercise of a power of appointment or revocation, or to be diminished by the increase of the class to which he belongs."

E F It is said that the language which I have read from the Trustee Act, 1925, substantially reflects what had become the practice of conveyancers of inserting into settlements or wills powers of advancement, and again I use the convenient label. To what extent that is so is a matter on which I am not confident that I could express any very firm view, more particularly since I do have in mind what was said by SIR GEORGE JESSEL, M.R., in *Lowther v. Bentinck* (1). The corresponding power in the will there before the court was thus:

G " . . . the testator declared that it should be lawful for the trustees, at any time or times during the life of Francis William Lowther, to levy and raise any part of the trust moneys, stocks, funds, and securities, not exceeding in the whole one moiety thereof, and to apply the same in or towards the preferment or advancement of Francis William Lowther, or otherwise for his benefit, in such manner as the trustees should in their discretion think fit."

H Mr. Cookson, in argument before the Master of the Rolls, said (2):

"This is not an ordinary advancement clause, such as is found in wills or settlements containing provisions for the benefit of infants."

I It is certain that the view of SIR GEORGE JESSEL, M.R., was that the words of the clause there before him should be given their sense according to the English language. He said (3):

"It seems to me that the words 'or otherwise for his benefit' are evidently put in for the purpose of not confining the preferment or advancement; and therefore, so far from finding any context which restricts the words, I think the context shows that the words could not mean something of the same kind."

(1) (1874), L.R. 19 Eq. 166.

(2) (1874), L.R. 19 Eq. at p. 168.

(3) (1874), L.R. 19 Eq. at p. 170.

That is to say, he rejected the view that "or otherwise for his benefit" was to be treated as meaning something ejusdem generis with what might be called, in a strict use of the word, advancement. A

Is the transaction then with which we are concerned within the contemplation of that phraseology? I have found this matter one of considerable difficulty. I am conscious that views have been taken about this matter which may have affected many settlements, and it is a subject on which practitioners in the Chancery Division, I gather, have taken sometimes one view and sometimes another. After, I confess, some changes of view in the course of the argument, I have in the end come to the conclusion that the question now before us, which I have tried to pose, ought to be answered in the negative. I think the question has been formulated most properly and for my purposes most conveniently in the first paragraph of the notice of appeal. The ground for the appeal is there stated in this form: B C

"(1) Because the proposed transaction is nothing less than a resettlement of the capital over which it extends on trusts and with and subject to powers and discretions not contained or contemplated by the testator's will and not authorised by the power of advancement contained in the said section and because it is irrelevant that the trustees think it for the benefit of the defendant Penelope Margaret Pilkington that it should be so resettled." D

It is obviously necessary at this stage that I should say something about the transaction, as I have called it, which is here in question. It has taken this form. There is intended to be executed a settlement. It is possible that it has been executed, but I understand that it has not yet been executed. It is a settlement made by Colonel Guy Pilkington, who is one of the brothers of the testator and who is the grandfather of the child mentioned in the notice of appeal, to whom I will hereafter allude as Penelope. The trustees of this settlement are in fact the same persons as are the trustees of the testator's will, and it recites that the settlor is desirous of making provision for the benefit of Penelope. Penelope was born on Dec. 29, 1956, so that on the date when this document was exhibited to the affidavit in support of the summons, she was somewhat less than two and a half years of age. The terms of the settlement proposed to be made, which was incidentally of the sum of £10 in cash, were that the trust money and any other moneys which the trustees might receive should be invested in the usual way and should then be held on trust so that until Penelope was twenty-one, the income should be available for her maintenance, education and the like. From the age of twenty-one to thirty she should be entitled to receive the income, and then on her attaining thirty years of age she was to be entitled to the capital, and there followed provisions so that if she were to die under thirty leaving children, those children would take the capital, and if she did not leave children, then there were trusts over. Clause 9 of this document reads: "The power of advancement contained in s. 32 of the Trustee Act, 1925, shall apply". I do not intend to attempt any kind of definition by way of limitation or otherwise of the vital language which I have already read from s. 32 (1) of the Trustee Act, 1925. But to my mind the power which is conferred by that section contemplates something being done for the advancement or benefit (and I accept entirely what SIR GEORGE JESSEL, M.R., said, that the benefit should be construed in the widest sense) of the particular person in question according as that course may seem to be called for by the circumstances at the time, that is at the time when the advancement or benefit is conferred. I would observe from the subsection that it is intended to deal with capital of the trust fund and to deal with the case of a person who is entitled to some share in the capital of the trust fund which, for one reason or another, he or she cannot at the time touch, either because it is liable to be divested or because her interest is contingent or because it is subject to some prior interest. In those circumstances the subsection contemplates that subject to the limitation as to amount in the first proviso and to such other E F G H I

A limitations as there are, and to which I need not allude, the trustees are entitled to take part of the capital out of the trust fund, to liberate it from the trusts which prevent the person concerned receiving it or enjoying it, and then to make it available or apply it for the benefit of the person concerned; but, as I have indicated and as I construe it, in the light of the circumstances affecting that person as they then exist.

B What I have said has, at any rate, the support of the language, which I will not cite, of PICKFORD, L.J., in *Re Joicey, Joicey v. Elliott* (4). When I look at this settlement it seems to me that it does not, as a matter of common sense, fulfil that qualification. As MAUGHAM, J., observed in *Re Mewburn's Settlement, Perks v. Wood* (5), these are matters which may strike one mind in one way and another mind in another way. I have a very high regard, if I may say so, in a

C matter such as this for the view of the learned judge from whom this appeal comes; but it has seemed to me, looking at it as I have tried to do against the background which I have tried to state, that what is proposed just does not fall within the contemplation of the statutory power. I cannot escape the conclusion that it is in truth a resettlement, an addition of supplementary trusts to those which one finds in the original will, which I am fully prepared to assume the

D trustees quite properly think is for the benefit of the various persons concerned, including Penelope, though try as I have, I cannot persuade myself that it really relates to Penelope and her benefit in the sense which I think the section contemplates. There has been some discussion of the question of the avoiding, for the benefit of those concerned, of liability to taxation, and quite properly doing so. *Re Collard's Will Trusts, Lloyds Bank, Ltd. v. Rees* (6), to which counsel for

E the trustees alluded a moment ago and to which our attention was earlier this morning called by counsel for the beneficiaries, is an example of what is now accepted, that if one can prevent the diminution of the trust estate by the impost of taxation, that is a perfectly legitimate thing to do and is clearly a benefit to those who are interested in the fund. It is quite true also, as counsel for the trustees pointed out, that one can enumerate advantages which will

F result to Penelope. She will have an income available and immediately available for her maintenance. She will have that without having to suffer herself, unless she has other funds I know not of, the imposition of surtax. Her capital, the capital here in question, cannot be divested by any exercise of the power of appointment by her father, the testator's nephew, and if her father should live, as seems reasonable to hope since he is only forty-two, for five years, then

G the sum which is proposed to be transferred to the trustees of the intended settlement will not bear estate duty which otherwise might be imposed. The last of the advantages referred to by counsel is reflected in something said in an affidavit filed in support of the summons, that although she will be entitled to the income at twenty-one, she will not get the capital until she is thirty, and so—I now read from the affidavit—she

H “would be protected from the risk that she might at the age of twenty-one or on her earlier marriage be able to dissipate the capital of the amount so applied.”

I This child is now four and upwards, and who can tell what, in the twentieth century, her interests will be and for what her talents may fit her? She might become a member of a great profession, she might become an artist, a musician, a politician or an explorer. She might, on the other hand, follow the example of domesticity which was more common in past centuries. But can it be said and ought it to be said now that she should be in the position when she cannot “dissipate”, and I would qualify that by saying, “or alternatively use”, capital at twenty-one or only do so if the trustees then think it would be for her benefit? It seems to me that it cannot be in contemplation in a statutory power

(4) [1915] 2 Ch. at p. 122.

(5) [1933] All E.R. Rep. 663; [1934] Ch. 112.

(6) [1961] 1 All E.R. 821.

of this sort as applied to a will that all these things should be assumed about a child aged two or three and not, as I think the clause intends, deal with the problem when it really arises in some sensible form for determination. The advantages which counsel for the trustees enumerated are, to my mind, of an impersonal kind when related to Penelope, whereas, according to my understanding of the section, the advancement or benefit intended should be personal to the person concerned in the sense of being related to his or her own real or personal needs. All the many cases to which our attention was properly drawn, as it seems to me, were cases where for one reason or another it was desirable that a fund should be made available to meet a particular circumstance affecting a particular person, though it does not follow (and there are instances which show it) that all you can do or ought to do is to hand over a capital sum. I have said that because I for my part am not prepared to accept and make a general rule of certain of the propositions by which counsel supported the case for the Crown. I prefer strictly to confine myself to the facts of this case and the impression which my mind has formed on this transaction and to give in regard to it the answer which, as I think, is in accordance with the contemplation of the statutory language. Thus, I am not saying anything which might cast any doubt on transactions which might involve the making of some settlement in some form or another, doing the kind of thing that was done, for example, in *Re Halsted's Will Trusts*, *Halsted v. Halsted* (7) decided by FARWELL, J., or by MAUGHAM, J., in *Re Mewburn's Settlement* (8). I also bear in mind again what BUCKLEY, J., said in *Re Collard's Will Trusts* (9), on which I most certainly do not desire to cast any doubt, viz., that if what is to be achieved can quite properly be achieved by two documents, it is no necessary objection that it is done by one.

I will add a word or two about the grounds on which counsel for the Crown in opening the case founded his objections. First I would not like to accept the view that this section only contemplates acceleration as distinct from postponement. That no doubt is a form of words, but it is, if counsel for the Crown will forgive me for saying so, merely a form of words, and I do not think one can improve on the matter, certainly one cannot qualify or expound the fairly clear words of this statute, by trying to introduce some such formula as no postponement, only acceleration. Similarly, I would not accept that anything which appeared to involve, or might be said at first sight to involve, an infringement of the rule *delegatus non potest delegare* is of itself necessarily fatal to what is done. Again I think it depends on the circumstances and the form of the transaction. Instances have been cited from the cases which show that if in other respects what is done is fairly within what I take to be the intendment of the statute, it is no objection that, as ancillary to what is done, one would confer powers, including powers of advancement, which might, if one looked at it otherwise and with great strictness, be thought at first blush to involve some encroachment on that principle. Nor, as a somewhat similar ground, would I condemn this transaction so far as this matter is concerned by saying that there are persons who would be entitled to benefit who are not objects of the benefaction under the original will, viz., issue of Penelope. Again, the cases which I have cited show that if what is done is being done as an exercise of what I think the section contemplates, it may not be an objection that there are added to it provisions which will or might result in persons taking a benefit who were not themselves objects of the original settlement or will. I also cannot attach so narrow a significance as counsel for the Crown would suggest, I think, with all respect to him, to the words "pay or apply". As a matter of English, if one has a fund available, one can be said to apply it for the benefit of some person in any manner one likes by quite an elaborate transaction.

Of those grounds put forward, however, I have, I confess, felt more force in

(7) [1937] 2 All E.R. 570.

(8) [1933] All E.R. Rep. 663; [1934] Ch. 112.

(9) [1961] 1 All E.R. 821.

A the problem raised by reference to the rule against perpetuities. In the circumstances of this case I would prefer myself not to express any concluded view. It is plain that if the transaction to be entered into in purported exercise of the power of advancement postpones final distribution of the funds to a date that would not have been legitimate in the original will and settlement, then there may be difficulty over the rule against perpetuities. Unless one can say that B the fund, the sum of money which is made the subject of the new settlement in the exercise of the power, has been altogether severed from the original settlement so that it makes, so to speak, a new start, it involves considering whether the trusts of the new document ought to be treated in some sense as read into, and by way of qualification or expansion of, the trusts of the original document. Put in other and familiar phraseology, it might depend on whether one thought C that the power of advancement as exercised was in the nature of a special power.

Now in this case it is to be noted that the trustees have not merely declared new trusts of part of the funds in their hands as trustees of Mr. Pilkington's will. What they have done or what they propose to do is in effect this. They say: It so happens that there is another settlement made by someone else and what we are going to do is to take part of the testator's capital and transfer it to the D trustees of this other convenient settlement, which is a settlement for the benefit of Penelope, and therefore there is a complete break and one avoids the problem of perpetuities. By perhaps a parity, if not an inversion, of the reasoning which appealed to BUCKLEY, J., in *Re Collard's Will Trusts* (10), I find it a little difficult to think that the transaction can be looked at quite so disjunctively. And there is the difficulty that unless that be so, then at what point can the sum become the subject-matter of the new settlement—become, so to speak, free of any subsisting E trusts? For the trustees themselves would have no power to make a settlement in this form for the benefit of Penelope and her issue. On the other hand it might be that if the other settlement, to the trustees of which the transfer is to be made, had a wholly independent existence, then other things being equal the trustees might in consideration of the circumstances of the day as they F affected a particular beneficiary, say—"The best thing we can do for this person now is to take part of the capital of the trust fund and hand it over to this other subsisting trust". If that were done, one might avoid any question of perpetuity and one might in other respects, as I have indicated, be within the scope and intendment of the section. For myself, therefore, I prefer to express no view on the perpetuity question.

G I come back in the end, therefore, to the simple point which is one—and I repeat LORD MAUGHAM's language—that might appeal to different minds in different ways (11). I do not attempt any further definition of the language of s. 32. I venture to suggest that it means what it says, but I do not forget, as counsel for the Crown pointed out, that it is, after all, contained in a group of sections which bears the statutory cross-heading: "Maintenance, Advancement and Protective Trusts", and that cross-heading, at least to my mind, emphasises H the point which I have tried to make clear and which has in the end influenced my mind, that the exercise of the power, if truly within the section, must be an exercise done to meet the circumstances as they present themselves in regard to a person within the scope of the section whose circumstances call for that to be done which the trustees think fit to do. Unless this be so, I see no limitation to I the scope of the power. I hope that I have not in anything that I have said suggested that the trustees in this case have not been acting in what they properly feel to be the best interests of those whom it is their duty to look after. It is no part of the Crown's argument so to suggest, and, indeed, the presence of the Crown, though it has been of great assistance to the court, might in some sense have been an embarrassment to the Crown because they were arguing in a sense an academic case.

I have in the end concluded that the first ground stated in the notice of appeal (12) correctly states what the position is, with the result that we should hold in my judgment that what is proposed to be done is not within the intendment of the statutory power of advancement, and so that this appeal should be allowed.

UPJOHN, L.J.: I agree, and in deference to the learned judge from whom we are differing and the arguments that have been presented to us, I propose to add a few words of my own, although I agree with all that has fallen from my Lord. I start with the assumption that the proposed new trusts (if valid) are for the benefit of Penelope: certainly any reasonable body of trustees may properly think so, and I do not myself dissent from that view. The bona fides of the trustees is not in question and they do not surrender their discretion to the court. The sole question, therefore, is whether the proposed transaction of raising and applying the sum of £7,000 to £8,000 out of Penelope's expectant share under her great-uncle's will and transferring it to new trustees on the trusts of another settlement is within the powers of the trustees. That question depends entirely on whether they are so empowered by virtue of s. 32 of the Trustee Act, 1925. I do not propose to read the enactment as it has already been read by LORD EVERSHED, M.R. Counsel for the beneficiaries has argued that having regard to the very wide construction that has been put on the word "benefit" by SIR GEORGE JESSEL, M.R., in *Lowther v. Bentinck* (13), and followed by FARWELL, J., in *Re Halsted's Will Trusts* (14), once the trustees are satisfied that it is for the benefit of Penelope, it must follow that to carry out the transaction must be within the powers of the trustees under s. 32. There being no challenge to the propriety of the exercise of their powers, it follows, therefore, that the proposed transaction is necessarily, so it has been argued, a proper one. That is a very attractive argument and makes necessary a close examination of the true scope and ambit of the powers conferred on trustees by s. 32.

As is well known and was pointed out by MAUGHAM, J., in *Re Mewburn's Settlement* (15), s. 32 produced in statutory form the power which had for many years been inserted in all properly drawn instruments, rendering it unnecessary to insert such powers in such documents in future. It must not, however, be overlooked that the power is one which, if the settlor so desires, may be excluded altogether or varied, as indeed was recently done in *Re Collard's Will Trusts* (16). The section, therefore, must be considered in the light of its historical background and of judicial interpretations of similarly expressed powers of advancement in pre-1926 settlements. Furthermore (and in my judgment this is very important) it must never be forgotten that the power of advancement, whether expressed in the settlement or incorporated by virtue of s. 32, is essentially a power which is ancillary to the trusts declared by the settlor, and when exercised in favour of the object of the power, operates in derogation of the beneficial trusts declared by the settlor.

With those preliminary observations I propose to mention one or two cases to which we have been referred to illustrate how the power of advancement has been exercised in the past, and I use the words "power of advancement" as including the wide form of words to be found in s. 32. The normal and usual exercise of a power of advancement is the raising and application of a sum of money out of the expectant share of the object of the power by paying it directly to him or applying it for his benefit; for example, to buy him a business or to pay his debts or (in the old days) to buy him a commission in the army. In such cases the trustees are merely anticipating his interest in the trust fund, but the exercise of the power is not, however, necessarily confined to that type of advancement. In special circumstances and provided (and this, I think, is essential) it is for the benefit of the object of the power, the power may be exercised in favour of

(12) See p. 334, letter C, ante.

(14) [1937] 2 All E.R. 570.

(13) (1874), L.R. 19 Eq. 166.

(15) [1933] All E.R. Rep. 663; [1934] Ch. 112.

(16) [1961] 1 All E.R. 821.

- A non-objects; see, e.g., *Re Kershaw's Trusts* (17) where money was raised to purchase a business in England for the husband of the object of the power, the circumstances being that otherwise he would have to leave his wife and children and reside abroad. Then again, provided always that it is for the benefit of the object of the power, in special circumstances it may be proper to raise money and hold it on trusts for his benefit and for others in succession who may be non-objects such as the wife and children of the object of the power and possibly remoter issue: see *Roper-Curzon v. Roper-Curzon* (18) and *Re Halsted's Will Trusts* (19). The extent of the class of non-objects who may take under such settlements has not yet been judicially defined and probably is incapable of definition, for it must depend on the particular circumstances of each case. No reported case, however, apart from *Re Ropner's Settlement Trusts*, *Ropner v. Ropner* (20), decided by HARMAN, J., without argument, has gone so far as to authorise trustees to raise money for the benefit of the object of the power, merely because the trustees bona fide thought that it was for his benefit, where there was no evidence of any circumstances making it desirable to benefit the particular object of the power on that particular occasion.

D Like my Lord, I do not think that it is possible to lay down any rule as to the ambit of the powers conferred by s. 32 except to say that the exercise of the power must have reference to the actual circumstances of the object of the power requiring to be benefited at the time of the exercise of the power.

E My Lord has referred to *Re Joicey* (21). I propose to refer to this case in greater detail, making clear, however, that it is only relevant for the contrast drawn by two judges of that court between the exercise of a wide and unlimited power and the exercise of the ordinary power of advancement. The daughter of the settlor had a power of appointment and she exercised that power of appointment and added this:

F "provided always that the said trustees shall (if and so far as I can authorise the same) have power from time to time or at any time during the said period of twenty-one years in their absolute discretion to transfer and make over the share or shares for the time being of the appointed funds of any son of mine who shall have attained the age of twenty-one years or any part of such share or shares to such son for his own use absolutely."

That power was held to be far beyond a power of advancement and to be invalid as a delegation of the power of appointment conferred on the appointor. PICKFORD, L.J., referring to this power, said (22):

G "I do not think it is a power of maintenance or advancement at all. It is not confined in any way to circumstances requiring maintenance or advancement and may be exercised by the trustees irrespective of such considerations."

WARRINGTON, L.J., said (23):

H "It is not even a mere power of advancement which might possibly be said to be so common an incident to such interests as the donee has here created as to be fairly within the words 'in such manner in all respects'—as to this I express no opinion. It is I think impossible to deny that under the provision in question the trustees might of their own mere motion and without reference to the circumstances of the son or any other consideration convert a contingent interest into an absolute one and thus completely alter the dispositions made by the testatrix."

I Those observations assist the conclusion which, like my Lord, I reach independently, that the power conferred by s. 32 is not to be exercised by the trustees without reference to the particular circumstances of the object of the power requiring to be advanced at the time of its exercise.

(17) (1868), L.R. 6 Eq. at p. 323.

(19) [1937] 2 All E.R. 570.

(22) [1915] 2 Ch. at p. 122.

(18) (1871), L.R. 11 Eq. 452.

(20) [1956] 3 All E.R. 332.

(21) [1915] 2 Ch. 115.

(23) [1915] 2 Ch. at p. 123.

As I ventured to point out in *Re Wills' Will Trusts, Wills v. Wills* (24), the section does not in my judgment permit the trustees, under the guise of making an advancement, to create new trusts or to make a resettlement merely because they think that such new trusts or new settlement will be more beneficial to the object of the power than those which the settlor has chosen to declare. There must be some particular circumstance which justifies the exercise of the power in favour of the object of the power at that particular time in the manner then proposed. But the mere creation of new trusts, in my judgment, in this particular case is just what the trustees, acting perfectly bona fide, are trying to do. On the facts of this case I cannot see that there are any circumstances in reference to this child of under five with a rich father aged forty-two, well capable of providing for her and her education, which can justify at the present time—and I emphasise those last four words—the invocation of the powers conferred by s. 32. I agree with my Lord that para. 1 of the notice of appeal gives the true picture of what the trustees are attempting to do, and I think that is beyond their powers.

I desire to add a few words on the application to this case of the rule against perpetuities. In the ordinary conventional case where an advancement is made to an adult who can settle the sum advanced to him, no doubt no question as to reading back a new settlement into the head settlement would arise, but in this case the object of the power, being of tender years, is incapable of making any settlement. Consequently, the trustees can only justify the making of a settlement provided it is within the powers conferred on them by s. 32. That is plainly a special power and of course the trusts created by virtue of the exercise of the power must conform to the rule against remoteness. Moreover, being a special power it is clear that its exercise must for the purpose of the rule be written into the instrument creating the power: see *Re Fane, Fane v. Fane* (25), per BUCKLEY, L.J.

To this the answer was made and accepted by the learned judge that a sum advanced is taken out of the settlement for all purposes and, therefore, in the case of a power of advancement, the new settlement ought not to be read back into the testator's will. No doubt the law has been stated that a sum advanced is taken out of the settlement for all purposes: see *Re Fox, Wodehouse v. Fox* (26), and the cases there referred to. But examination of that case and of the earlier cases shows that they were all cases where a sum had been advanced to the object of the power out and out, and questions arose whether, as in *Lawrie v. Bankes* (27) the purpose having failed, the object of the power ought to repay it to the trustees or might keep it. In *Re Fox* (26) the question was whether the sum advanced had to be brought into hotchpot. It was held in those cases that the payment having been made out and out, the sum did not have to be repaid in the one case or accounted for in the other. But none of the cases touch or, indeed, could touch on any question relating to the rule against perpetuities because being out-and-out payments it could not arise. It is a cardinal rule that the observations of judges and the law as stated by them must be read in relation to the issues which they had to try and their remarks cannot safely be applied to questions which could not have been in the judges' minds at the time. The position seems to me to be this. Section 32 of the Trustee Act, 1925, either empowers the trustees to make a settlement or it does not. If the former, they are exercising a special power of advancement conferred by s. 32, and exercising that special power, it must be subject to the usual rule for the purposes of the rule against perpetuities. If they have no power to make a settlement, cadit quaestio. The one thing which it seems to me that they cannot do in law is to say—let us make an out-and-out advancement and then transfer it to the trustees of the existing settlement and that is a new settlement which need not

(24) [1958] 2 All E.R. 472; [1959] Ch. 1.

(26) [1904] 1 Ch. 480.

(25) [1913] 1 Ch. at p. 413.

(27) (1858), 4 K. & J. 142.

A be read back into the will. All that they can do is to say—under the powers conferred by s. 32 we are going to create a new settlement containing new trusts. It matters not whether they themselves declare the trusts or whether they hand it over to the trustees of an existing trust, whose terms are thought to be appropriate to the circumstances. They are still plainly exercising a special power and it seems to me, therefore, that these new trusts must, for the purposes of the rule against perpetuities, be read into the testator's will.

B What, then, is the consequence of that? I must examine briefly the terms of the new settlement. I am content to assume that the gift of income to Penelope from the time when she shall attain the age of twenty-one years until she shall attain the age of thirty years is good, but the next direction that the trustees shall hold the capital of the trust fund on trust for Penelope if she shall attain the age of thirty years absolutely, is *prima facie* bad. It may be—the question has not been argued before us—that s. 163 of the Law of Property Act, 1925, saves it. If it does save it, it does so by directing the trustees to hold the capital of the trust fund for Penelope absolutely on attaining the age of twenty-one years. The next trust for the children of Penelope, if she shall die under the age of thirty years, is plainly bad on any footing. The effect, therefore, of the rule against perpetuities on the proposed settlement is basic; it entirely alters the settlement, and that seems to me to be fatal to this case, for the trustees have never been asked to express any opinion as to whether they would think the proposed settlement, modified by reason of the rule against perpetuities in the manner I have mentioned, is for the benefit of Penelope. That is a matter to which they have never addressed their minds, and, therefore, it cannot possibly be justified under s. 32, for it has not been shown that the trustees think that the settlement, as so modified, is for the advancement or benefit of Penelope. On that ground too, therefore, I would think that the transfer to the trustees of this new settlement is entirely beyond the powers of the trustees.

E I would only add one further matter and that is that I think DANCKWERTS, J., has read more into certain observations which I made in *Re Wills' Will Trusts* (28) than I intended or, with all respect, than is justifiable on reading what I said. In the passage which he quoted (29), I pointed out the general rule that a person on whom powers are conferred cannot delegate those powers unless he is expressly authorised so to do. That rule applies, as I venture to think that I was quite right in saying, not only to a person exercising a power of appointment but also to a person exercising a power of advancement.

G For those reasons I would allow this appeal.

PEARSON, L.J.: I agree, for the reasons which have been given by my Lords, that the proposed transaction would not be a valid exercise of the powers conferred by s. 32 of the Trustee Act, 1925. I do not find it necessary to express any opinion with regard to the application to this case of the rule against perpetuities. I agree that the appeal should be allowed.

Appeal allowed. Leave to appeal to the House of Lords granted.

Solicitors: *Solicitor of Inland Revenue; Alsop, Stevens & Co.* (for all parties other than the Inland Revenue Commissioners).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

(28) [1958] 2 All E.R. 472; [1959] Ch. 1.

(29) [1959] 2 All E.R. at p. 627; [1959] Ch. at p. 706.

NOTE.

Re WIRE NAILS MANUFACTURERS' AGREEMENT.

[RESTRICTIVE PRACTICES COURT (Pearson, J., Russell, J., Sir Stanford Cooper, Mr. W. L. Heywood and Mr. W. G. Campbell), February 1, 1960.]

Restrictive Trade Practices—Court—Practice—Statement of case—Late delivery—Whether unreasonable delay—Costs—Restrictive Practices Court Rules, 1957 (S.I. 1957 No. 603), r. 76, r. 77.

Appeal.

Appeal by the respondents, who were certain Manufacturers of Wire Nails, from a decision of the clerk of the Restrictive Practices Court, dated Dec. 16, 1959, refusing to grant further time for the delivery by the respondents of the statement of case and the list of documents. The respondents had been granted three extensions of time for delivery of the statement of case with the consent of the Registrar of Restrictive Trading Agreements and two further extensions of time by the clerk, the last one expiring on Dec. 16, 1959. On Dec. 8, 1959, the respondents applied to the clerk for an extension of time to Jan. 16, 1960. The statement of case was filed with the court on Jan. 26, 1960, and the list of documents was filed on Jan. 28, 1960. The respondents now applied that the extension be made to Jan. 29, 1960*.

W. Gumbel for the respondent Manufacturers of Wire Nails.

J. F. Donaldson for the Registrar.

W. Gumbel: The main reason why it took several months to get the statement of case before the court was that, since this was not a case of an association, but of an agreement between nine manufacturers, the taking of instructions required a more elaborate procedure than in the case of an association where instructions were taken from the secretary of the association. The respondents had formed a sub-committee on which three members were represented, but it was necessary to get the approval of all of the manufacturers for the final statement of case. Also, the time expired near the long vacation. The statement of case was settled on Dec. 16, 1959, but the sub-committee did not approve it and a further conference had to be held. After that, it then had to go before all nine manufacturers for their final approval.

J. F. Donaldson: The Registrar does not oppose any application for the delivery of the statement of case to be regularised by the court, but this is a case where an order for costs should be made under r. 76 of the Restrictive Practices Court Rules, 1957,† and under r. 77 the court has power‡, instead of ordering a taxation, to order that a lump sum for costs be awarded and I put forward the figure of twenty-five guineas.

PEARSON, J.: In the view of the court there has been unreasonable delay here. On the respondents' appeal from the order of the clerk of the court there will be no order, except that the purported delivery and filing of the statement of case and list of documents shall be treated as good and valid filing and delivery of these documents. There will be an order for the payment of twenty-five guineas by way of costs by the respondents to the Registrar.

Solicitors: *Allen & Overy* (for the respondent Manufacturers of Wire Nails); *Treasury Solicitor*.

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

* On Apr. 17, 1961, following on the termination of the agreement as from Mar. 31, 1961, the court made an order under s. 20 (3) of the Restrictive Trade Practices Act, 1956, and the respondents gave the usual undertaking.

† Rule 76, so far as relevant, provides: "Where it appears to the court that any party has been guilty of unreasonable delay . . . the court may make an order for costs against him".

‡ Rule 77, so far as relevant, provides: "Where an order is made under the last foregoing rule, the court may direct that the party against whom the order is made shall pay to any other party a lump sum by way of costs . . ."

A

R. v. CUGULLERE.

[COURT OF CRIMINAL APPEAL (Lord Parker, C.J., Gorman and Salmon, JJ.), April 17, 1961.]

Criminal Law—Offensive weapon—Having an offensive weapon in a public place without lawful authority—Knowledge—Onus of proof of knowledge—Direction to be given to jury—Prevention of Crime Act, 1953 (1 & 2 Eliz. 2 c. 14), s. 1 (1).

B

The words in s. 1 (1) of the Prevention of Crime Act, 1953*, "has with him in any public place" mean "knowingly has with him in any public place" (see p. 344, letter F, post).

C

The appellant was arraigned on a charge, among others, of having with him without lawful authority or excuse in a public place offensive weapons, i.e., three pickaxe handles. The implements in question were in the back of a stolen van which the appellant was driving at the time. His defence was that he had no idea that the implements referred to were in the back of the van. In the summing-up the jury were not told that they must be satisfied beyond reasonable doubt that the appellant knew that the pickaxe handles were in the back of the van, and later on were directed that once the prosecution had proved possession the onus shifted to the appellant to show that he was in lawful possession. On appeal against conviction,

D

Held: the conviction must be quashed for the jury should have been directed that the onus remained throughout on the Crown to prove that the appellant knew that the pickaxe handles were in the van.

E

Appeal allowed.

[As to carrying offensive weapons, see 10 HALSBURY'S LAWS (3rd Edn.) 583, para. 1084.]

For the Prevention of Crime Act, 1953, s. 1, see 33 HALSBURY'S STATUTES (2nd Edn.) 34.]

F Case referred to:

R. v. Petrie, [1961] 1 All E.R. 466; [1961] 1 W.L.R. 358.

Appeal.

G

H

I

This was an appeal by Sidney Cugullere against his conviction on indictment at London Sessions on Nov. 30, 1960, before the chairman and a jury on a count of having with him, without lawful authority or reasonable excuse in a public place, offensive weapons, namely, three pickaxe handles. He had been arraigned on five counts in all, he pleaded guilty to the first two, namely, (i) taking and driving away a motor vehicle without the consent of its owner and (ii) a count of larceny; and not guilty to the other three counts, namely, (iii) stealing a motor van (which was not the vehicle referred to in count (i)), (iv) receiving the motor van knowing it to have been stolen, and (v) the count which was the subject-matter of this appeal and has been stated above. The jury found him not guilty on count (iii) but guilty on counts (iv) and (v). He was sentenced to six months' imprisonment on count (i), twelve months' imprisonment on count (ii) to six months' imprisonment on count (iv) and eighteen months' imprisonment on count (v). The sentences on counts (i) and (iv) were to run concurrently. The sentences on counts (ii) and (v) were to run consecutively, and the concurrent sentences on counts (i) and (iv) were to run consecutively on those, making three years' imprisonment in all. The appellant appealed against his convictions and on Mar. 28, 1961, the court (LORD PARKER, C.J., BARRY and HINCHCLIFFE, JJ.) gave him leave to appeal against his conviction on count (v) only. The facts appear in the judgment of the court.

C. A. A. Nicholls for the appellant.

Miss N. M. Collins for the Crown.

* The relevant part of s. 1 (1) is set out at p. 344, letter E, post.

SALMON, J., gave the following judgment of the court: This appellant appeals by leave of the court from his conviction on a count, count (v) of the indictment, in relation to the possession of offensive weapons. On that last count he received a sentence of eighteen months' imprisonment which was consecutive to the other terms of imprisonment imposed on him. A

The material facts are very short. On Oct. 4, 1960, two policemen in a police car saw the appellant driving a stolen Austin van. The police car drove alongside the van and one of the policemen opened the van door next to the driving seat. The accused man got out of this door and ran away; after a chase he was ultimately caught by one of the policemen. In the back of the car were found three pickaxe handles bound with adhesive tape (alleged by the prosecution to be offensive weapons) and a number of other articles clearly designed to be used for illegal and aggressive purposes. The accused at the time was shown the pickaxe handles, and a policeman after warning him said: "Would you care to tell me about them?" The accused replied: "You know what they are for. Why bother to ask?" B

His defence at the trial was that he had no idea that the van which he was driving had been stolen and that he had no idea that the implements to which I have referred were in the back of the van. He said that he ran away because he knew he was wanted by the police for the offences to which he pleaded guilty. C

The section under which he was convicted on count (v), s.1 (1) of the Prevention of Crime Act, 1953, reads as follows: D

"Any person who without lawful authority or reasonable excuse, the proof whereof shall lie on him, has with him in any public place any offensive weapon shall be guilty of an offence . . ."

Offensive weapons are defined in s. 1 (4) as E

" . . . any article made or adapted for use for causing injury to the person, or intended by the person having it with him for such use by him."

This court is clearly of the opinion that the words "has with him in any public place" must mean "knowingly has with him in any public place". If some innocent person has a cosh slipped into his pocket by an escaping rogue, he would not be guilty of having it with him within the meaning of the section because he would be quite innocent of any knowledge that it had been put into his pocket. In the judgment of this court the section cannot apply in circumstances such as those. It is, therefore, extremely important in any case under this section for the judge to give a careful direction to the jury on the issue of possession. The first thing the jury have to be satisfied about, and it is always a question for the jury, is whether the accused person knowingly had with him the alleged offensive weapon. F

The summing-up on this point is far from clear and, indeed, most unsatisfactory. The real question for the jury here was: Did the appellant know that these pickaxe handles were in the back of the van? The jury should have been told that if they were in any real doubt about this question, the appellant was entitled to be acquitted. G

The learned chairman dealt with the topic of possession thus; he said:

"Let me say at once, Mr. Hutchinson [who was then appearing for the defence] a moment or so ago told you—and this is a matter of law—that there was no evidence that his client was in possession. With very great respect to Mr. Hutchinson, that is wrong." H

So far, the summing-up is unexceptionable because obviously there was evidence that these pickaxe handles were in the possession of the appellant, but the learned chairman went on to say, "He was in possession", which was the very question of fact that it was for the jury to determine. Then the learned chairman said: I

A "What he is saying is that he had reasonable and lawful excuse for being in possession because it was an innocent possession, coupled with the van that he was repairing, that there was not any unlawful reason that they were there when he was driving the van back upon his lawful occasion to return it to the owner."

B That is obviously rather muddled, and could only have confused the jury. The learned chairman certainly does not say, as he should have done: "Are you satisfied beyond reasonable doubt that this accused man knew that these pickaxe handles were in the back of the van?" The whole defence was primarily based on the proposition that the accused did not know that the pickaxe handles were in the back of the van. Then again, later on the learned chairman says:

C "The next thing is the question of possession. This is one of those cases where once the prosecution have proved possession the onus shifts to the accused to show that he was in lawful possession. Here there is evidence that these implements, amongst other things, were in this sack in the back of the van under his control. He has said: 'My possession was lawful because I had had that van for the purpose of re-spraying and re-painting, and at the behest of the owner I was in the process of returning it to him when I was stopped. Indeed, I had no idea what was in the back of it'. As I say, the onus shifts to him..."

D That is clearly wrong because as far as the question of possession was concerned the onus remained throughout on the Crown to prove that the appellant knew that the pickaxe handles were in the van.

E The court is clearly of the opinion that on that ground alone this conviction cannot be allowed to stand. The summing-up is also open to criticism on the ground that the learned chairman did not direct the jury about the meaning of "offensive weapon" and leave to the jury whether this was an article adapted for use for causing injury to the person or intended by the appellant for such use. This matter was dealt with by this court recently in *R. v. Petrie* (1), and it is unnecessary to repeat anything that was said on that occasion.

F As already indicated, this court has come to the conclusion that the summing-up in relation to possession was so unsatisfactory that it would be unsafe to allow this conviction to stand, and it will, accordingly, be quashed.

Appeal allowed. Conviction quashed.

Solicitors: Registrar, Court of Criminal Appeal (for the appellant); Solicitor, Metropolitan Police (for the Crown).

[Reported by N. P. METCALFE, ESQ., Barrister-at-Law.]

WATSON v. PARK ROYAL (CATERERS), LTD.

[QUEEN'S BENCH DIVISION (Edmund Davies, J.), February 23, March 20, 21, 1961.]

Trade Name—Registration—Relief—Grounds of relief—Belief that relief granted on request not "sufficient cause" for failing to register—Effect of interpleading on plea of default under Act—Registration of Business Names Act, 1916 (6 & 7 Geo. 5 c. 58), s. 8 (1) (a).

Interpleader—Application—Time—When entitled to relief—Must be real foundation for expectation of being sued by rival claimant.

From 1957 the plaintiff carried on business under the name of Brays which was not her true surname, but, although when she started the business she knew of the registration requirements of the Registration of Business Names Act, 1916*, she had not registered under the Act. By writ dated Feb. 6, 1959, the plaintiff claimed from the defendants, the proprietors of a hotel, £918 16s. 4d. for goods sold and delivered between 1957 and 1958 in the course of the plaintiff's business. Before the proceedings were begun the defendants had taken the point that the plaintiff had not registered under the Act of 1916, and had given notice of their intention to rely on that plea in any proceedings, which in due course they did, relying in their defence on s. 8 of the Act of 1916†. While the defendants had admitted that they were indebted to "Brays" for the sum claimed they had, before the issue of the writ, stated that they were not satisfied that the plaintiff was entitled to the money because of conflicting claims to the ownership of the business; in particular, in a letter dated July 9, 1958, the defendants had stated they they knew one, Waite, was associated with the business and that Waite had told the hotel staff he owned the business. By a letter dated Apr. 7, 1960, the defendants received a formal claim to the £918 16s. 4d. on behalf of Waite and on July 22, 1960, they received a further claim to the money from one Wood. As a result of these rival claims on July 25, 1960, before the trial of the action, the defendants applied for interpleader relief. The action was then stayed and an interpleader summons was issued. Subsequently Wood withdrew his claim; the £918 16s. 4d. was paid into court by the defendants, and an order was made directing that whatever the result of the interpleader proceedings, £200 should remain in court until the question of costs of the main action was determined. Waite then withdrew his claim, judgment was entered for the plaintiff in the interpleader proceedings and an order was made for payment out to her of £718 16s. 4d. On Dec. 1, 1960, the district registrar made a further order that the defendants should pay £150 of the plaintiff's costs of the action, and that the balance of £200 in court should be paid to the plaintiff. The grounds for the order were that the defendants could have interpleaded at an earlier stage, when they wrote the letter of July 9, 1958, and that the defendants had abandoned the defence under s. 8 of the Act of 1916. The defendants appealed against that order to a judge in chambers. At the hearing of the appeal the plaintiff, for the first time, applied for relief under s. 8 (1)† proviso (a) of the Act of 1916, on the ground that default in registration had been "accidental, or due to inadvertence, or some other sufficient cause, or that on other grounds it is just and equitable to grant relief".

Held: (i) the district registrar's order as to costs could not stand and the appeal would be allowed because:—

(a) discretionary relief of interpleader would not be granted unless there appeared to be some real foundation for the expectation of a rival claim;

* See s. 1 (b) of the Act of 1916, set out at p. 350, letter I, post.

† The terms of s. 8 (1) are set out at p. 351, letter A, post.

it was not until the defendants received the letter dated Apr. 7, 1960, that there was real foundation for an expectation on their part that they would be sued, and, therefore, if the defendants had applied for interpleader relief within twenty-eight days of receipt of the letter of Apr. 7, they would have acted with reasonable promptitude and would have been entitled to their costs of the action up to that date.

Isaac v. Spilsbury ((1833), 2 Dowl. 211), *Harrison v. Payne* ((1836), 2 Hodg. 107), *Sharpe v. Redman* ((1837), Will. Woll. & Dav. 375) and *Morgan v. Marsack* ((1816), 2 Mer. 107) applied.

(b) the defendants had not, by interpleading and thereby disclaiming any interest in the money claimed, abandoned their plea under s. 8 of the Act of 1916, and accordingly, as the plaintiff was in default under s. 8 and had not applied for relief under s. 8 (1) proviso (a) at the date of the district registrar's order she was not then entitled to any part of the money claimed.

(ii) relief under s. 8 (1) proviso (a) of the Act of 1916 would be refused since on the facts the plaintiff's default was neither accidental nor due to inadvertence, nor was it "sufficient cause" for failing to register that the plaintiff, mistakenly, thought that relief would be granted automatically on request; further it was not just and equitable to grant relief in view of all the circumstances, particularly that the defendants had not withheld payment, but had parted with the whole of the sum claimed.

(iii) had relief been granted, notwithstanding that the effect of relief was to rehabilitate the proceedings from the beginning, the court would have granted it in the circumstances only on terms that each party paid their costs of action.

Dictum of LORD HANWORTH, M.R., in *Re Shaer* ([1926] All E.R. Rep. at p. 424) considered.

[As to applications for registration of business names, see 32 HALSBURY'S LAWS (2nd Edn.) 635, para. 940; and for cases on the subject, see 43 DIGEST 268-270, 1043-1055.]

As to interpleader relief, see 22 HALSBURY'S LAWS (3rd Edn.) 457-461, paras. 905-911; and for cases on the subject, see 29 DIGEST 456-459, 50-70.

For the Registration of Business Names Act, 1916, s. 8 (1), see 25 HALSBURY'S STATUTES (2nd Edn.) 1151.

For relief by way of interpleader, see R.S.C., Ord. 57, the ANNUAL PRACTICE, 1961, p. 1631.]

Cases referred to:

Harrison v. Payne, (1836), 2 Hodg. 107; 29 Digest 456, 52.

Hawkins v. Duché, [1921] All E.R. Rep. 673; [1921] 3 K.B. 226; 90 L.J.K.B. 913; 125 L.T. 671; 43 Digest 269, 1049.

Isaac v. Spilsbury, (1833), 2 Dowl. 211; 10 Bing. 3; 3 Moo. & S. 341; 131 E.R. 805; 29 Digest 468, 170.

Morgan v. Marsack, (1816), 2 Mer. 107; 35 E.R. 881; 29 Digest 456, 51.

Shaer, Re, [1926] All E.R. Rep. 422; [1927] 1 Ch. 355; sub nom. *Re Shaer, Ex p. Silverman*, 96 L.J.Ch. 282; 136 L.T. 695; 43 Digest 269, 1053.

Sharpe v. Redman, (1837), Will. Woll. & Dav. 375; 1 Jur. 775; 29 Digest 456, 53.

Smith, Re, [1920] W.N. 115; 43 Digest 270, 1054.

Weller v. Denton, [1921] 3 K.B. 103; 90 L.J.K.B. 889; 125 L.T. 569; 43 Digest 269, 1052.

Appeal.

By specially indorsed writ dated Feb. 6, 1959, the plaintiff, Joan Winifred Watson, trading as "Brays", claimed from the defendants, the proprietors of the Park Royal Hotel, Brighton, £918 16s. 4d. for the price of foodstuffs sold and delivered to the defendants between October, 1957 and June, 1958. In an

affidavit seeking leave to defend the action it was deposed that though a firm trading as Brays had sold and delivered goods to the defendants to the value of £918 16s. 4d. and the defendants were indebted to that firm for that sum, the plaintiff had never carried on the business of Brays which the defendants understood had been at all material times carried on by one Robert Wood. It was further deposed that the name of Brays was not registered under the Registration of Business Names Act, 1916, and that this fact provided a complete defence to the action. By order dated Apr. 2, 1959, the defendants were given leave to defend and a statement of claim and defence were ordered to be delivered. In their defence, which was delivered on Jan. 4, 1960, the defendants, *inter alia*, relied on s. 8* of the Registration of Business Names Act, 1916. The action was due to be tried at Lewes Assizes in July, 1960, but as a result of competing claims, in addition to the plaintiff's claim, to the £918 16s. 4d. made against the defendants by Wood and by the trustee in bankruptcy of one Waite, on July 25, 1960, before the trial of the action, the defendants applied to the trial judge, JONES, J., for interpleader relief and supported their application with an affidavit deposing that they had no interest in the £918 16s. 4d. save as to the costs of the action and were ready to bring that sum into court or to pay or dispose of it, less costs, as the court might direct. By order dated July 27, 1960, JONES, J., stayed all proceedings in the action on terms that the defendants issued an interpleader summons; that in the interpleader proceedings the plaintiff should be the plaintiff in the main action and the defendants, Wood and Waite's trustee; that the defendants in the main action should have liberty to apply for leave to appear and be heard in the interpleader proceedings and that costs should be reserved to the trial judge. Before the interpleader summons was heard Wood withdrew his claim and on Sept. 1, 1960, the district registrar ordered the trial of an interpleader issue between the plaintiff and Waite's trustee and further ordered that the defendants in the main action pay into court the £918 16s. 4d.; that the question of costs and all further questions should be reserved to the judge at the trial of the interpleader issue and that the defendants' application to be heard in the interpleader proceedings should not be granted. On Sept. 1, 1960, the defendants paid the £918 16s. 4d. into court. The registrar's order was appealed against and on Oct. 7, 1960, PAULL, J., varied it by ordering that whatever the result of the interpleader proceedings, the sum of £200 should remain in court until the question of the costs of the main action was decided. Thereafter Waite's trustee withdrew his claim and on Oct. 27, 1960, the district registrar entered judgment for the plaintiff in the interpleader proceedings and ordered payment out to her of £718 16s. 4d. but reserved the question of the costs of the main action. By a further order, dated Dec. 1, 1960, the registrar ordered the defendants to pay the plaintiff's costs of the main action limited to £150 and ordered payment out to the plaintiff of the balance in court of the £200. The grounds for that order were that on the facts the defendants could and should have interpleaded before the plaintiff commenced the action and that although s. 8 of the Registration of Business Names Act, 1916, *prima facie* provided a good defence to the action, the defendants had abandoned that defence. From that order the defendants now appealed to EDMUND DAVIES, J., sitting in chambers. The appeal came on on Feb. 23, 1961, but was adjourned by the judge to enable the parties to put in affidavits setting out grounds for and against the court granting relief to the plaintiff against the disability imposed on her by s. 8 of the Act of 1916 as a result of her non-registration of the firm of Brays. The hearing of the appeal was resumed before EDMUND DAVIES, J., on Mar. 20, 1961, and judgment (see p. 350, post) was delivered in open court on Mar. 21, 1961.

The following facts were referred to by the judge. From 1956 to June, 1958, the defendants' hotel was supplied with foodstuffs by the firm of Brays and to

* The terms of s. 8 are set out at p. 351, letter A, post.

A the defendants' knowledge that firm carried on business from 155, Preston Road, Brighton, which was the only address appearing on the invoices produced to the court. The defendants throughout thought that the proprietor of Brays was Wood. On the plaintiff's own showing, she did not acquire any interest in the business of Brays until an assignment dated Dec. 31, 1957, which was made some three months after the commencement of the deliveries now sued on by the plaintiff. The assignment of Dec. 31, 1957, on which the plaintiff relied as constituting her title to the business, called for comment since it did not mention Brays or any business carried on from 155, Preston Road, but simply referred to the business of greengrocer, grocer and poulterer carried on at 39, New England Road, Brighton. Further a search of the Business Names Register revealed that three weeks after the assignment the plaintiff had registered a business of greengrocers and general stores as being carried on by her from 39, New England Road, under the title of New England Fruit Stores, not Brays. Also, the assignment did not expressly transfer to the plaintiff trade debts accrued due to the business which she was acquiring.

D The correspondence began on June 16, 1958, when the plaintiff's solicitor wrote to the defendants that they were indebted to the plaintiff for a considerable amount. The defendants replied that they had no knowledge of the plaintiff as the proprietor of Brays but enclosed a cheque for £176 5s. 9d. made out in favour of Brays. The plaintiff's solicitor then wrote saying that he could not understand the reference to Brays. In a letter dated July 9, 1958, the defendants replied that they had been dealing with Brays for two and a half years and that "comparatively recently it became known that a Mr. E. Waite was associated with the business . . . and gave the hotel staff to understand that he was Brays as an earlier partner or associate had dropped out". On July 14, 1958, the plaintiff's solicitor wrote that the plaintiff was the sole owner of the business which had "been known as Brays in the past". Correspondence followed on the amount of money owed which turned out to be the sum of £918 16s. 4d., stated by the defendants. On Dec. 3, 1958, the plaintiff's solicitor wrote that if the defendants were in difficulty the plaintiff was prepared to give an indemnity. On Dec. 8, 1958, the defendants' solicitors wrote that they were advising the defendants that it would be unsafe to pay the plaintiff because it was not certain that she was the person entitled to the amount due and they went on to refer to two other conflicting claims to the ownership of the business of Brays laid by Wood who appeared to have become bankrupt and Waite who appeared to be an undischarged bankrupt. On Dec. 12 the defendants' solicitors wrote that if the plaintiff put forward in detail the ground on which she claimed to be proprietor of Brays the defendants would consider the matter and if necessary would be prepared to pay the amount due into court. On Dec. 15 the plaintiff's solicitor wrote that the plaintiff

H "is the only person interested in the business being carried on at 39, New England Road, Brighton, and has been the only person so interested at all material dates and when deliveries of goods have been effected . . ."

I In fact the plaintiff did not purport to have acquired any interest in the business at 39, New England Road until the assignment of Dec. 31, 1957. On Dec. 16, 1958, the necessity of registration was first mentioned when the defendants' solicitors asked for evidence of the plaintiff's interest, such as trading and banking accounts, income tax returns and assessments and registration under the Registration of Business Names Act, 1916, for the period covered by the claim, and stated that, as there were other claims to the ownership of Brays, payment would not be made until the defendants were assured beyond doubt that the plaintiff was the proper person to give a valid and effective discharge. On Feb. 6, 1959, the writ in the action was issued by the plaintiff (see p. 347, letter I, ante). In a letter dated May 14, 1959, from the defendants' solicitors, the first mention was made in the correspondence of the assignment on which

the plaintiff relied as constituting her title to the business of Brays. On Oct. 23, 1959, the plaintiff's solicitor sent the defendants an "epitome" of the plaintiff's title which, as to 39, New England Road, referred to an agreement for sale and purchase of the goodwill of that business and to the assignment of the goodwill of the business dated Dec. 31, 1957. As to 155, Preston Road, the only address of which the defendants assented they had knowledge, the epitome stated that the plaintiff held under an oral agreement but no indication was given as to when she acquired her interest in the business at 155, Preston Road. Accordingly, the defendants sought further information and again made the point that no information, oral or documentary, had been supplied to them regarding the plaintiff's title to Brays of 155, Preston Road. On Jan. 4, 1960, the defence to the action was filed and again the defendants expressly relied on non-compliance with the Registration of Business Names Act, 1916 (see p. 348, letter B, ante). There followed a letter from the plaintiff's solicitor dated Mar. 23, 1960, stating:

"I am instructed that at the end of 1956 my client [the plaintiff] wrote to your clients informing them that the business had been acquired by her . . . I would be obliged if you would kindly request your clients to search for this letter . . ."

The plaintiff's present case, however, was that her title dated from the assignment of Dec. 31, 1957. In a further letter to the defendants' solicitors dated Mar. 23, 1960, the plaintiff's solicitor gave notice that at the hearing of the action the plaintiff would ask the court to grant her relief under s. 8 (1) (a) of the Act of 1916, but in fact the plaintiff did not apply for relief under the Act until the hearing in chambers before EDMUND DAVIES, J., when the judge pointed out to her the peril in which she stood under s. 8 of the Act of 1916, even though on July 7, 1960, the defendants' solicitors had written that a search by them in the Business Names Register revealed that the only firm called Brays in the register was a business carried on at 17, Portland Road, Worthing, and that the plaintiff was not among the persons registered as proprietors of that business. On Apr. 7, 1960, the defendants had received a letter from Waite's trustee in bankruptcy stating that in his statement of affairs Waite had shown a debt due to his estate of £1,000, contracted in 1957-58, and that the trustee would be glad to receive a remittance for this amount from the defendants. In a letter dated July 22, 1960, the solicitors acting for Wood wrote to the defendants' solicitors claiming the sum of £918 16s. 4d. claimed by the plaintiff and alleging that at all material times Wood was trading as Brays. It was at that stage that the defendants applied for interpleader relief (see p. 348, letter C, ante).

P. Panto for the plaintiff.

J. L. E. MacManus for the defendants.

EDMUND DAVIES, J., having referred to the writ commencing the action, to the subsequent interpleader proceedings and to the order now appealed against, continued: In the course of the hearing it became clear that the plaintiff was in complete breach of the registration requirement imposed by s. 1 of the Registration of Business Names Act, 1916, which required that

"(b) Every individual having a place of business in the United Kingdom and carrying on business under a business name which does not consist of his true surname without any addition other than his true Christian names or the initials thereof . . . shall be registered in the manner directed by this Act."

The plaintiff thereupon requested me to grant her relief (limited to the £918 odd claimed) against the disability imposed by s. 8 of the Act in cases of non-registration. I adjourned the matter so that the parties might put in affidavits setting out the grounds for and against the granting of such relief and the hearing was resumed before me yesterday, I having dispensed with the necessity

for service or advertisement of the application (1). Section 8 (1) of the Registration of Business Names Act, 1916, provides as follows:

“Where any firm or person by this Act required to furnish a statement of particulars [see s. 3 of the Act] or of any change in particulars [see s. 6] shall have made default in so doing, then the rights of that defaulter under or arising out of any contract made or entered into by or on behalf of such defaulter in relation to the business in respect to the carrying on of which particulars were required to be furnished at any time while he is in default shall not be enforceable by action or other legal proceeding either in the business name or otherwise: Provided always as follows:—(a) The defaulter may apply to the court for relief against the disability imposed by this section, and the court, on being satisfied that the default was accidental, or due to inadvertence, or some other sufficient cause, or that on other grounds it is just and equitable to grant relief, may grant such relief either generally, or as respects any particular contracts, on condition of the costs of the application being paid by the defaulter, unless the court otherwise orders, and on such other conditions (if any) as the court may impose, but such relief shall not be granted except on such service and such publication of notice of the application as the court may order, nor shall relief be given in respect of any contract if any party to the contract proves to the satisfaction of the court that, if this Act had been complied with, he would not have entered into the contract.”

An application as belated as this must be very unusual but nevertheless it is clear that relief under s. 8 can be granted in proper circumstances even after judgment and that, if granted, it operates retrospectively right back to the institution of proceedings: *Re Shaer* (2). But while the court undoubtedly has the widest powers to grant relief (*Weller v. Denton* (3)) and is required to construe the disabling section broadly (see *Re Shaer*, per SARGANT, L.J. (4)), it is at the same time necessary to inquire in each case whether it would be proper in all the circumstances to grant the relief sought. I turn accordingly to the facts of the present case.

[HIS LORDSHIP referred to the facts and the correspondence, commenting in relation to the correspondence down to and including the letter dated Dec. 15, 1958, from the plaintiff's solicitor (see p. 349, letter H, ante), that it was directly material in considering whether it would be “just and equitable” to grant the plaintiff relief under s. 8 (1) (a) of the Act of 1916. Further, the fact that from the outset of the proceedings the defendants had maintained that the plaintiff was not registered in accordance with the Act of 1916, was material to the plaintiff's plea of inadvertence or ignorance made in support of her application for relief under s. 8. Another matter material to her plea of inadvertence was the fact that although the defendants in their letter of July 7, 1960, had pointed out that the plaintiff's name did not appear in the Register of Business Names the plaintiff had still not applied for relief. The plaintiff could clearly have applied for relief earlier in the proceedings as was done by the defaulting plaintiff in *Weller v. Denton* (3) but she had not done so and her application was made only now when HIS LORDSHIP had pointed out the peril in which she stood under the Act. HIS LORDSHIP continued:] The district registrar made his order of Dec. 7, 1960, that the plaintiff recover the £200 in court and £150 costs of action, as he has made clear in his careful and helpful note, on two grounds: First, he held that the defendants could have interpleaded before proceedings were ever instituted and, indeed, should have done so at the stage when their director wrote the letter of July 9, 1958. In my judgment, so to

(1) See s. 8 (1) (a) of the Registration of Business Names Act, 1916.

(2) [1926] All E.R. Rep. 422; [1927] 1 Ch. 355.

(3) [1921] 3 K.B. 103.

(4) [1926] All E.R. Rep. at p. 424; [1927] 1 Ch. at p. 359.

hold was wrong. There is ample authority for the proposition that the discretionary relief of interpleader will not be granted unless there appears to be some real foundation for the expectation of a rival claim: see *Isaac v. Spilisbury* (5), *Harrison v. Payne* (6), and *Sharpe v. Redman* (7). The fact that these are, in the words of the district registrar, "somewhat elderly authorities" I think adds to their weight rather than diminishes it. Applying them, in my judgment, while there were intimations of a sort that Wood and Waite were entitled to the £918 odd, no sufficient claim had been advanced on their behalf until the letters of Apr. 7 and July 22, 1960, already referred to. From the receipt of the earlier letter, however, although the defendants had not actually been sued by Waite's trustee, there was a real foundation for the expectation that they would be sued (*Morgan v. Marsack* (8)). Accordingly, while the matter becomes academic in the light of the decision I have come to on the s. 8 point, it is obviously convenient to the parties that I should now state that, had the defendants applied for interpleader relief on receipt of the letter of Apr. 7, 1960, or, say, within twenty-eight days thereafter, they would, in my judgment, have acted with reasonable promptitude, and I should in any event have awarded them their costs of action up to that date.

Secondly, the district registrar held that, while the defendants' reliance on the plaintiff's non-compliance with s. 8 of the Act of 1916 was a "more telling point" and "was a prima facie defence to the action", the defendants had abandoned it. He did not state how or why, and the only support for that finding advanced before me on the plaintiff's behalf was that it derived from the defendants' interpleading and thereby disclaiming any interest in the money claimed, save as to their costs. I disagree. Although the defendants interpleaded, they never abandoned their plea that the plaintiff was in default under s. 8. Indeed, they would have been unwise to do so, for even though Wood and Waite both failed, it by no means followed that the plaintiff was justly entitled to payment. As no application has ever been made until the present moment for relief, it follows that, although she is to be congratulated on recovering £718 odd of the sum claimed, the plaintiff has not hitherto been entitled to recover one penny in these proceedings, and that, accordingly, the district registrar's order as to costs cannot stand. It further follows that I allow the defendants' appeal from that order. The question still remains—ought this court, even at this late stage, to grant s. 8 relief, thus enabling the plaintiff, in view of the retrospective operation which *Re Shaer* (9) has decided would follow, to retain the order for costs which the district registrar has made in her favour or to seek now to obtain a like order from me? I have before me the affidavits of the parties. The plaintiff asserts that when she started trading as Brays she was unaware of the registration requirements of the Act of 1916. On the contrary, I think that she was aware. On Jan. 20, 1958, as I have already recalled, she registered the New England Fruit Stores, and her application must have contained the information prescribed by s. 3 of that same Act and must have been signed by her in accordance with s. 4. The plaintiff in her further affidavit says that that registration was effected by the solicitor then acting for her and that she did not appreciate "the implications" of registration. Such an assertion is wholly unsatisfactory. But the matter does not rest there. It has already been demonstrated by the correspondence and other documents that from the outset, and long before these proceedings were begun, the defendants were taking the point that there had been no registration and were giving due notice of their intention to rely on that plea were any proceedings instituted, which they in due course did. The plaintiff must therefore be held to have been amply warned and fully aware at all material times of the statutory requirement. Her duty was then to register and thereafter to apply for relief under

(5) (1833), 2 Dowl. 211.

(6) (1836), 2 Hodg. 107.

(7) (1837), Will. Woll. & Dav. 375.

(8) (1816), 2 Mer. 107.

(9) [1926] All E.R. Rep. 422; [1927] 1 Ch. 355.

s. 8 either generally or in respect of these particular deliveries, as was done in *Re Smith* (10). Although the district registrar said: "In my view, the failure to register was a prima facie defence to the action", he added that it was not pursued "because it was realised that relief would almost certainly be given". I disagree. However "broadly" s. 8 be construed (as SARGANT, L.J., directed in *Re Shaer* (11)) before granting relief from the disability thereby imposed the Act still requires the court to be "satisfied" of the matters therein set out, that is

"that the default was accidental, or due to inadvertence, or some other sufficient cause, or that on other grounds it is just and equitable to grant relief."

For the reasons which I have just stated the plaintiff has wholly failed to satisfy me that non-compliance was either "accidental" or "due to inadvertence". The only "other sufficient cause" suggested appears to be, in effect, "I did not apply for relief simply because I thought that relief would be mine for the asking". That is not the law and that is not "sufficient cause" for failing to register. Judges do, of course, from time to time refuse relief, as, indeed, ROCHE, J., and SALTER, J., each in turn originally did in *Hawkins v. Duché* (12), and to hold that it is automatically granted on request would simply be to put a pencil through the provisions of an Act of Parliament which obviously had security and stability in business dealings as its object. Nor, in view of the events and correspondence preceding the writ and subsequent thereto to which reference has already been made, am I in any degree satisfied that it would now be "just and equitable to grant relief". This is not a case where the defendants have had the plaintiff's goods and are withholding payment. They have parted with every penny of the £918 odd sued for, and the only question that remains is whether they or the plaintiff are to have the costs of the action. For these reasons I decline to exercise my discretion in favour of the plaintiff and the relief sought is refused.

I would add one further observation. Even had I thought this a proper case in which to grant relief, it would by no means necessarily follow that the plaintiff would be entitled to the prima facie right of a successful party to recover her costs of action. Notwithstanding that in *Re Shaer* (13) LORD HANWORTH, M.R., said: "The effect of that relief was to rehabilitate the proceedings from the beginning", relief is granted, if at all, only on such conditions as the court thinks proper to impose. Having regard to the early stage at which the defendants raised the s. 8 point, the unsatisfactory failure of the plaintiff to meet it, and the general merits of the case, I certainly do not regard the defendants as snatching at a mere technicality in order to avoid or postpone payment of a just debt. On the contrary, I think that they were placed in a real dilemma and suffered from a genuine apprehension that in paying the plaintiff they might well be paying the wrong person. Accordingly, even had I been disposed to grant relief, it would have been only on terms that each party paid their own costs of action. As it is, relief is refused, and the contracts sued on remain unenforceable by action. The defendants will have the costs of the appeal from the district registrar's order and of this application and the general costs of action, save as to the costs of the appeal to PAULL, J. (14), which he ordered to be the plaintiff's in any event. The £200 in court will remain there until the whole of the defendants' costs have been taxed. If they exceed £200, that sum will be

(10) [1920] W.N. 115. (11) [1926] All E.R. Rep. at p. 424; [1927] 1 Ch. at p. 359.

(12) [1921] All E.R. Rep. 673; [1921] 3 K.B. 226.

(13) [1926] All E.R. Rep. at p. 424; [1927] 1 Ch. at p. 357.

(14) See p. 348, letter F, ante.

paid out to them in part satisfaction thereof. If they tax at less than £200 the defendants have intimated their preparedness that any balance be paid out to the plaintiff and in that event I order accordingly. A

Appeal allowed. Application for relief refused. Order for costs accordingly.

Solicitors: *Whitehouse, Gibson & Oldershaw*, agents for *Leslie Wilner*, Brighton (for the plaintiff); *Boxall & Boxall*, agents for *Edwin Boxall & Kempe*, Brighton (for the defendants). B

[Reported by WENDY SHOCKETT, Barrister-at-Law.]

RIDGE NOMINEES, LTD. v. INLAND REVENUE COMMISSIONERS. C

[CHANCERY DIVISION (Buckley, J.), March 22, 23, 1961.]

Stamp Duty—Conveyance on sale—Transfer of stock—Offer to acquire all company's stock—Offer conditional on acceptance by sufficient stockholders—Transfers executed before condition fulfilled—Whether transfers on sale—Subsequent notice to acquire stock of dissenting stockholders—Transfer executed by purchasers' nominee under Companies Act, 1948 (11 & 12 Geo. 6 c. 38), s. 209—Whether transfer on sale—Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 54, Sch. 1. D

A company made an offer to purchase the whole of the stock of another company from the stockholders at a stated price. The offer was conditional on its acceptance by a stated date by the holders of ninety per cent. of the issued capital or such smaller percentage as the offering company might elect to accept, and the stockholders were to sign a form of acceptance and to execute a transfer of their stock and send them to a stated address, an undertaking being given that the acceptance and transfer duly cancelled would be returned with the stock certificate, or a re-transfer effected and a new stock certificate issued, if the offer was not accepted. Two stockholders accepted the offer and executed transfers of their stock to the offering company. The company, having obtained acceptances in respect of the ninety per cent. of stock as stipulated, gave notice to a dissenting stockholder of its desire to acquire her stock and caused a transfer of her stock to be made by its nominee on her behalf to itself under s. 209 of the Companies Act, 1948. E

Held: (i) the first two transfers were conveyances on sale within s. 54 of the Stamp Act, 1891, and were liable to ad valorem duty under the head of "conveyance or transfer on sale" in Sch. 1 to that Act, since they were made in pursuance of a binding and completed contract of sale concluded when the stockholders accepted the offer, the condition relating merely to some of the rights and obligations under the contract. F

(ii) the third transfer was liable only to 10s. duty and not to ad valorem duty under the head of "conveyance or transfer on sale" in Sch. 1, since sale for the purpose of that head of charge connoted a contractual sale involving consensus ad idem and not a transfer made under compulsion by virtue of an enactment. G

Great Western Ry. Co. v. Inland Revenue Comrs. ([1894] 1 Q.B. 507) considered. H

A.-G. v. Felixstowe Gas Light Co. ([1907] 2 K.B. 984) distinguished.

Appeal allowed in part. I

[As to the meaning of "conveyance or transfer on sale" for the purposes of the Stamp Act, 1891, see 28 HALSBURY'S LAWS (2nd Edn.) 458, para. 973; and for cases on the subject, see 39 DIGEST 278-285, 621-671.]

A For the Stamp Act, 1891, s. 54 and Sch. 1 ("Conveyance or transfer on sale") see 21 HALSBURY'S STATUTES (2nd Edn.) 627, 667.]

Cases referred to:

A.-G. v. *Felixstowe Gas Light Co.*, [1907] 2 K.B. 984; 76 L.J.K.B. 1107; 97 L.T. 340; 39 Digest 281, 650.

B *Great Western Ry. Co. v. Inland Revenue Comrs.*, [1894] 1 Q.B. 507; 63 L.J.Q.B. 405; 70 L.T. 86; 58 J.P. 397; 39 Digest 280, 646.

Ulverstone & Lancaster Ry. Co. v. Inland Revenue Comrs., (1864), 2 H. & C. 855; 159 E.R. 354; sub nom. *Furness Ry. Co. v. Inland Revenue Comrs.*, 33 L.J.Ex. 173; 10 L.T. 161; 39 Digest 280, 645.

Case Stated.

C The appellant company presented three instruments of transfer to the Commissioners of Inland Revenue for their opinion as to the stamp duty chargeable under the Stamp Act, 1891. The instruments were transfers of stock units in Gresham Trust, Ltd. The commissioners were of opinion that each of the instruments was a "conveyance or transfer on sale" for the purposes of the Stamp Act, 1891, and was accordingly chargeable with ad valorem duty. The appellant company contended that at the time when the first two instruments were executed it was uncertain whether they would operate as transfers or not and that they were therefore not liable to ad valorem duty under the head suggested. It also contended that the third instrument in any event was not a transfer on sale. It appealed by way of Case Stated to the High Court.

E *K. W. Mackinnon, Q.C.*, and *J. G. Monroe* for the appellant company.

H. B. Magnus, Q.C., and *E. Blanshard Stamp* for the Crown.

F **BUCKLEY, J.:** This case raises two distinct points, both arising out of an offer made by a company, Ridge Securities, Ltd. (which I will call "Ridge") to purchase from the stockholders of another company, Gresham Trust, Ltd. (which I will call "Gresham"), the whole of the ordinary stock of that company. In each case the question is whether a transfer of part of that stock attracts ad valorem duty as on a "conveyance or transfer on sale". The two types of transfer with which I am concerned are, first, a transfer executed by an accepting stockholder of Gresham; and, secondly, a transfer executed under the Companies Act, 1948, s. 209, on behalf of a dissentient stockholder of Gresham.

G The offer was made on Nov. 14, 1958, and was made by way of a circular letter from Ridge addressed to the stockholders of Gresham, and the opening words of the offer are:

"We hereby offer to purchase each of your stock units of £1 (free from encumbrances) in [Gresham]... at the price of 40s. 6d. per stock unit inclusive of future dividends.

H "This offer is conditional upon acceptance on or before Dec. 4, 1958 (or such later date (if any) not being later than Dec. 16, 1958, as we may stipulate) by the holders of ninety per cent. of the issued capital of [Gresham] or such smaller percentage as we may on or before Dec. 30, 1958, elect to accept."

I The stockholders were instructed that, if they wished to accept the offer, they should sign a form of acceptance which was enclosed and a transfer of their stock in Gresham both of which documents were to be dated with the date of signature and forwarded to the appropriate address. The letter then went on:

"If the offer is not accepted by the holders of a sufficient number of stock units either (a) your acceptance of this offer and the executed transfer will be cancelled and together with your stock certificate(s) will be returned to you or (b) your stock units will be re-transferred to you and a new certificate issued to you."

The form of acceptance which accompanied the letter is addressed to Ridge and Ridge Nominees, Ltd. (the appellant company), which is a company associated with Ridge and it is also addressed to Midland Bank, Ltd. It reads:

"Gentlemen,

"1. I/We hereby irrevocably accept the offer made by [Ridge] and communicated to me/us by the circular letter dated Nov. 14, 1958, to acquire on the terms and subject to the conditions set out therein the stock units of £1 in [Gresham] (hereinafter called 'the company') of which I/we am/are the registered proprietor(s).

"2. In accordance with the terms of the offer mentioned above I/We have executed and enclose a transfer in favour of [the appellant company] of my/our holding of stock units in the company, together with the stock certificate(s) in respect thereof, such transfer having been executed on the following conditions: (a) [The appellant company] will hold the stock units transferred thereby to my/our order until the said offer becomes unconditional. (b) [The appellant company] will lodge with Midland Bank, Ltd., duly executed transfer(s) of such stock units from [the appellant company] together with appropriate stock certificate(s) and an authority to the bank to complete the re-transfer of such stock units to me/us if the said offer has not become unconditional by Dec. 30, 1958. (c) If the offer becomes unconditional on or before that date, [the appellant company] will hold such stock units to the order of [Ridge].

"3. In the event of the said offer becoming unconditional I/we hereby authorise and request Midland Bank, Ltd., to despatch to me/us by post to the first address given below a cheque in my/our favour for the amount of the purchase money due to me/us at the rate of 40s. 6d. per stock unit."

On Nov. 17, 1958, and on Nov. 28, 1958, two stockholders in Gresham, Miss Abbott and Mr. Agnew, amongst other stockholders, accepted that offer and signed the forms of acceptance and executed transfers of their stock to the appellant company, in accordance with the terms of the offer. I have to consider how those transfers ought to be stamped. Acceptances from holders of ninety per cent. of the issued capital of Gresham had not been received on Dec. 4, 1958, and Ridge accordingly stipulated that the time should be extended to Dec. 16, 1958, in accordance with the terms of their offer. On Dec. 12, 1958, but not before, acceptances were received from the holders of ninety per cent. of the stock of Gresham.

In those circumstances it is contended by the appellant company that the transfers executed by Miss Abbott and Mr. Agnew, and other stockholders who accepted the offer before it became unconditional on Dec. 12, 1958, do not fall to be stamped as "conveyances or transfers on sale"; because, it is said, one must look at the circumstances as they existed at the moment when the transfers of their stock were executed, and see whether at that date they could properly be said to have been transfers on sale, and, since as at that date the offer had not become unconditional, there was then (so the argument goes) no sale but merely an anticipation that a sale might eventuate thereafter. That the relevant date at which to consider the character of the transfers is the date when they were executed is common ground: what is not common ground is whether, looking at the transfers at that date, they ought properly to be described as "transfers on sale" within the meaning of the Stamp Act, 1891.

The charge to duty under that Act is to be found in s. 1 which provides:

"From and after the commencement of this Act the stamp duties to be charged for the use of Her Majesty upon the several instruments specified in Sch. 1 to this Act shall be the several duties in the said Schedule specified . . ."

Then, when one turns to Sch. 1 to the Act, under the heading "Conveyance or transfer", one finds a number of different classes of conveyance or transfer referred to, and the relevant one in the present case is: "Conveyance or transfer

on sale—Of any property (except such stock as aforesaid)”, such stock being colonial and government stock. So far, therefore, the Act charges duty at the rates set out in Sch. 1, which are ad valorem rates, on something which is properly to be described as a “conveyance or transfer on sale” of property. Section 54 of the Act provides:

“For the purposes of this Act the expression ‘conveyance on sale’ includes every instrument, and every decree or order of any court or of any commissioners, whereby any property, or any estate or interest in any property, upon the sale thereof is transferred to or vested in a purchaser, or any other person on his behalf or by his direction.”

That is not, in terms, a comprehensive definition, because it uses the word “includes”, but, whether one looks at Sch. 1 or at the section, one has to see whether there is a sale. In one case, one has got to find that the document can properly be described as a “transfer on sale”, and in the other case it has got to be an instrument whereby property “upon the sale thereof is transferred to or vested in a purchaser”.

What then was the nature of the transaction in the present case? The offer was manifestly an offer to buy stock in Gresham. True, it is a conditional offer, but it is an offer to buy stock at a price in terms of money. The acceptance is an acceptance of that offer, and I think that, as soon as any stockholder in Gresham accepted the offer, there was a contract between Ridge and that stockholder in Gresham. It was a conditional contract, not in the sense that the assent of either party was subject to some condition precedent, so that he could say that there was no true contract until that condition was satisfied, but only in the sense that it was a binding and completed contract, some of the rights and obligations under which were dependent on certain conditions. At that stage it seems to me that there was a contract of sale between the stockholder who accepted the offer and Ridge who made it. The fact that it was a conditional contract does not in my view make it any the less a contract of sale. One of the terms of the offer was that acceptance should be accompanied by an executed transfer of the stock to which the acceptance related, and that transfer was clearly intended to be used for completing the contract if and when the purchaser was in a position to insist on the sale being carried out.

It is worth noting that, although the purchasers could call the deal off if they did not obtain acceptances from the holders of ninety per cent. of the stock in Gresham, they could at any time before Dec. 30 decide to hold all those stockholders who had accepted to their bargain, because Ridge could decide to accept a smaller percentage than ninety per cent. The contract was really a binding contract on the vendor to sell his stock subject to a power for Ridge to call the deal off at any time before Dec. 30, 1958, unless ninety per cent. of the stockholders of Gresham had by then accepted. So the vendor had no avenue of escape from the contract, whereas the purchaser had in certain events.

To take a rather fanciful example, if a purchaser were to offer to buy land on terms that the vendor should immediately execute a conveyance of the property to him, but that he, the purchaser, should not be bound to pay the purchase price until the vendor had made a satisfactory title, and that, if the vendor did not make the satisfactory title, the purchaser would re-convey the land to the vendor, and if that offer were accepted, it seems to me clear that the conveyance executed by the vendor would be a conveyance on sale, notwithstanding that the purchaser might have a right to call the deal off in certain events. In just the same way, it seems to me that in the present case the transfers which were executed by the accepting stockholders of Gresham were transfers on the sale of their stock within the meaning of the Act and in fact, notwithstanding that, in certain circumstances, the purchaser might thereafter be in a position to call the deal off and, if he did so, would be bound to return the stock to the stockholder. I therefore reach the conclusion, as regards the transfers executed by

Miss Abbott and Mr. Agnew, that these were transfers on sale within the natural meaning of that term in the English language, and having regard to the nature of the transaction and the course that it took. A

The other question with which I have to deal is whether the transfer executed under s. 209 of the Companies Act, 1948, on behalf of a stockholder who declined to accept the offer falls to be stamped as a transfer on sale or not. Under s. 209 of the Act of 1948, the transferee company may in certain circumstances give a notice to a dissenting shareholder that it desires to acquire his shares. When such notice is given, unless the dissenting shareholder obtains an order of the court to the contrary, the transferee company becomes entitled and bound to acquire the shares of the dissenting shareholder at a particular price. If, however, the dissenting shareholder does not choose to transfer the shares in accordance with that right of the transferee company, then under sub-s. (3) there is provision for the execution of a transfer on behalf of the shareholder by a person appointed by the transferee company; and the transfer with which I am concerned was a transfer executed under that statutory provision. B C

The argument presented on behalf of the appellant company on this part of the case is to this effect: that the procedure under s. 209 does not result in a sale properly so-called by the dissenting shareholder to the transferee company, since a sale implies assent on the part of the transferor, and ex hypothesi there is no assent on the part of the transferor. Counsel for the appellant company has drawn my attention to the definition of "sale" in BENJAMIN ON SALE (8th Edn.), at p. 2, where it is said: D

"By the common law a sale of personal property was usually termed a 'bargain and sale of goods.' It may be defined to be a transfer of the absolute or general property in a thing for a price in money. Hence it follows that, to constitute a valid sale, there must be a concurrence of the following elements, viz.: (1) Parties competent to contract; (2) mutual assent; (3) a thing, the absolute or general property in which is transferred from the seller to the buyer; and (4) a price in money paid or promised." E

Counsel says that, on the facts of this case, one cannot find a sale by the dissenting shareholder because there is no mutual assent. F

On the other hand, it is said on behalf of the Crown that the question is not really whether there was a sale by the dissenting shareholder, but whether the transfer executed under s. 209 falls, for the purpose of the Stamp Act, 1891, to be regarded as if it were a transfer on sale. Counsel for the Crown says that in the case of a transfer under s. 209 of the Act of 1948, admittedly there is no sale in the sense of the definition that I have read from BENJAMIN, but that, where a transfer is effected for a price pursuant to an Act of Parliament, for stamp duty purposes there is a sale and the instrument is a transfer on sale. He says further that, where someone does something under statutory compulsion which would attract ad valorem stamp duty if done consensually, duty is charged as though he were acting under a consensual contract. G H

In *Great Western Ry. Co. v. Inland Revenue Comrs.* (1):

"By the Great Western Railway Act, 1892, it was enacted that the undertaking of two other railway companies should be amalgamated with and form part of the undertaking of the Great Western Railway Company, the amalgamated companies being dissolved as from the date of the amalgamation. From that date the shareholders in one of the amalgamated companies were, in lieu of and in exchange for their shares, to become holders of guaranteed stock of the Great Western Company in certain specified proportions . . . In the case of the other company the consideration for the amalgamation was the payment by the Great Western Company of the principal and interest of certain outstanding debentures, the share I

capital of that company being already held by the Great Western Company.” The Act included a provision in s. 32 in the following terms:

“ A Queen’s printer’s copy of this Act shall be chargeable with the same stamp duty as would be chargeable if the transaction effected by the Act with reference to each of the amalgamated companies were a transaction effected by an executed instrument in writing, and the copy were the instrument.”

It appears from the recital of the facts that no written agreement had been entered into between the three companies before the Act was passed relating to the proposed amalgamation, but that the usual resolutions approving the Bill had been passed by the proprietors of the several companies. So it is clear that all three companies were assenting parties to the arrangement before the Act was enacted, and the Act was enacted in order to carry out their common intention. It was argued that duty was not chargeable as on a “ conveyance or transfer on sale ” because there had been no sale but merely a statutory transfer of the assets of the smaller companies, and that what had really taken place had been an amalgamation or a fusion of the subsidiary companies with the larger or amalgamating company.

In my view, the decision of the court really turned on that provision of the Act which I have read relating to the stamping of a Queen’s printer’s copy of the Act. LORD ESHER, M.R., said (2):

“ If that transaction had taken place between private persons or private companies without an Act of Parliament, supposing that were possible, how would it be done, and what would be the substance of the transaction?”

He is there addressing his mind, I think, to the question of what would have been the instrument in writing executed by the parties to which the Act of Parliament was to be equated for the purpose of stamp duty. He continued (2):

“ It would be done by an instrument, which, as regards its legal effect, would be, in part at all events, a transfer of the property of the one company to the other for the consideration I have just described. That might or might not be in virtue of a contract of purchase and sale, but it would have precisely the same effect as if it were a conveyance, the consequence of a contract of purchase and sale. The substance of such a transaction, then, would be a transfer of property for a consideration, as if it were upon a contract of purchase and sale. Turning to the Stamp Act, the words used are ‘ a conveyance on sale.’ Does that expression mean a conveyance where there is a definite contract of purchase and sale preceding it? Is that the way to construe the Stamp Act, or does it mean a conveyance the same as if it were upon a contract of purchase and sale? The latter seems to me to be the meaning of the phrase as there used.”

In that passage I think that LORD ESHER is addressing his mind to the question whether, before a document can be said to be a conveyance on sale, one must find an antecedent contract of sale; and I think that he is saying that, if the conveyance is one which carries out a sale, it is not necessary to find some antecedent contract of sale. I do not think that he is saying that something can be regarded as a conveyance on a sale which is not a conveyance on a sale at all.

LOPES, L.J., appears to me to base his judgment, at any rate in part, on the ground that the arrangement was a consensual arrangement. He says (3):

“ As was pointed out by CAVE, J., in the court below, there is everything here which constitutes a sale—two parties, one parting with something and the other giving something for it, the arrangement ultimately come to being embodied in an Act of Parliament.”

"The arrangement ultimately come to" refers, I think, to the resolutions which the three companies had passed, approving the proposed arrangement, before the Act was enacted. A

KAY, L.J., I think, clearly bases his decision also on that provision in the Act which related to stamp duty on the Queen's printer's copy. He says this (4):

"Substantially, as it seems to me, it is a purchase and sale of the property and undertaking, the business, the powers, and everything that is involved in the word 'undertaking' of the company which is to be dissolved. The transfer is effected by this Act of Parliament, and this Act of Parliament is to receive the same stamp which an instrument carrying out that arrangement would have been subject to if the companies had had power to do it without an Act of Parliament. Supposing this could have been done without an Act of Parliament, the one company would by deed of conveyance have conveyed the whole of its property to the other company, the latter paying as a consideration the money's worth in stock which it had practically handed over to the former company." B C

At the conclusion of the judgments LORD ESHER, M.R., made a pregnant remark (5):

"I ought to have said that we cannot distinguish this case from the case of *Furness Ry. Co. v. Inland Revenue Comrs.* (6)." D

The headnote to that case is:

"The consideration for the transfer of the whole undertaking of one railway company to another consisted of the purchasing company taking on themselves the liabilities of the vendors, and creating and allotting to the shareholders of the selling company preference stock of the purchasing company equal in amount to the capital of the other, which was to be extinguished: *Held*, that this preference stock was to be stock within the meaning of the schedule, and therefore liable to pay duty on its market value." E

In that case the sale was a purely contractual sale, and no question of the statutory transfer of the assets, or anything of that nature, was involved. F

I think that that observation by LORD ESHER makes it plain that the Court of Appeal in that case was not deciding that a statutory transfer which lacked the qualities necessary to constitute a sale could amount to a conveyance on sale for the purposes of the Stamp Act, 1891. The reason why, in this particular instance, the statute had to be stamped in the way in which it was, was that the Act itself provided that it should be stamped as if it were an instrument executed by the parties for the purpose of carrying the transaction into effect. I do not, therefore, consider that *Great Western Ry. Co. v. Inland Revenue Comrs.* (7) assists counsel for the Crown in his argument in the present case. G

In *A.-G. v. Felixstowe Gas Light Co.* (8) by a special Act of Parliament, one company was dissolved and another company incorporated. The property of the dissolved company was vested in the new company, the shareholders in the old company being given stock in the new company in substitution for the stock of the old company. It was held by BRAY, J. (8): H

"that the property of the dissolved company 'vested by way of sale' in the new company within the meaning of s. 12 of the Finance Act, 1895, notwithstanding that there was no contract of sale between the two companies by reason of their never having been in existence at the same time." I

This case did not turn on Sch. 1 to the Stamp Act, 1891, or on s. 54 of the Act, but on the terms of s. 12 of the Finance Act, 1895, which provides:

"Where after the passing of this Act, by virtue of any Act, whether passed

(4) [1894] 1 Q.B. at p. 515.

(6) (1864), 33 L.J.Ex. 173.

(5) [1894] 1 Q.B. at p. 516.

(7) [1894] 1 Q.B. 507.

(8) [1907] 2 K.B. 984.

before or after this Act, either—(a) any property is vested by way of sale in any person; or (b) . . . such person shall within three months after the passing of the Act, or the date of vesting, whichever is later, or after the completion of the purchase, as the case may be, produce to the Commissioners of Inland Revenue a copy of the Act printed by the Queen's printer of Acts of Parliament or some instrument relating to the vesting in the first case, and an instrument of conveyance of the property in the other case, duly stamped with the ad valorem duty payable upon a conveyance of sale of the property . . .”

The crucial words were “any property is vested by way of sale”. The question for BRAY, J., to decide was whether, in the circumstances of that particular case, it could be said that the property of the old company had vested in the new company by way of sale. Clearly, there could be no contract of sale between the two, no consensual arrangement of any sort, because the one company did not come into existence before the moment when the other company went out of existence. BRAY, J., said (9):

“What is necessary to constitute a sale? No doubt as a general rule it is necessary that there should be two parties; there must be a consensus between those parties; there must be a consideration and a transfer of the property. The difficulty suggested here is that the two parties were never in existence at the same time, and consequently there could be no consensus, no mutual assent of two persons meeting and agreeing together. I think, however, that the want of a consensus may be supplied by the Act of Parliament. If there was a real intention on the part of the old company to transfer the property and on the part of the new company to acquire it for consideration, and if that intention was expressed, not in an ordinary contract inter partes, but in an Act of Parliament, then the fact that the two companies were not existing at the same moment was immaterial; the Act enabled them to do that which without it they could not have done. Equally, of course, it might be said that a ‘transfer’ means a transfer from an existing person to another existing person, and that, as these two persons never existed at the same time, there could be no transfer in the strict sense of the term. But, as I have said, I think the Act of Parliament supplies that deficiency, and that this transaction is to be treated as if it were a transfer from the one company to the other.”

Then he says that he thinks that colour is given to that by LORD ESHER's judgment in *Great Western Ry. Co. v. Inland Revenue Comrs.* (10), and BRAY, J., continues (9):

“I gather that if he had had to construe the words before me, ‘vested by way of sale’, he would have considered them satisfied if the transfer of the property was for a consideration, as if it were upon a contract of purchase and sale. In my opinion, this property was vested by way of sale in the new company, and the duty is accordingly payable upon it.”

Relying on that case, counsel for the Crown says that Parliament can supply the want of consensus between the parties to a transaction, so that the transaction must be treated as though it were a consensual transaction although in fact there is no consensus between the parties; and so it must be regarded as being one in respect of which it is appropriate to say either that the property is vested by way of sale or, if there is a transfer, that it is a transfer on the sale of the property.

Under s. 209 of the Companies Act, 1948, a transfer executed under sub-s. (3) is executed on behalf of the shareholder, and the person who executes it may be said to occupy the position of the statutory agent of the shareholder to make the transfer. So counsel for the Crown says that, in a case under the section, the position is really that the vendor is unwilling to sell, but the purchaser goes to the

court and obtains powers to compel the vendor to sell, and the purchaser becomes entitled to acquire the shares; and he then becomes entitled to a right which, apart from the particular machinery provided by the section, would enable him to obtain a decree of specific performance of that right. Then, instead of requiring the purchaser to come to the court for a decree of specific performance, the section itself provides the machinery by which the purchaser can get in the property to which he is entitled by means of a transfer executed by someone on behalf of the unwilling vendor. He says that, at the end of the day, what happens is a sale, although it is a sale which the vendor is compelled to make by the terms of the section. Notwithstanding that the vendor is unwilling, the relation of the parties is really that of vendor and purchaser, and the transaction is a transaction of sale.

I think that the problem really comes down to this: can Parliament, by some Act unconnected in any way with the Stamp Act, 1891, make some transaction which is not in the contemplation of law really a sale at all because it lacks the consensual element a sale for the purposes of the Stamp Act? Now, no doubt, if the Companies Act, 1948, had said: "and every transfer of shares carried out in this way shall be deemed to be a sale for the purposes of the Stamp Act", that would clearly achieve that result: but is the effect of s. 209 such that a transaction under that section is to be treated as a sale notwithstanding that it does not contain any such clear reference to the Stamp Act as that? Looking at the Stamp Act, 1891, itself, I see nothing to lead one to the conclusion that one ought not to give to the word "sale", both in Sch. 1 and in s. 54, its proper meaning; and its proper meaning, according to the law of this country, I think, is that defined in the passage that I have referred to in *BENJAMIN ON SALE*—and that involves a consensus between the vendor and the purchaser. In the case of a transaction under s. 209, that element is clearly absent. *Prima facie*, therefore, it seems to me that a transaction carried through under s. 209 of the Companies Act, 1948, does not constitute a sale within the meaning of the Stamp Act, 1891, and does not attract duty as on a "conveyance or transfer on sale".

Apart from *Great Western Ry. Co. v. Inland Revenue Comrs.* (11) with which I have dealt, the only authority on which counsel for the Crown relied for saying that I ought so to apply the language of the Act is *A.-G. v. Felixstowe Gas Light Co.* (12), but the *Felixstowe* case (12) is a decision on a different Act, and the words are a little different. The words that were relevant there were, as I have said, "any property is vested by way of sale", and *BRAY, J.*, seems to have thought that "by way of sale" were words that admitted of a certain degree of elasticity in their construction. At any rate, I have to consider a different Act and different words, and I have to consider a transaction in respect of which it seems to me there was no sale. It is quite true that, in those circumstances, the legislature has said that somebody purporting to act on behalf of the shareholder may execute a transfer which will have the effect of divesting him of those shares, but I cannot see that that makes that transfer a transfer on sale, or that it makes the dissenting shareholder a shareholder who must be taken to assent to his shares being sold. I therefore reach the conclusion, in regard to this part of the case, that the appeal should succeed and that the transfer ought not to be stamped as a transfer on sale.

Appeal allowed in part. Ad valorem duty on first two transfers confirmed. Duty assessed at 10s. on third transfer.

Solicitors: *Coward, Chance & Co.* (for the appellant company); *Solicitor of Inland Revenue.*

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

A R. v. LIVERPOOL LICENSING JUSTICES, *Ex parte* TYNAN.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Finnmere and Salmon, JJ.), April 14, 1961.]

B *Licensing—Permitted hours—Extension—Supper-hour—Requirement that there should be supply of substantial refreshment to which the sale and supply of intoxicating liquor was ancillary—Liquor ancillary to refreshment—Whether necessary for total sale of liquor to be ancillary to total sale of food—Licensing Act, 1953 (1 & 2 Eliz. 2 c. 46), s. 104 (1) (a).*

C Licensed club premises contained both an ordinary bar and also a restaurant, with its own bar, for serving members having food. Out of total takings of about £5,700 about £3,100 was taken in the ordinary bar and about £2,600 was taken in the bar restaurant. Of this £2,600, about £565 was for drink and the rest for food. A certificate under s. 104 (1) (a)* of the Licensing Act, 1953, for the purposes of the supper-hour extension having been refused, on the ground that, having regard to total receipts, the sale of intoxicating liquor was not ancillary to the sale of food, the applicant applied for mandamus.

D **Held:** section 104 (1) (a) of the Licensing Act, 1953, was satisfied because there were bona fide meals on the premises to which the sale of intoxicating liquor was ancillary, and there was not a sale of liquor under a mere cloak of meals; accordingly, an order of mandamus would issue.

[As to the supper-hour's extension, see 22 HALSBURY'S LAWS (3rd Edn.) 655-657, paras. 1377, 1378; and for a case on the subject, see 30 DIGEST (Repl.) 79, 608.]

E For the Licensing Act, 1953, s. 104, see 33 HALSBURY'S STATUTES (2nd Edn.) 236.]

Application for mandamus.

F On Mar. 14, 1961, the applicant, Lawrence Gordon Tynan, the proprietor and manager of the Golden Goblet Club, 22, Harrington Street, Liverpool, and the holder of the justices' licence in respect thereof, applied at the second session of the general annual licensing meeting of the Liverpool city licensing justices for a certificate under s. 104 (1) (a) of the Licensing Act, 1953. If the justices were so satisfied of the matters specified in s. 104 (1), that section would apply to the premises, and so for one hour after the normal permitted hours G intoxicating liquor might (by s. 104 (4) (a)) be sold or supplied therein, "for consumption at a meal supplied at the same time in such part of the premises as is usually set apart for the service of meals". There was no objection to the application but the justices refused it. The applicant now applied, pursuant to leave granted by the Queen's Bench Divisional Court on Mar. 28, 1961,

H * Section 104 (1), (2), (3) and (4) of the Licensing Act, 1953, reads as follows: "(1) This section shall apply to licensed premises or the premises of a registered club during the time that—(a) the licensing justices for the district in which the premises are situated are satisfied that the premises are structurally adapted and bona fide used, or intended to be used, for the purpose of habitually providing, for the accommodation of persons frequenting the premises, substantial refreshment to which the sale and supply of intoxicating liquor is ancillary, and (b) the holder of the licence or, as the case may be, the secretary of the club applies the section to the premises under sub-s. (5) of this section.

I "(2) The permitted hours in any licensed premises to which this section applies shall on weekdays be increased by the addition of one hour at the end of the evening permitted hours fixed by or under s. 101 of this Act.

"(3) The permitted hours in the premises of any club to which this section applies may, on weekdays, be one hour longer, and end in the evening one hour later, than is allowed by the last preceding section.

"(4) During the said hour—(a) intoxicating liquor shall be sold or supplied only for consumption at a meal supplied at the same time in such part of the premises as is usually set apart for the service of meals, (b) no person shall consume or be permitted to consume any intoxicating liquor on the premises except at such a meal, and (c) any bar in the premises shall be closed."

for an order of mandamus to the justices to hear his application. The facts are stated in the judgment of LORD PARKER, C.J. A

The cases enumerated below were cited in argument*.

M. H. Jackson-Lipkin for the applicant.

The respondents did not appear and were not represented.

LORD PARKER, C.J.: In these proceedings counsel moves on behalf of one Lawrence Gordon Tynan for an order of mandamus directed to the licensing justices for the city of Liverpool, to hear and determine according to law an application by the applicant for a certificate that the licensing justices are satisfied that a club of which the applicant is the proprietor and manager, known as the Golden Goblet Club, 22, Harrington Street, Liverpool, is B

“structurally adapted and bona fide used . . . for the purpose of habitually providing, for the accommodation of persons frequenting the premises, substantial refreshment to which the . . . supply of intoxicating liquor is ancillary.” C

Those words which I have read are the relevant words of s. 104 (1) (a) of the Licensing Act, 1953, which is the section dealing with the supper-hour extension. D

The club in question here appears to be and was a bona fide club. There is no doubt that the premises were structurally adapted for the provision of meals. The applicant gave evidence before the justices as to the premises. He put in photographs, from which it can be seen that part of the premises is laid out as a restaurant. The application was not opposed. The justices, however, refused the application without giving any reason, and it is said that, the premises being structurally adapted, and the figures showing that a restaurant business was and had been carried on there for some time, the justices must have taken into consideration something which they had no power to consider. E

In these proceedings the chairman of the licensing justices has very properly put in an affidavit. In that affidavit he states that the justices were satisfied that the premises were structurally adapted as required by the section but that they were not satisfied that they were bona fide used for the purpose of habitually providing, for the accommodation of persons frequenting the premises, substantial refreshment to which the supply of intoxicating liquor is ancillary. He says that they were not so satisfied “inasmuch as they were not satisfied that the supply of intoxicating liquor was ancillary to the supply of refreshment”. Apparently in these premises there is an ordinary bar, which out of total receipts of some £5,700 produced some £3,100, and also the restaurant with its own bar for serving members who are having food, which is referred to as the bar restaurant. The receipts for food amounted to £2,000 or thereabouts and the receipts of the bar restaurant £565. In other words, if one takes the receipts for the meals one has a figure of some £2,600 of which £565 is for drink. Again, looked at in that way, it is perfectly clear that the drink is ancillary to the meal. What the justices have done is to take the total amount of receipts for drink in the premises as a whole and compare that with the receipts for the food. On that basis, one would have £3,100 odd in the bar proper and £565 in the bar restaurant, making some £3,700, as against receipts for food of £2,000. Looked at in that way the justices say, and no doubt they are right, that drink was not ancillary to food. F G H

However that approach is the wrong approach. The requirement in the section that the sale and supply of intoxicating liquor should be ancillary is not referring to the sale and supply being ancillary to the total business done on the premises, but is a description of the sort of meal or refreshment which the I

* *R. v. Spelthorne Licensing Justices, Ex p. Turpin*, [1926] 2 K.B. 519; 90 J.P. 155; *R. v. Altrincham Justices*, [1937] B.T.R.L.R. 55; *R. v. Lymington and New Forest Justices, Ex p. Armstrong*, [1953] B.T.R.L.R. 45; and *Solomon v. Green*, [1955] B.T.R.L.R. 17; 119 J.P. 289.

A premises must be bona fide intended to be used to provide. In other words it is descriptive of the meal. It must not be a sale of liquor under the cloak of meals but there must be bona fide meals that are being considered to which the drink is ancillary. Looked at in that way, which I think is the proper way, there is no doubt here that the provisions of the section were proved and that the justices should have been satisfied under the section. In those circumstances

B the order of mandamus must issue.

FINNEMORE, J.: I agree.

SALMON, J.: I also agree.

C M. H. Jackson-Lipkin: Would your Lordships indicate that an early date for hearing be fixed in this matter?

LORD PARKER, C.J.: Yes.

Solicitors: *Harold Stern & Co.*, agents for *E. Rex Makin & Co.*, Liverpool (for the applicant).

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

D

CLARKE v. HALL.

[QUEEN'S BENCH DIVISION (Widgery, J.), March 20, 21, 1961.]

E Agriculture—Agricultural holding—Notice to quit—Consent of tribunal—Need for consent—Exception—Notice given by reason of death of the tenant with whom the contract of tenancy was made—Deceased “tenant” not the holder of the land at date of death—Consent of tribunal not needed—Agricultural Holdings Act, 1948 (11 & 12 Geo. 6 c. 63), s. 24 (2) (g), s. 94.

F By an agreement dated July 20, 1948, the plaintiff let certain agricultural land to the defendant's mother on a yearly tenancy from Mar. 25, 1948. The agreement did not provide against assigning or underletting the land. Two years later the defendant requested the plaintiff to have the tenancy agreement transferred into the defendant's own name. The plaintiff agreed to the request but, in good faith, said that a licence to assign from him would be necessary although none was required under the agreement of July 20, 1948. Accordingly, by a licence dated Apr. 12, 1950, the plaintiff consented to the defendant's mother assigning the land to the defendant with the benefit of the tenancy created by the agreement of July 20, 1948, and the licence also contained a covenant by the defendant not to assign, underlet or part with the land. On the same date, Apr. 12, the defendant's mother assigned the land and the benefit of her tenancy agreement to the defendant subject to the terms contained in that agreement. Following the execution of these two documents the defendant occupied the land for agricultural purposes. On Feb. 15, 1959, the defendant's mother died, and on Mar. 19, 1959, the plaintiff served the defendant with a notice to quit the land on Mar. 25, 1960. The notice stated that it was given by reason of the death of the defendant's mother (the tenant with whom the contract of tenancy was made) within three months before the date of the giving of the notice to quit and that s. 24 (1)* of the Agricultural Holdings Act, 1948, did not apply. In an action for possession of the land the defendant contended that para. (g) of s. 24 (2)† did not apply and that the notice to quit was invalid.

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* Section 24 (1), which is printed at p. 368, letter D, post, restricts, in certain circumstances, the effectiveness of a notice to quit.

† Section 24 (2) (g) provides that s. 24 (1) shall not apply where “the tenant with whom the contract of tenancy was made had died within three months before the date of the giving of the notice to quit, and it is stated in the notice that it is given by reason of the matter aforesaid.”

Held: the restrictions on the effectiveness of a notice to quit imposed by s. 24 (1) of the Agricultural Holdings Act, 1948, were inapplicable, and the notice to quit had accordingly determined the defendant's tenancy on Mar. 25, 1960 (see p. 371, letter A, post), because the notice to quit was, for the following reasons, within the exception from s. 24 (1) enacted by s. 24 (2) (g)—

(i) "the contract of tenancy" to which, in the circumstances of the present case, para. (g) of s. 24 (2) referred was the original contract of letting with the defendant's mother, who was thus, for the purposes of s. 24 (2) (g), the person with whom the contract of tenancy was made, because the defendant became, by virtue of the assignment and licence dated Apr. 12, 1950, tenant under the original contract of letting to his mother (see p. 369, letter I, post).

(ii) on the true construction of para. (g) of s. 24 (2) and of the definition of "tenant" in s. 94, the word "tenant" in s. 24 (2) (g) could include a former tenant, and the unambiguous words of s. 24 (2) (g), "tenant with whom the contract of tenancy was made" meant the individual who was the tenant on the former occasion when the contract of tenancy was made, even though that individual was not the actual holder of the estate in the land at the time of his or her death (see p. 370, letter I, to p. 371, letter A, post).

[As to restriction of a notice to quit by a counter-notice, and as to where a counter-notice is not available, see 1 HALSBURY'S LAWS (3rd Edn.) 282, para. 599, and 284, para. 601.]

For the Agricultural Holdings Act, 1948, s. 24, see 28 HALSBURY'S STATUTES (2nd Edn.) 46.]

Cases referred to:

Costagliola v. Bunting, [1958] 1 All E.R. 846; [1958] 1 W.L.R. 580; 3rd Digest Supp.

Harman Singh v. Jamal Pirbhai, [1951] A.C. 688; 2nd Digest Supp.

Woodward v. Earl of Dudley, [1954] 1 All E.R. 559; [1954] Ch. 283; [1954] 1 W.L.R. 476; 2 Digest (Repl.) 15, 66.

Action.

In this action the plaintiff, as landlord, claimed possession of an agricultural holding from the defendant, the tenant, under a notice to quit, dated Mar. 19, 1959. The plaintiff contended that in the circumstances of the case para. (g) of s. 24 (2) of the Agricultural Holdings Act, 1948, applied and that, accordingly, the defendant was not entitled to serve a counter-notice under s. 24 (1) of the Act preventing the operation of the notice to quit. The defendant contended that the notice was invalid and had continued to exercise rights of possession over the land. The facts and the relevant provisions of the Act of 1948 are set out in the judgment, post.

A. H. Head for the plaintiff.

G. L. S. Dobry and *M. S. Rich* for the defendant.

WIDGERY, J.: This is a case in which Mr. John Eric Clarke sues Mr. William Howard Hall for an injunction and damages in respect of an alleged trespass by the defendant on the plaintiff's land which is known as Tanyard Land, in the parish of Frittenden, in the county of Kent. Although the action takes that form, it is in fact a landlord and tenant dispute of a familiar kind, the substance of the matter being that the plaintiff owns the land in question and the defendant is, or was, the tenant of that land. The plaintiff alleges that the defendant's tenancy has been determined. The defendant denies this and has proceeded to exercise certain rights of possession over the land. In those circumstances the plaintiff seeks to adjust the issue by claiming the injunction and damages to which I have referred.

A The facts of this case begin in 1948, when the plaintiff bought the Tanyard Land, together with certain other land in the vicinity, and when he took up occupation of an adjoining house which is not directly the subject of these proceedings. At that time the defendant was already the tenant of the Tanyard Land, and discussions took place between the plaintiff and the defendant because the plaintiff was anxious to recover possession of part of the premises then let to the defendant. The discussions were perfectly amicable. The parties reached agreement as to the part of the land which the defendant was to give up and of which the plaintiff was to take possession, and they appear to have been agreeable also to the terms of this new arrangement being contained in a new agreement of tenancy. The plaintiff is a solicitor. He was not acting as solicitor for the defendant at any material time but in the circumstances it was suggested that C he should prepare the tenancy agreement without charge to the defendant, save that they would bear the stamp duty equally between them.

The plaintiff proceeded to prepare the tenancy agreement, but shortly before it came to be executed the defendant approached him and said that, for reasons of the defendant's own, he would prefer that the tenancy should be granted to his mother, Mrs. Edith Elsie Hall, instead of to the defendant. The plaintiff D was not averse to this and the tenancy agreement was prepared and executed by the plaintiff and by Mrs. Hall accordingly. I need not take time in reviewing the terms of the tenancy in any detail. It suffices to say that it was a normal agricultural yearly tenancy from Mar. 25, 1948, at a rent for the fifty odd acres comprised in the letting of £70 per annum. The only other feature of the agreement to which I would draw attention is the absence in it anywhere of a E covenant, or condition, against assigning or subletting by the tenant.

Some two years later, in 1950, the defendant's circumstances had apparently changed and, again, for reasons of his own, he was anxious that the tenancy of this land should be in his name rather than in the name of his mother. He approached the plaintiff with this request and the plaintiff replied that that might be done but that a licence to assign, to him from the plaintiff, would be necessary. I am quite sure that in saying that the plaintiff had no intention to F mislead, but in point of fact no such licence was necessary. However, again in this case, it was left to the plaintiff to prepare the documents and in due course he prepared two for execution by the parties. I say at once that no one has sought to attack these documents as having been obtained by misrepresentation or any undue influence on the part of the plaintiff, and accordingly, in my G judgment, I have to consider them and their effect by construing them in the ordinary way. The first document, not in chronological order but in importance, is an assignment dated Apr. 12, 1950, whereby Mrs. Hall assigned the tenancy to the defendant. It is an assignment in the briefest and simplest form and records that for a consideration of £5 Mrs. Hall assigned to the defendant all H the premises comprised in the original tenancy agreement, and the benefit of the tenancy thereby subsisting, to hold unto the defendant subject to the terms, conditions and stipulations of the original agreement, henceforth on the part of the defendant to be paid, observed and performed. The other document is a document under seal between the plaintiff and the defendant and it reads:

I "In the matter of an agreement dated July 20, 1948 and made between John Eric Clarke [the plaintiff] and Edith Elsie Hall being a tenancy from year to year from Mar. 25, 1948, of Tanyard Land, I, John Eric Clarke of Cranbrook in the county of Kent solicitor being the present landlord of the property comprised in the said agreement hereby consent to the said Edith Elsie Hall assigning Tanyard Land comprised in the said agreement to William Howard Hall [the defendant] of Biddenden in the county of Kent farmer with the benefit of the tenancy created by the said agreement. I, William Howard Hall hereby covenant with the said John Eric Clarke

not to assign charge underlet or part with the premises known as Tanyard Land or any part thereof or the benefit of the said agreement." A

I draw attention to the fact that nothing is provided in that agreement which would make the proviso for re-entry in the original tenancy agreement exercisable in the event of a breach by the defendant of his covenant not to assign, which is contained in the licence.

Following the execution of those documents the defendant occupied the land for agricultural purposes. It was mainly pasture. Nothing else of significance happened until the year 1959, but on Feb. 15, 1959, Mrs. Edith Elsie Hall died, and on Mar. 19, 1959, the plaintiff served on the defendant a notice to quit the premises on Mar. 25, 1960. The notice to quit contains this sentence: B

"This notice to quit is given by reason of the death of the said Edith Elsie Hall (the tenant with whom the contract of tenancy was made) within three months before the date of the giving of this notice to quit and on the ground of such death and accordingly s. 24 (1) of the Agricultural Holdings Act, 1948, does not apply." C

It is common ground that that notice to quit was properly served and has no technical defect, and the interest in it focuses on the passage which I have just read and which, of course, must be related to the provisions of the Agricultural Holdings Act, 1948. Section 24 (1) of that Act reads: D

"Where notice to quit an agricultural holding or part of an agricultural holding is given to the tenant thereof, and not later than one month from the giving of the notice to quit the tenant serves on the landlord a counter-notice in writing requiring that this subsection shall apply to the notice to quit, then, subject to the provisions of the next following subsection, the notice to quit shall not have effect unless [the Agricultural Land Tribunal (1)] consents to the operation thereof." E

Subsection (2) of s. 24 provides:

"The foregoing subsection shall not apply where . . . (g) the tenant with whom the contract of tenancy was made had died within three months before the date of the giving of the notice to quit, and it is stated in the notice that it is given by reason of the matter aforesaid." F

It becomes obvious, therefore, that the plaintiff was taking the view that the death of Mrs. Hall had given him the right to serve a notice to quit without an opportunity of the defendant serving the counter-notice contemplated by s. 24 (1). G

The defendant took the notice to quit to his solicitors and on Apr. 2, 1959, his solicitors wrote to the plaintiff:

"We act for Mr. W. H. Hall who has received a notice to quit from you. On his behalf we enclose herewith a counter-notice under s. 24 (1) of the Agricultural Holdings Act, 1948. In our opinion in view of the deed of assignment which was executed Mr. Hall is the tenant and the death of his mother does not affect his tenancy." H

There were two or three further letters passing between the plaintiff and the defendant's solicitors at that time but they came to no conclusive result, and the last one is dated Apr. 17, 1959, in which the plaintiff concludes by saying "In any case I shall not have to worry you again for some months." The position at that point, therefore, was that the plaintiff was maintaining that he was entitled to give the notice to quit in the circumstances which I have outlined, and the defendant's solicitors were taking the opposite view. [His LORDSHIP then referred to a meeting on Feb. 1, 1960, between the plaintiff and a Major Chalk, I

(1) By the Agriculture Act, 1958, s. 3 and Sch. 1, the functions of the Minister under s. 24 and s. 25 of the Agricultural Holdings Act, 1948, were transferred to the Agricultural Land Tribunal.

A who was a land agent and a friend of the defendant, at which the plaintiff still maintained that he was entitled to give the notice to quit. Shortly before Feb. 25, 1960, the plaintiff gave the defendant notice under s. 58 of the Agricultural Holdings Act, 1948, of intention to claim for depreciation of the holding at the termination of the tenancy. On Feb. 25, Major Chalk, in a letter to the plaintiff, referred to the notice under s. 58 and stated that the defendant's "claims upon
B quitting [the holding] are for tenant's pasture, unexhausted manurial values of fertilisers applied, and feeding stuffs fed and for one field gate which has always been his property". The notice to quit expired on Mar. 25, 1960, and on Mar. 28 the defendant removed from the holding, to his farm a few miles away, the bulk of his flock of ewes but left behind two ewes, two lambs and some hay and dead stock. The defendant's evidence, which was supported by other evidence, was
C that it was his normal practice during lambing to remove the ewes to his farm and that the removal from the holding on Mar. 28 was an example of that practice and was not intended as a delivery up of possession under the notice to quit. On May 16, 1960, the plaintiff followed up his claim under s. 58 by sending a notice under s. 70 of the Act requiring determination of the claim, which amounted to about £700, by arbitration. On May 18, 1960, Major Chalk's
D firm wrote protesting at the amount of the claim and expressed the view that "from March to May if left dormant is just the time when a difference in appearance [of the holding] can be made". On May 23, 1960, the defendant's solicitors wrote that they had advised that the notice to quit was invalid and required the plaintiff to remove some stock which he had put on the land since Mar. 25. On the same day, May 23, the defendant brought back on to the land
E a substantial quantity of sheep and from that date onwards asserted his full rights to occupation of the land. HIS LORDSHIP continued:] The issues which arise in this case are these: the plaintiff says that the defendant's tenancy has been determined. The defendant denies it. The plaintiff bases his submissions really on two points. He says, first, the notice to quit is itself a valid notice, effectively determining the tenancy on Mar. 25, 1960; alternatively, he says that
F the defendant has determined this tenancy by a surrender; or, possibly, in the second alternative, is estopped from denying that he has determined his tenancy. It would be convenient if I took those two points in that order.

Returning to s. 24 (2), para. (g), of the Act of 1948, the first question which I must decide in considering whether this paragraph gives the plaintiff the relief which he claims is: what, on the facts of this case, is the contract of tenancy to
G which para. (g) refers. It is urged on me by counsel for the defendant that on the facts which I have outlined a new contract of tenancy came into existence in 1950 when the defendant became tenant of this land. He says, therefore, that, there being a new contract of tenancy made in 1950, the tenant with whom that contract was made is the defendant, and not his mother, and that consequently there is no room for the application of para. (g). Counsel for the
H defendant has fought this point most tenaciously but I am bound to say that it seems to me to be virtually unarguable. The assignment to which I have referred, by its very terms, says that what was being passed to the defendant was the existing estate of his mother on the terms and conditions which she had contracted to observe in the original tenancy agreement, and I cannot accept the argument that the accompanying licence is in any sense a novation, creating
I a new tenancy agreement. In my judgment these two documents are entirely consistent with the defendant becoming a tenant under the old tenancy and being regulated by the terms of the old tenancy, and I regard the additional covenant against assigning or underletting, which the defendant entered into in the licence, as being a purely collateral personal bargain between himself and the plaintiff. I therefore find against the defendant on that argument and hold that the contract of tenancy in this case, within the context of para. (g), was the original contract of letting with Mrs. Hall, and that, therefore, means that Mrs. Hall is the individual with whom that contract was made.

Counsel for the defendant then contends that even on that view para. (g) has no application here and his argument, in substance and however it is put, really amounts to this, that on the proper construction of para. (g) the landlord is only entitled to take advantage of the facility to give notice to quit an agricultural property if the tenant who has just died was not only the tenant with whom the contract of tenancy was made but was also at the moment of death the actual tenant of the land, in the sense of being the person in whom the tenant's interest was actually vested. He says, in effect, that para. (g) on its proper construction can only apply when the person whose death is said to make the giving of the notice to quit possible is both the original tenant and still the tenant at the date of death. Accordingly, he says that once the tenancy has been assigned, as it has been assigned in this case, para. (g) can have no further effect.

I have been referred to two authorities (2) on the construction of para. (g) but neither of them is directly helpful on this point, and, indeed, it seems to arise for decision for the first time. Counsel for the defendant has referred me to s. 94 of the Act, which contains a definition of "tenant" in the following terms:

" 'tenant' means the holder of land under a contract of tenancy, and includes the executors, administrators, assigns, committee of the estate, or trustee in bankruptcy of a tenant, or other person deriving title from a tenant."

He submits that in the light of that definition para. (g) of s. 24 (2) should be read as follows, namely: "The holder of land, being the holder with whom the contract of tenancy was made, had died within three months before the date of the giving of the notice to quit", and he relies on the fact that by incorporating the word "holder" in that way he incorporates a word which implies the actual holding of the estate and is inconsistent with a reference to someone who formerly held that estate.

In my judgment, looking at the words in para. (g) without assistance from authority I think that they are clear and I think that they mean what, in my view, they say, namely, that the landlord may take this opportunity of serving notice to quit if the individual who was the tenant with whom the contract of tenancy was made has died within the preceding three months. I do not think that the words are ambiguous and that is the meaning which I would give them, and I am unable to accept the argument of counsel for the defendant based on s. 94, because I think that it is implicit in that argument that a reference to "tenant" in s. 24 should not, unless the context otherwise requires, include a former tenant. That, in my judgment, is really the basis of his argument and that it is unsound is apparent to me both from s. 24 itself and from s. 94, because each of those sections in its own way makes it perfectly clear that the draftsman is using the word "tenant" to include not merely the present holder of the land but also a former holder who was formerly the tenant. Thus in s. 94 there is reference to the executors and administrators of a tenant. That, in itself, as I see it, shows that the word "tenant" is being used to describe a past holder, not a present one, and, as counsel for the plaintiff has pointed out, the same considerations apply to s. 24 itself. Under s. 24 notice to quit can be given to the tenant of land, in the circumstances contained in para. (g) of sub-s. (2) when the death has occurred of a former holder. Thus the draftsman still, in para. (g) uses the words "the tenant" to describe that person who, by hypothesis, is already deceased.

It seems to me, therefore, that it is quite impossible to say that whenever the Act refers to a person as tenant it is necessarily speaking of someone who is a present tenant and necessarily not speaking of someone who was a former tenant, and in my judgment the correct interpretation of para. (g) is that the person referred to as "the tenant" is someone who is not now the tenant, because he

(2) *Viz., Costagliola v. Bunting*, [1958] 1 All E.R. 846, and *Woodward v. Earl of Dudley*, [1954] 1 All E.R. 559; [1954] Ch. 283.

A or she is dead, but someone who was the tenant on a former occasion. That being the case I see no reason at all to confine the words so as to require that the tenant referred to should still have been the holder of the estate at the date of his or her death. Consequently, in my judgment this notice to quit is valid and the tenancy duly determined in accordance with it on Mar. 25, 1960.

B That is sufficient to dispose of this matter, but, in case the defendant is minded to have the question considered in another court, it would be helpful if I at least made some observations and finding of fact with regard to the other issues which have been argued. On these other issues counsel on behalf of the plaintiff has first of all submitted that where a notice to quit is given by a landlord and the tenant's actions, or representations, are indicative of the fact that he is accepting that notice as valid and will proceed to quit in accordance with it there may then be set up an estoppel which will prevent the tenant from subsequently denying the validity of the notice. That such an estoppel could, or may, arise is apparent from authority which has been cited to me, and I refer in particular to *Harman Singh v. Jamal Pirbhai* (3). It is equally apparent, in my judgment, that before such an estoppel can be set up there must be an unequivocal representation made by the defendant to the effect that he is treating the notice as valid and proposes to go.

[His LORDSHIP, having referred to the letter from Major Chalk dated Feb. 25, 1960 (see p. 369, letter A, ante), to the removal by the defendant of the ewes from the land on Mar. 28 and to the letter from Major Chalk's firm dated May 18, 1960 (see p. 369, letter D, ante), held that the defendant was not estopped from denying the validity of the notice to quit. His LORDSHIP continued:] Lastly, counsel for the plaintiff contends that there has been an actual surrender here by operation of law, and by that he submits that the conduct of the parties is consistent and consistent only with the defendant having surrendered possession of the land at some date after Mar. 25, and with the plaintiff having resumed and accepted possession from him. It is, of course, clear that if that has happened there has been a surrender and the tenancy has come to an end in any event regardless of the validity of the notice to quit. The question is: has it happened? [His LORDSHIP found on the facts that there was no surrender by the defendant of his tenancy and in particular that the removal of the ewes from the land on Mar. 28, 1960, and the fact that no normal farming operations were carried out on the land between Mar. 28 and May 23, 1960, did not amount to a surrender. He continued:] However, my judgment on the first point is such that the plaintiff succeeds and he is entitled to damages. In substance he has been kept out of this land for about twelve months and it is common ground between the parties that the value of this land is about £200 per annum, whether one thinks in terms of the rent at which it would let or of the profit which the owner-occupier might reasonably expect to make. In my judgment, therefore, the matter of damages will be adequately met by my awarding the plaintiff £200. He is also entitled to the injunction for which he prays.

Judgment accordingly for the plaintiff.

Solicitors: *Wrinch & Fisher*, agents for *Murton, Clarke & Murton-Neale*, Cranbrook, Kent (for the plaintiff); *Field, Roscoe & Co.*, agents for *Hallett & Co.*, Ashford, Kent (for the defendant).

[Reported by WENDY SHOCKETT, Barrister-at-Law.]

HENTY & CONSTABLE (BREWERS), LTD. (in voluntary liquidation) v. INLAND REVENUE COMMISSIONERS.

[CHANCERY DIVISION (Buckley, J.), March 21, 1961.]

Stamp Duty—Conveyance on sale—Amalgamation of companies—Shares of brewery company acquired by purchasing company from shareholders—Liquidation of brewery company—Conveyance of brewery company's lands to purchasing company—Conveyance by liquidator of brewery company by authority of shareholders—Transfers of shares by vendor shareholders not registered or stamped—Whether conveyance attracted stamp duty as a conveyance on sale—Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 54, Sch. 1.

Acting in pursuance of a written agreement between them, the shareholders of a brewery company, C., Ltd., transferred all their shares in April, 1921, to a purchasing company, H., Ltd., in return for shares in H., Ltd. then allotted to them in payment therefor, but the transfers were not registered or stamped. The vendor shareholders then resolved to wind-up C., Ltd. voluntarily and gave authorities to the liquidator to transfer assets to which they as shareholders might be entitled to H., Ltd. In accordance with this authority the liquidator executed a conveyance of freehold and leasehold properties to H., Ltd.

Held: the true character of the sale agreement was that of a sale of shares in C., Ltd. by its shareholders, not that of a sale of lands belonging to C., Ltd. and, on H., Ltd.'s satisfying its obligation to the vendor shareholders in April, 1921, they became trustees of their shares for H., Ltd.; therefore, though the conveyance of the lands in the course of the liquidation of C., Ltd. was a consequence of the sale of the shares, the conveyance was not a "conveyance on sale" within s. 54 of the Stamp Act, 1891 (for it was a conveyance of property that was not the property sold and was for giving effect to rights belonging to H., Ltd. at the time of the conveyance) and accordingly the conveyance attracted 10s. stamp duty only as a "conveyance or transfer of any kind not hereinbefore described" within Sch. 1 to the Stamp Act, 1891.

Oughtred v. Inland Revenue Comrs. ([1959] 3 All E.R. 623) distinguished. Appeal allowed.

[As to the meaning of "conveyance or transfer on sale" for stamp duty purposes, see 28 HALSBURY'S LAWS (2nd Edn.) 458, para. 973; and for cases on the subject, see 39 DIGEST 278-285, 621-671.]

For the Stamp Act, 1891, s. 54 and Sch. 1 ("Conveyance or transfer on sale"), see 21 HALSBURY'S STATUTES (2nd Edn.) 627, 667.]

Cases referred to:

Anderson v. Inland Revenue Comrs., (1878), 6 R. (Ct. of Sess.) 56.

Great Western Ry. Co. v. Inland Revenue Comrs., [1894] 1 Q.B. 507; 63 L.J.Q.B. 405; 70 L.T. 86; 58 J.P. 397; 39 Digest 280, 646.

Oughtred v. Inland Revenue Comrs., [1959] 3 All E.R. 623; [1960] A.C. 206; [1959] 3 W.L.R. 898; 3rd Digest Supp.

Case Stated.

The appellant company presented a deed to the Commissioners of Inland Revenue for their opinion as to the stamp duty with which it was chargeable. The deed was a deed of conveyance of freehold and leasehold properties made between a brewery company in liquidation and its liquidator and the appellant company and was executed on Dec. 31, 1921, on paper bearing an impressed 10s. stamp. The commissioners were of opinion that by the deed of conveyance the assets of the brewery company in liquidation comprised therein were conveyed by the direction of the shareholders of that company to the appellant company in consideration of the issue to the shareholders of shares in the appellant company.

A They inferred as a matter of fact from the circumstances that it had been contemplated and agreed between the shareholders and the appellant company that a sale agreement made between them providing for the sale of the shares in the brewery company in liquidation to the appellant company should be completed, not by registering the appellant company as shareholders in the brewery company, but by a conveyance or transfer by the liquidator by the direction of the shareholders of the property comprised in the conveyance. B They were therefore of the opinion that the deed of conveyance was a "conveyance or transfer on sale" for the purposes of the Stamp Act, 1891, and they assessed the instrument with ad valorem duty by reference to that head of charge in Sch. 1 to the Act, the duty amounting to £985 less the 10s. already impressed. The appellant company also paid penalties under s. 15 (1) of the Act. C The appellant company contended that the deed was not a "conveyance or transfer on sale" for the purposes of the Act, but that it was executed for the purposes of conveying or assigning to the appellant company the assets in the brewery company in liquidation to which it was entitled as the beneficial owner of the shares in that company, and that it attracted a fixed duty of 10s. by reference to the head of charge "conveyance or transfer of any kind not hereinbefore described" in Sch. 1 to the Act. D They appealed by way of Case Stated to the High Court.

J. P. Brookes for the appellant company.

Sir Lynn Ungood-Thomas, Q.C., and *E. Blanshard Stamp* for the commissioners.

E **BUCKLEY, J.:** This is an appeal by a company which is now known as Henty & Constable (Brewers), Ltd. from a determination by the Commissioners of Inland Revenue that a certain conveyance attracts stamp duty ad valorem as a conveyance on sale. The matter arises in the following way. On Apr. 17, 1921, all the shareholders in a company known as G. S. Constable & Sons, Ltd., entered into an agreement with George Henty & Sons, Ltd., for the sale to the Henty company of their shares in the Constable company. F The agreement provided that the vendors should sell their shares in the Constable company and transfer them to the Henty company or its nominees and that the Henty company should purchase them at the prices set out in a schedule to the agreement. It was further provided that the sale should be completed on Apr. 25, 1921, when the purchase consideration should be satisfied and thereupon the vendors and all other necessary parties were to transfer the shares so sold to the Henty company or its nominees. G The consideration as specified in the schedule was to consist of fully paid up shares of the Henty company distributable amongst the vendors in proportion to the shares of the Constable company that they were then holding. Clause 4 of the agreement provided as follows:

H "The vendors hereby agree: That as soon as conveniently may be after completion of the sale of the said shares in the Constable company they will procure the Constable company to pass a special resolution that the Constable company be wound up voluntarily and that [Mr.] Beldam be appointed liquidator thereof."

I need not read the rest of the clause. Clause 6 provided:

I "Whereas the consideration payable on the said sale was arrived at without taking into account the value of the said properties specified in Sch. 2 hereto which belong to the Constable company Now it is further agreed that the Henty company shall before completion give an irrevocable authority to the Constable company or its liquidator directing such liquidator on distribution of the assets of the Constable company to make over the said properties to the vendors or their nominees free from the mortgages at present thereon with the rents and profits thereof less outgoings as from Apr. 1, 1920."

Clause 11 provided:

"The Henty company shall be entitled to all dividends on the shares in the Constable company in respect of the period commencing Apr. 1, 1920, and to all distribution of capital assets in respect thereof."

Schedule 2 contained particulars of a substantial number of unlicensed properties which belonged to the Constable company. On Apr. 25, 1921, a board meeting of the board of the Henty company took place, at which it was resolved that the completion of the sale and purchase of the shares in the Constable company provided for by the agreement should be carried out forthwith. The minute goes on:

"Certificates and transfers of all the shares in G. S. Constable & Sons, Ltd. having been handed to the board together with forms of authority signed by each shareholder as to the distribution of the assets of that company, it was resolved that in pursuance of the agreement, 81,255 shares of £1 each be issued as follows",

and there are set out particulars of the persons to whom they were to be issued and the quantity which each was to receive, and those are in accordance with the sale agreement, the allottees being the vendors in the sale agreement. It was resolved that each of such shares be credited as fully paid up in accordance with the provisions of the agreement, and certificates were then resolved to be sealed and a return of the allotments was to be completed.

At that point, therefore, the Henty company had completely satisfied all its obligations under the sale agreement to the vendors. On Dec. 31, 1921, the conveyance, which is the subject-matter of this appeal, was executed. It is a conveyance between the Constable company and Mr. Beldam, the liquidator, of the one part and Henty & Constable (Brewers), Ltd., of the other part. It recites that the Constable company is seised of certain freehold and leasehold properties which are set out in the schedule, and it recites that by a special resolution of the Constable company passed and confirmed on May 4 and 21, 1921, the Constable company had been put into voluntary liquidation and that Mr. Beldam had been appointed liquidator, and then it contains this recital:

"... and whereas each of the shareholders of the Constable company has signed and delivered to the said William Beldam as such liquidator as aforesaid an authority upon any distribution by him of the assets of that company to transfer or deliver any such assets to which such shareholder might be entitled as a shareholder or contributory to the Henty company or its nominees ..."

It recites that the liquidator had made provision for the discharge of all the debts and liabilities of the Constable company and for the costs and expenses of the liquidation, and the operative part of the conveyance is:

"Now this indenture witnesseth that in consideration of the premises the Constable company as beneficial owner acting by the said William Beldam as the liquidator thereof hereby grants and conveys ..."

The freehold properties are conveyed, and for a similar consideration the leasehold properties are also assigned. The Constable company was a company engaged in the brewery trade and amongst the freehold properties sold was the brewery and premises where it carried out its business, and the stables, cellars, yard and carpenter's shop attached thereto, and a large number of licensed houses, some freehold and some leasehold.

The question which I have to decide is whether, in those circumstances, the conveyance is properly to be regarded as a conveyance on sale within the meaning of the Stamp Act, 1891, or not. Owing to the lapse of time which has occurred since 1921 and the fact that no books or records kept by the Constable company are now in existence, it has not been possible to ascertain the precise circumstances in which the conveyance came to be executed, but it was executed as part

A of a scheme for the amalgamation of the Constable and Henty companies. There is no evidence available as to the form of the transfers which are referred to in the board's minute of Apr. 25, 1921, or that they were ever sealed or stamped by the appellant company or that they were ever registered in the books of the Constable company. In the Case Stated, the commissioners say:

B "Having regard to the existence of the said authorities the manner in which the transaction was completed and the recitals in the deed of conveyance the commissioners (so far as this may be material for the purposes of this Case) have drawn the inference that the said transfers were not registered and were not stamped."

C I must take that as a finding of fact by the commissioners based on such evidence as was available to them, and I think that the indications are that the inference which the commissioners drew was the right inference. The commissioners arrived at the conclusion that, on a true view of the facts, the conveyance was a conveyance on sale, and on that basis they assessed the amount of duty payable at the sum of £985, or £984 10s. after giving credit for a 10s. stamp which was the stamp, in fact, on the conveyance. Precisely how the figure on which that amount was calculated was arrived at is not perfectly clear from the terms of the Case Stated.

D The way in which counsel for the appellant company has put the case is that on Apr. 25, 1921, the Henty company as purchaser of the shares of the Constable company discharged all its obligations under the agreement and thereupon the shareholders in the Constable company became mere trustees for the Henty company of the whole of the share capital of the Constable company, and consequently, when in due course the Constable company was put into liquidation, the Henty company was the body entitled to all the assets of the Constable company distributable in that liquidation and the conveyance by the liquidator to the Henty company of the licensed premises was not a conveyance on sale at all but a conveyance by the liquidator to the person who, in the circumstances and by reason of the liquidation, had become entitled to have the assets distributed to him. On the other hand, counsel for the commissioners contend that one must look at the substance of the transaction, and, when one looks at the contemporary documents and in particular at the terms of the resolution and the minute of the board meeting of Apr. 25, 1921, and at the recitals in the conveyance, I ought to reach the conclusion that the real nature of this transaction was a sale to the Henty company of the assets of the Constable company other than the unlicensed premises which were excepted from the sale and that the conveyance was the way in which that transaction was ultimately carried into effect; and that, as the Henty company was undoubtedly purchasing something, the conclusion which I ought to reach is that the conveyance was a conveyance on sale, because that was the means by which the purchase by the Henty company was ultimately carried out.

H The expression "conveyance on sale" is defined in s. 54 of the Stamp Act, 1891, in the following terms:

I "For the purposes of this Act the expression 'conveyance on sale' includes every instrument, and every decree or order of any court or of any commissioners, whereby any property, or any estate or interest in any property, upon the sale thereof is transferred to or vested in a purchaser, or any other person on his behalf or by his direction."

The crucial words in that section for the present purpose are, I think, the words "upon the sale thereof". I have been referred by counsel for the appellant company to *Anderson v. Inland Revenue Comrs.* (1) in support of his proposition that the operation of this conveyance was not the operation of a conveyance on sale at all but was for giving effect to rights which belonged to the Henty company. That authority, I think, does not carry him entirely home, because in that

(1) (1878), 6 R. (Ct. of Sess.) 56.

case, Anderson, the person who was resisting the claim for duty, had apparently acquired from all the other members of the building association to which the case relates all their rights, and those rights had been formally transferred to him so that he had become the sole owner—the sole legal owner—of all the right, title and interest in the assets of the association, and as I understand it, the decision did not turn on any question of equities at all.

On the other hand, counsel for the commissioners has referred me to *Great Western Ry. Co. v. Inland Revenue Comrs.* (2) in support of two parts of his argument: first, that it is not necessary, as he says, to show that a conveyance has been executed for purposes of implementing some pre-existing contract of sale; and secondly, that it shows, as he says, that one must look at the substance of the transaction and not merely at its form. *Great Western Ry. Co. v. Inland Revenue Comrs.* (2) on its facts was a rather particular case in which certain railway companies were amalgamated by Act of Parliament, and the Act provided that a copy of the Act was to be chargeable with the same stamp duty as would have been chargeable had the transaction effected by the Act been effected by an executed instrument in writing. Putting it shortly, the Act provided that the assets of one railway company should be vested in another railway company, the Great Western Railway Co., who should issue stock to the shareholders in the company whose assets it was acquiring. It was suggested in the argument in that case that this was not really a sale at all but a statutory transfer in the nature of an amalgamation or fusion of the two companies, that no consideration passed from the Great Western Railway Co. to the other railway company and that on those grounds the Act could not be regarded as analogous to a conveyance on sale at all. Except that I think this case does show that the Court of Appeal there thought that one had got to look at the nature of the conveyance in a reasonable way in order to discover whether it was one properly to be described as a conveyance on sale, I do not think that this case is of very great assistance. LORD ESHER, M.R., did indicate, however, that he thought that the right way to construe s. 54 of the Stamp Act, 1891, was to treat it as meaning that a conveyance must be of the same kind as if it were made on a contract of purchase and sale. One does not necessarily have to find a pre-existing contract. It is sufficient if there is a conveyance made in circumstances substantially similar to those which would exist where there had been a pre-existing contract.

I was also referred to the decision of the House of Lords in *Oughtred v. Inland Revenue Comrs.* (3). In that case, under a settlement, a lady was tenant for life of certain shares in a company and her son was absolutely entitled to the settled property in reversion on her death. They orally agreed that on a certain date he would exchange his interest under the settlement for certain other shares in the same company which his mother owned, with the intention that her life interest in the settled shares should be enlarged to an absolute interest. On the specified date, the lady and her son executed a release to the trustees which recited the facts, including the oral agreement, and recited that the trust funds consisting of the shares were accordingly held in trust for the mother absolutely and that it was intended to transfer them to her. On the same day, the shares in question were transferred by the trustees to the lady for a nominal consideration. The question was whether the transfer of the shares to the lady was a conveyance on sale within the meaning of the Act. The case was decided by a majority of three to two.

Of the speeches of the majority, the one which deals with the matter in the greatest detail is that of LORD JENKINS. First of all, he drew attention to the fact that the expressed intention of the parties was that the appellant's life interest should be enlarged to an absolute ownership, which was, in his view, indistinguishable from an intention that the appellant's life interest should

(2) [1894] 1 Q.B. 507.

(3) [1959] 3 All E.R. 623; [1960] A.C. 206.

A merge in the reversionary interest so as to convert the reversionary interest into an immediate absolute interest in possession: that is important for the purpose of his ultimate decision. The case had been decided at first instance on the ground that, as soon as the mother had transferred to her son, as she had, her own free shares in the company, he became a bare trustee for her of his reversionary interest and no transfer in writing of that interest was, in those circumstances, necessary.

B A question arose how s. 53 of the Law of Property Act, 1925, which requires, in certain cases, a transfer of an equitable interest to be effected in writing, applied to the case. LORD JENKINS said (4):

C “I find it unnecessary to decide whether s. 53 (2) has the effect of excluding the present transaction from the operation of s. 53 (1) (c), for, assuming in the appellant's favour that the oral contract did have the effect in equity of raising a constructive trust of the settled shares for her untouched by s. 53 (1) (c), I am unable to accept the conclusion that the disputed transfer was prevented from being a transfer of the shares to the appellant on sale because the entire beneficial interest in the settled shares was already vested in the appellant under the constructive trust, and there was, accordingly, nothing left for the disputed transfer to pass to the appellant except the bare legal estate. The constructive trust in favour of a purchaser which arises on the conclusion of a contract for sale is founded on the purchaser's right to enforce the contract in proceedings for specific performance. In other words, he is treated in equity as entitled by virtue of the contract to the property which the vendor is bound under the contract to convey to him. This interest under the contract is, no doubt, a proprietary interest of a sort, which arises, so to speak, in anticipation of the execution of the transfer for which the purchaser is entitled to call. But its existence has never (so far as I know) been held to prevent a subsequent transfer, in performance of the contract, of the property contracted to be sold from constituting for stamp duty purposes a transfer on sale of the property in question.”

F He does there draw attention to the fact that what he is considering is a transfer of the property contracted to be sold. Then he added (5):

G “Take the simple case of a contract for the sale of land. In such a case, a constructive trust in favour of the purchaser arises on the conclusion of the contract for sale, but (so far as I know) it has never been held on this account that a conveyance subsequently executed in performance of the contract is not stampable *ad valorem* as a transfer on sale. Similarly, in a case like the present one, but uncomplicated by the existence of successive interests, a transfer to a purchaser of the investments comprised in a trust fund could not, in my judgment, be prevented from constituting a transfer on sale for the purposes of stamp duty by reason of the fact that the actual transfer had been preceded by an oral agreement for sale.”

H A little later he goes on (6):

I “The parties to a transaction of sale and purchase may, no doubt, choose to let the matter rest in contract. But if the subject-matter of a sale is such that the full title to it can only be transferred by an instrument, then any instrument they execute by way of transfer of the property sold ranks for stamp duty purposes as a conveyance on sale, notwithstanding the constructive trust in favour of the purchaser which arose on the conclusion of the contract.”

Again I draw attention to the words “transfer of the property sold”. Then he says this (7):

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- (4) [1959] 3 All E.R. at p. 633; [1960] A.C. at p. 239.
 (5) [1959] 3 All E.R. at p. 633; [1960] A.C. at p. 240.
 (6) [1959] 3 All E.R. at p. 633; [1960] A.C. at p. 241.
 (7) [1959] 3 All E.R. at p. 634; [1960] A.C. at p. 241.

"A further argument raised on the appellant's side is to the effect that, in any case, the disputed transfer was not a transfer of the property sold, but was a transfer of the settled shares, whereas the property sold was Peter's reversionary interest. It is said that the disputed transfer was, accordingly, outside the definition in s. 54 of the Act of 1891 because it was not an instrument whereby property or any estate or interest therein was transferred on a sale thereof. I cannot accept this argument, in considering which I adhere to the assumption made above as to the exclusion of s. 53 (1) (c) of the Act of 1925. It appears to me that, in transferring the settled shares to the appellant, the disputed transfer was transferring to her the property then representing the reversionary interest, which, under the oral contract, had been converted into an immediate interest in possession by virtue of the expressed intention that the sale to the appellant of the reversionary interest should have the effect of enlarging her life interest into absolute ownership, which, as I have said above, appears to me to be indistinguishable from an intention that the appellant's life interest should merge in the absolute reversionary interest."

He decides the case on this footing, that the oral agreement had such an effect that the reversionary interest which was the subject-matter of the sale became an immediate interest in possession in the purchaser—i.e., the mother—and that when the settled shares were transferred to her that was, in fact, a transfer of the property which had been agreed to be sold.

Later he turns to a rather different aspect of the matter (8):

"I should next refer to the point taken on the appellant's side that the disputed transfer was made not by the vendor, namely, Peter, but by the trustees. In my view, there is no substance in this. Where property sold is outstanding in some person other than the vendor, being a trustee for or nominee of the vendor so as to be bound to transfer the property according to the vendor's direction, then, in my view, a transfer by such person at the direction of the vendor is for the present purpose equivalent to a transfer by the vendor himself."

Once again I draw attention to the words "property sold".

At the end of his speech LORD JENKINS says (8):

"Let a case be supposed in which trustees hold a net fund in trust for some person who before the fund is distributed orally agrees to sell his interest to a purchaser, and, on the conclusion of this agreement, the original beneficiary and purchaser from him direct the trustees to transfer the investments representing the fund to the purchaser against a proper release, and the trustees execute the appropriate transfers accordingly. In such a case, it appears to me that the resulting transfers would plainly be transfers on sale although they also effected the winding-up of the trust."

As I understand it, LORD JENKINS is treating this supposed case as a simpler form of transaction leading to the same result as he considered flowed from the particular facts of the case before him, where the reversionary interest, which was the property sold, had been converted as a result of the sale into an absolute interest in possession in the purchaser, in which circumstances he held that a transfer of the shares amounted to a transfer of the property which was the subject-matter of the sale.

I have to look with some care at the facts of this case to see what was the agreement which was entered into between the parties and what was the property which was agreed to be sold by the vendors to the purchaser. According to its terms, the agreement provided for a sale of shares in the Constable company and it provided that on completion those shares should be transferred to the purchaser. It may seem a little inconsistent that cl. 4 (a) provided that at a date

(8) [1959] 3 All E.R. at p. 635; [1960] A.C. at p. 243.

A subsequent to completion the vendors should procure a winding-up resolution to be passed. I do not think, however, that that is a very forceful indication that the contract was not intended to be carried out according to the tenor of its language, because there was quite a possibility that in any event the transfers might not be registered immediately following completion of the sale, and it might be more convenient that the winding-up resolution should be passed by the vendor shareholders in the Constable company than by the purchaser.

Clause 6, relating to the unlicensed premises, seems to me to indicate that the draftsmen of the agreement thought that the effect of the sale would be to confer on the purchaser the right to receive the assets of the company in its liquidation, for in cl. 6 it is stated that the Henty company is irrevocably to authorise the liquidator of the Constable company to distribute the unlicensed properties to the vendor shareholders of the Constable company. I think that that can only be on the footing that the Henty company would be the person who, but for such authority, would be entitled to receive those assets of the Constable company in its liquidation.

Then next one must consider what was done on Apr. 25. On that date the certificates and transfers of all the shares in the Constable company were handed over by the vendor shareholders to the Henty company. There is no reason to suppose that those transfers were not in proper form and properly executed by the vendor shareholders: they did what they could to dispossess themselves of the shares they had agreed to sell. On the same day, on completion of the contract, the purchaser, the Henty company, satisfied the consideration by allotting and issuing the shares which constituted the purchase price. There is in this minute a reference to forms of authority signed by each of the vendor shareholders as to the distribution of the assets of the Constable company, and I think that it must have been in contemplation of the parties that possibly the administrative act of registering the transfers would not be performed and that the liquidation would be carried out without that having been done. Whether those transfers were ever registered and whether they were stamped, and if so on what footing, nobody knows.

It seems to me that on Apr. 25, the purchasing company having done all that was required of it under the contract, the vendor shareholders did become mere trustees for the purchaser of the shares the subject-matter of the sale, and, had they not then given forms of authority with regard to the distribution of the assets, I do not think that the absence of such authority would really have made any difference. In any event at any time after that time, it seems to me that the Henty company could have called for such authority had it desired to do so.

Then when one comes to the conveyance, which recited that authorities were delivered to the liquidator, it seems to indicate that some further forms of authority were signed at some time or other by the vendor shareholders because the company did not go into liquidation until May 21, and not until that time was Mr. Beldam the liquidator, and presumably the authorities referred to in the conveyance are authorities of a later date than those actually handed over on Apr. 25. I do not know that much turns on that. I think that one must reasonably infer, as the commissioners have inferred, that the transfers of the shares still remain unregistered.

The way in which the case has been presented by counsel for the commissioners is that it was always contemplated that the transfers would not be executed; that authority to the liquidator from the vendor shareholders directing him to distribute the assets of the Constable company by transferring all the licensed premises to the Henty company would be an integral part of the scheme, and that that is clear from the board's minutes and from the recital in the conveyance; that when one looks at the transaction as a whole one must come to the conclusion that the true nature of the agreement was an agreement to sell assets which would become distributable on the winding-up, including, amongst others, the freehold and leasehold properties the subject-matter of the conveyance; and

that when one looks at the transaction in that way it becomes clear that the conveyance was the way in which the intention of the parties was implemented. A

It is quite true that the agreement does contemplate that the company will be put into liquidation so that the result of the transfer of the shares to the Henty company would merely transfer to the Henty company the right to receive assets in the liquidation. I think that that is expressing it rather too tersely, because it would have conferred other rights on the Henty company. Had the Henty company altered its mind it could have had the liquidation stayed, but no doubt the contemplation was that the company would be wound up and as a result the Henty company would receive the assets except so far as they fell within the provisions of cl. 6. B

Nevertheless, it seems to me that the true character of the agreement was not an agreement for the sale of land or specific assets, but an agreement for the sale of shares in the Constable company and I find nothing on the face of the agreement to suggest that that was not what the parties intended it to be, or that the way in which they intended this transaction to be worked out was not by means of the Henty company acquiring the share capital in the Constable company. Had the transfer of the shares been registered in the name of the Henty company, it is common ground that the distribution by the liquidator of the Constable company's assets to the Henty company would have attracted no ad valorem duty and counsel for the appellant company asks why, in those circumstances, should the omission of the administrative act of registering the transfers make any difference to the liability to duty on the conveyance. There is very great force in that observation, because the property conveyed by the conveyance was not the same as the property agreed to be sold by the contract, and the conveyance was a conveyance for giving effect to rights which belonged to the Henty company at the date when the conveyance was executed. C D E

It seems to me that the position in the case I have to consider is not really parallel to *Oughtred v. Inland Revenue Comrs.* (9). There, the House of Lords came to the conclusion that the interest which was sold—i.e., the absolute reversionary interest—had, at the relevant date, the date of the transfer of the settled shares, become an absolute interest, so that the transfer of the shares was, in fact, the transfer of the property which had been sold. In the present case I do not think that, on a true view of the facts, the conveyance of the land was a transfer of the property agreed to be sold. I think it was a conveyance made in consequence of the sale, but not as part of the sale. It was no more a conveyance on sale than it would have been had the transfers been registered, and had the assets after such registration been conveyed to the Henty company. In those circumstances the conveyance would have been a consequence of the sale but it would have been impossible to say the conveyance was a conveyance on sale and on the facts of the present case I come to the conclusion that this was not a conveyance on the sale of the land. F G

Had I arrived at another conclusion, a complication would necessarily have arisen from the fact—of which I feel little doubt, although there is no finding of fact about this in the case—that there were other assets as well as land which were disposed of in the liquidation of the Constable company, and it would have become necessary to investigate how the consideration provided for in the contract of sale ought to be apportioned between the land and the other assets. It was suggested to me that, in fact, the figure on which the duty was assessed by the commissioners was a figure ascertained by relation to the value of the land and not by relation to the value of the shares in the Constable company or the Henty company and, if that was so, maybe the figure would be the right figure on which to assess the duty. If, as I originally thought, it was a figure related to the value of the shares of the Henty company, it seems to me there H I

would have had to be some apportionment, but in view of my decision that point does not arise.

Appeal allowed. Determination that the instrument was liable to duty of 10s.

Solicitors: *Robins, Hay & Waters* (for the appellant company); *Solicitor of Inland Revenue.*

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

CHATHAM EMPIRE THEATRE (1955), LTD. v. ULTRANS, LTD. AND OTHERS.

[QUEEN'S BENCH DIVISION (Salmon, J.), March 28, 1961.]

Landlord and Tenant—Lease—Forfeiture—Arrears of rent—Terms of relief—Sub-lessees of part of premises—Whether sub-lessees required to pay total arrears in respect of whole of premises or only that part of the arrears attributable to the premises sub-let to them—Law of Property Act, 1925 (15 & 16 Geo. 5 c. 20), s. 146 (4).

By a head lease dated Sept. 2, 1958, landlords let a block of property comprising a theatre, a cinema, a car park and restaurant to R., Ltd. at a total rent of £3,640 a year. The lease provided for re-entry on the premises and termination of the lease if the rent was in arrears for more than fourteen days. R., Ltd. assigned the whole of the premises to U., Ltd. who retained possession of the theatre but sub-let the cinema to sub-lessees at a rent of £780 a year plus a premium of £1,000. The other parts of the premises were sub-let by U., Ltd. to C. and T. U., Ltd. failed to pay the rent due under the head lease on Sept. 29, 1959, Dec. 25, 1959, and Mar. 25, 1960, and there was accordingly £2,730 owing from them in respect of the rent of the whole of the premises. In April, 1960, the landlords issued a writ claiming the £2,730 arrears of rent from U., Ltd. and claiming possession of the premises against U., Ltd., C., T. and the sub-lessees of the cinema. The sub-lessees of the cinema were now the only effective defendants in the action. On an application by the sub-lessees for relief against forfeiture under s. 146 (4)* of the Law of Property Act, 1925, the landlords contended that relief should be granted only if the sub-lessees paid the whole of the £2,730 arrears of rent, not merely that part of the arrears attributable to the cinema, which amounted to £585.

Held: the sub-lessees were entitled to relief against forfeiture on payment of that proportion of the total arrears of rent which the rent payable under their sub-lease bore to the rent payable under the head lease, since the landlords were only entitled to be put back into the same position as they were in before the forfeiture qua that part of the premises let to the sub-lessees; accordingly, the sub-lessees were entitled to relief on payment of £585, plus an element for the premium.

London Bridge Buildings Co. v. Thomson ((1903), 89 L.T. 50) explained and distinguished.

[As to relief from forfeiture for non-payment of rent generally, and as to an underlessee's right to relief, see 23 HALSBURY'S LAWS (3rd Edn.) 681-683, paras. 1409, 1410; and for cases on an underlessee's right to relief, see 31 DIGEST (Repl.) 550-552, 6714-6726.

For the Law of Property Act, 1925, s. 146 (4), see 20 HALSBURY'S STATUTES (2nd Edn.) 745.]

* Section 146 (4) is set out at p. 383, letter D, post.

Cases referred to:

Egerton v. Jones, [1939] 3 All E.R. 889; [1939] 2 K.B. 702; 108 L.J.K.B. 857; 161 L.T. 205; 31 Digest (Repl.) 545, 6670.

London Bridge Buildings Co. v. Thomson, (1903), 89 L.T. 50; 31 Digest (Repl.) 552, 6725.

Action.

In this action the plaintiffs claimed arrears of rent from the defendants, Ultrans, Ltd., under a lease of premises comprising a theatre, a cinema and certain other property of which Ultrans, Ltd. were the assignees, and they claimed possession of the premises and mesne profits to the date of possession against all four defendants to the action. Ultrans, Ltd. and two of the remaining three defendants being no longer effective defendants, the only effective defendants were the sub-lessees of the cinema. The sub-lessees now sought relief from forfeiture under s. 146 (4) of the Law of Property Act, 1925, and the only question arising in the action was the terms on which relief should be granted and, in particular, whether the sub-lessees, as a condition of relief, were required to pay all the arrears of rent, in respect of the whole of the premises, outstanding at the date of the writ or only that part of the arrears attributable to the cinema. The facts are more fully stated in the judgment, post.

A. C. Goodall for the plaintiffs.

R. H. W. Dunn for the defendants, the sub-lessees.

SALMON, J.: By a head lease dated Sept. 2, 1958, Chatham Empire Theatre (1955), Ltd., who are the plaintiffs in this action, let to J. Rowland Sales, Ltd. a block of property in Chatham High Street comprising the Empire Theatre, with a frontage on the High Street, and, behind the Empire Theatre, the Empire Cinema, access to which is gained from the High Street by a narrow passage, a car park, and restaurant premises above the theatre. The total rent of the whole property demised was £3,640 a year (1). J. Rowland Sales, Ltd. assigned the whole of the property to Ultrans, Ltd. Ultrans, Ltd. kept the theatre in their own possession, and sub-let the cinema to Entertainments Chatham, Ltd. and other parts of the property to Mr. Chryssafi and Mr. Tak Tfang. Ultrans, Ltd. failed to pay the rent in respect of this property due on Sept. 29, 1959, on Dec. 25, 1959, and on Mar. 25, 1960, respectively. There is, accordingly, due from Ultrans, Ltd. £2,730 in respect of the rent of the whole property. A writ was issued by the plaintiffs in April, 1960, claiming payment of the rent and possession against all the defendants (2). Ultrans, Ltd., I understand, has gone into liquidation and is no longer an effective defendant; neither is Mr. Chryssafi or Mr. Tak Tfang. The defendants, Entertainments Chatham, Ltd., claim relief against forfeiture in respect of the cinema which was sub-let to them. The only question in this action is what are the terms on which relief should be granted. It is to be observed that the cinema was sub-let to the defendants, Entertainments Chatham, Ltd., at an annual rent of £780 a year, they paying a premium of £1,000. I will hereafter refer to Entertainments Chatham, Ltd. as "the defendants", as they are the only effective defendants.

Counsel for the plaintiffs argued that the defendants should be granted relief against forfeiture only if they pay the whole of the rent outstanding at the date of the issue of the writ in respect of the cinema, the theatre, the car park and the restaurant premises, that is to say, all the premises comprised in the head lease. He bases that contention on the well-known principle which is alluded to by JOYCE, J., in *London Bridge Buildings Co. v. Thomson* (3), and by SIR WILFRID

(1) By cl. 4 (1) of the head lease, if the rent reserved by the lease was at any time in arrear and unpaid for fourteen days after it had become due, whether legally demanded or not, the plaintiffs were entitled to re-enter the premises and thereon the lease would determine.

(2) Viz., Ultrans, Ltd., Entertainments Chatham, Ltd., P. Chryssafi and Tak Tfang.

(3) (1903), 89 L.T. 50.

GREENE, M.R., in *Egerton v. Jones* (4) that in a case of relief against forfeiture the plaintiffs are entitled to be put back into the position that they would have been in if the forfeiture had not occurred. There is no doubt about that principle, and no question arises where a tenant is applying for relief against forfeiture in an action by his landlord. In this case, however, as is apparent from the facts which I have stated, the question is how that principle applies—and it does obviously apply—when a sub-lessee of a part of the premises is claiming relief against forfeiture: is the landlord entitled to be put back in the same position as he was in before the forfeiture qua the whole of the premises in the head lease or only in respect of the premises of which the sub-lessee is in possession?

There seems to be singularly little authority on this point. Counsel for the plaintiffs relies on *London Bridge Buildings Co. v. Thomson* (5) to which I have already referred. In that case it is quite true that JOYCE, J., gave the under-lessee relief only on the terms that he should pay the whole of the rent in arrear in respect of the whole of the property demised in the head lease. As I read the judgment of JOYCE, J., he was deciding on the facts of that particular case and not purporting to lay down any general principle on which the very wide discretion of the court should be exercised. He was considering s. 4 of the Conveyancing and Law of Property Act, 1892. The corresponding section that I have to consider today is s. 146 (4) of the Law of Property Act, 1925, and I will read it:

“Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso, or stipulation in a lease, or for non-payment of rent, the court may, on application by any person claiming as underlessee any estate or interest in the property comprised in the lease or any part thereof, either in the lessor’s action (if any) or in any action brought by such person for that purpose, make an order vesting, for the whole term of the lease or any less term, the property comprised in the lease or any part thereof in any person entitled as underlessee to any estate or interest in such property upon such conditions as to execution of any deed or other document, payment of rent, costs, expenses, damages, compensation, giving security, or otherwise, as the court in the circumstances of each case may think fit, but in no case shall any such underlessee be entitled to require a lease to be granted to him for any longer term than he had under his original sub-lease.”

It seems to me quite plain that this subsection confers on the court the widest discretion as to the terms on which relief should be granted. Counsel for the defendants contends that the defendants should be required to pay only £195 per quarter for the three relevant quarters, that is to say, £585. The defendants had, of course, paid this sum to Ultrans, Ltd., who have not paid it to the plaintiffs. Counsel says that the defendants ought only to pay that part of the arrears attributable to their property, the property which was sub-let to them. Counsel for the plaintiffs says that the whole of the arrears in respect of the whole property in the head lease ought to be paid by the defendants. That really is the chief issue between the parties.

In my judgment it is clearly equitable that the landlord should be put in the same position as he was in before the forfeiture qua that part of the property, namely, the cinema, let to the defendants. In my judgment the defendants ought to be required as a condition of obtaining relief, to pay £585 plus an element for the premium and not the whole of the £2,730. One can envisage a case in which a block of property comprising a large number of shops and other premises is let to one corporation for £30,000 a year. The corporation then sub-lets the separate shops to various small shopkeepers at perhaps £300 a year each.

(4) [1939] 3 All E.R. at p. 892; [1939] 2 K.B. at p. 706. (5) (1903), 89 L.T. 50,

After some time the corporation goes into liquidation owing perhaps half a year's rent. It is quite plain that the legislature gives the right to the small shopkeeper to come and ask for relief. If counsel for the plaintiffs' contention is correct, the apparently wide discretion conferred by s. 146 (4) is so limited that the court could not give relief to the small shopkeeper unless he paid the £15,000 rent in arrear in respect of the whole block. It is suggested that that would not work any hardship because he could recoup himself from the corporation. That does not really commend itself to me as a practical argument because, in the first place, he will not be able to find the £15,000, and in any event the insolvent corporation could not pay. I cannot believe that in circumstances such as those the court's discretion is fettered as contended on behalf of the plaintiffs. I should have thought that if the shopkeeper paid his proportion of the arrears, namely, £150, and it was otherwise just and equitable that there should be relief, he should obtain relief on that basis. I can certainly conceive of cases where it would be quite wrong to give a sub-lessee relief on this basis; great hardship could be caused to the head lessor if granting relief to one or two of many sub-tenants would make it impossible for him to deal with the premises as a whole. Every case must be considered on its own facts.

I decide that the defendants here are entitled to relief providing they pay £585 plus an element for premium towards the arrears. If the premium of £1,000 had not been obtained presumably the £780 rent would have been that much higher. How much higher can no doubt be ascertained on the actuarial tables. I am told that the judgment of JOYCE, J. (6), has stood for the last fifty years, and indeed it has but it has never been referred to in any other case which is perhaps strange if it laid down any principle on which the court's discretion should be exercised: I read it merely as deciding how the learned judge considered it right to exercise his discretion on the facts of that case.

[After discussion, HIS LORDSHIP directed the defendants to pay the £585 in arrear under their sub-lease together with mesne profits up to the grant of the new lease at the rate of rent reserved by the old lease, viz., at the rate of £195 per quarter plus an element in respect of the premium. HIS LORDSHIP further directed that the defendants should pay the costs of the action as they had sought relief against forfeiture (7).]

Relief accordingly granted.

Solicitors: *Patersons, Snow & Co.* (for the plaintiffs); *Billinghursts* (for the defendants, the sub-lessees).

[*Reported by WENDY SHOCKETT, Barrister-at-Law.*]

(6) Viz., in *London Bridge Buildings Co. v. Thomson*, (1903), 89 L.T. 50.

(7) As to liability for costs of an applicant for relief against forfeiture, see 23 HALSBURY'S LAWS (3rd Edn.) 683, para. 1411.

THE ARABERT.

A. R. APPELQVIST A/B v. TYNE-TEES STEAM SHIPPING CO., LTD.
(OWNERS OF THE MOTOR VESSEL CYPRIAN COAST) AND OTHERS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P.), March 13, 14, 15, 16, 27, 1961.]

Shipping—Limitation of liability—Wreck-raising expenses—Removal of wreck by harbour authority under statutory powers—Wreck of vessel sunk in collision in which other ship solely to blame—Claim by owners of ship at fault to limit their liability in respect of wreck-raising expenses—Whether wreck-raising expenses were damage to vessel within Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 503 (1)—Whether wreck-raising expenses were damage caused to property or rights within Merchant Shipping (Liability of Shipowners and others) Act, 1900 (63 & 64 Vict. c. 32), s. 1.

Wreck-raising expenses (recoverable pursuant to a local Act incorporating s. 56 and s. 74 of the Harbours, Docks, and Piers Clauses Act, 1847) are "damage to" the vessel (viz., the vessel sunk by improper navigation of another ship and removed under s. 56) within s. 503 (1) (d)* of the Merchant Shipping Act, 1894 (see p. 393, letter G, post), and, if this were not so, would be damage to the property of the owners of the sunken vessel and also to their rights within s. 1† of the Merchant Shipping (Liability of Shipowners and others) Act, 1900 (see p. 395, letter B, post); accordingly, limitation of liability under s. 503 of the Act of 1894 is applicable in respect of such expenses when claimed as damages for negligence in a collision action against the ship at fault (see p. 395, letter D, post).

The Urka ([1953] 1 Lloyd's Rep. 478) not followed.

The Cairnbahn ([1914] P. 25) considered.

On Dec. 23, 1955, a collision occurred in the port of Newcastle between the Arabert and the Cyprian Coast, as a result of which the Cyprian Coast sank in the vicinity of No. 7 berth in the harbour. For this collision the Arabert was solely to blame. No question arose of actual fault or privity on the part of the owners of the Arabert. The Tyne Improvement Commission under a local Act incorporating s. 56 and s. 74 of the Harbours, Docks, and Piers Clauses Act, 1847, had the wreck raised by contractors and handed her over to her owners for removal and repair on the owners' undertaking to repay all costs which the commission had incurred. The owners of the Arabert sought to limit their liability to damages payable to the owners of the Cyprian Coast in respect of the casualty. It was conceded by the owners of the Cyprian Coast that the wreck-raising expenses would be part of their damages in a collision action that they had brought and in which they had succeeded. There was no dispute about the liability of the Arabert to pay damages, including the wreck-raising expenses, or about the right to limit in respect of the liability to damages, except in relation to these expenses.

Held: the owners of the Arabert were entitled to include the wreck-raising expenses in the damage for which they were entitled to limitation of liability under s. 503 (1) (d) of the Merchant Shipping Act, 1894.

[**Editorial Note.** Section 1 of the Merchant Shipping (Liability of Shipowners and others) Act, 1900, has been repealed by s. 8 (6) of, and the Schedule to, the Merchant Shipping (Liability of Shipowners and others) Act, 1958, and

* The relevant part of s. 503 is set out at p. 389, letter I, to p. 390, letter B, post.

† Section 1 reads: "The limitation of the liability of the owners of any ship set by s. 503 of the Merchant Shipping Act, 1894, in respect of loss of or damage to vessels, goods, merchandise, or other things, shall extend and apply to all cases where (without their actual fault or privity) any loss or damage is caused to property or rights of any kind, whether on land or on water, or whether fixed or movable, by reason of the improper navigation or management of the ship."

s. 503 of the Merchant Shipping Act, 1894, has been amended by s. 2 of the Act of 1958. A

As to statutory limitation of liability of shipowners, see 1 HALSBURY'S LAWS (3rd Edn.) 63, para. 126 and SUPPLEMENT; as to limitation of liability of owners and others, see 30 HALSBURY'S LAWS (2nd Edn.) 940-945, paras. 1303-1308 and SUPPLEMENT; and for cases on the subject, see 41 DIGEST 914, 915, 8058-8069, 918-922, 8086-8088, 8092, 8102, 8104-8120 and DIGEST Supplements. B

For the Merchant Shipping Act, 1894, s. 503, s. 504, and for the Merchant Shipping (Liability of Shipowners and others) Act, 1900, s. 1, see 23 HALSBURY'S STATUTES (2nd Edn.) 656, 658, 780. For the Merchant Shipping (Liability of Shipowners and others) Act, 1958, see 38 HALSBURY'S STATUTES (2nd Edn.) 1091.]

Cases referred to:

Cairnbahn, The, [1914] P. 25; 83 L.J.P. 11; 110 L.T. 230; 12 Asp. M.L.C. 455; 41 Digest 799, 6597. C

Hamilton (G. & G.) v. British Transport Commission, 1957 S.C. 300; 3rd Digest Supp.

Millie, The, [1940] P. 1; 109 L.J.P. 17; 161 L.T. 280; 19 Asp. M.L.C. 324; 2nd Digest Supp.

Stonedale No. 1, The, Abel (Richard) & Sons, Ltd. (Owners) v. Manchester Ship Canal Co., [1953] 1 W.L.R. 1241; *affd.* C.A., [1954] 2 All E.R. 171; [1954] P. 338; [1954] 2 W.L.R. 1075; *affd.* H.L., [1955] 2 All E.R. 689; [1956] A.C. 1; [1955] 3 W.L.R. 203; 3rd Digest Supp. D

Urka, The, [1953] 1 Lloyd's Rep. 478; sub nom. *Clifton Steam Trawlers, Ltd. v. Duncan MacIver, Ltd.*, [1953] S.L.T. 230.

Action. E

This was an action brought by the plaintiffs, A. R. Appelqvist A/B, owners of the steamship Arabert, for the right to limit their liability to damages payable to the defendants, Tyne-Tees Steam Shipping Co., Ltd., owners of the vessel Cyprian Coast, and the owners of the cargo laden on board and all other persons with claims against the plaintiffs in respect of a collision between the Arabert and the Cyprian Coast, in the River Tyne on Dec. 23, 1955. As a result of this collision the Cyprian Coast sank in the vicinity of No. 7 berth in the harbour of the port of Newcastle. There was no loss of life or personal injury in consequence of the said collision. On Dec. 28, 1955, the Tyne Improvement Commission served the defendants with a notice, in exercise of their powers under the Harbours, Docks, and Piers Clauses Act, 1847, the Merchant Shipping Act, 1894, the Tyne Improvement Acts, 1850 to 1950, and every other Act enabling them in this behalf, that the Cyprian Coast sunk in the River Tyne off No. 7 berth, Newcastle Quay, was, or was likely to become, an obstruction or danger to the said river or harbour, and to the navigation thereof, and stating their intention with all proper notices to take possession of and, inter alia, to raise, remove or otherwise dispose of the vessel, and to sell the vessel so raised and removed, or act otherwise in relation to the said vessel according to law. F

On Dec. 29, 1955, a writ was issued against the plaintiffs (sued as the owners of the Arabert) by the defendants, owners of the Cyprian Coast, and her master and crew claiming for lost and damaged effects and the defendants, owners of cargo laden on board the Cyprian Coast, claiming compensation for loss and damage suffered in consequence of the said collision. The Tyne Improvement Commission had the wreck of the Cyprian Coast raised by contractors and on Feb. 3, 1956, handed her over to her owners, the defendants, for removal and dry docking in the Tyne for the purpose of repairs against their undertaking to repay all costs which the commission might have incurred, including the remuneration of the contractors employed to carry out the work. G

On Nov. 20, 1957, a further action was started against the plaintiffs (sued as owners of the Arabert) by the defendants claiming £36,323 8s. 6d. and interest in respect of a claim by the Tyne Improvement Commission for wreck-raising expenses of the Cyprian Coast; but the writ was never served on the plaintiffs. H I

On Mar. 5, 1958, additional bail to cover these wreck-raising expenses was provided in the original action on certain undertakings. The hearing of the original action took place before WILLMER, J., on Apr. 15, 16 and 17, 1958, and on Apr. 21, 1958, in giving judgment, his Lordship held that the collision was solely caused by the negligent navigation of the Arabert by those on board her*. The plaintiffs appealed and on Dec. 2, 3, 4, 1958, the appeal was heard by the Court of Appeal (HODSON, MORRIS and ORMEROD, L.J.J.). On Feb. 24, 1959, the Court of Appeal gave judgment dismissing the appeal and refusing the plaintiffs leave to appeal to the House of Lords†.

The registered tonnage of the Arabert, with the addition of engine-room space deducted for the purpose of ascertaining such tonnage, is and was at the time of the collision 2,389.85 tons. Under s. 503 of the Merchant Shipping Act, 1894, and s. 1 of the Merchant Shipping (Liability of Shipowners and others) Act, 1900, the maximum liability of the plaintiffs to damages in respect of loss of or damage to vessels, goods, merchandise or other things, or in respect of loss or damage caused to property or rights of any kind, whether on land or on water, or whether fixed or movable arising out of the said collision, calculated at £8 per ton on the said tonnage of 2,389.85 tons, was £19,118 16s. In their statement of claim dated Nov. 26, 1959, the plaintiffs stated they were willing to pay into court this sum of £19,118 16s. with interest at four per cent. per annum or such other rate as the court thought fit. The defendants by way of defence and counterclaim dated Mar. 11, 1960, contended the plaintiffs were not entitled to limit their liability in respect of the wreck-raising expenses of the Cyprian Coast under s. 503 of the Act of 1894 and s. 1 of the Act of 1900 and counterclaimed for the sum of £30,593 17s. 1d. which amount the defendants, the owners of the Arabert, stated were the wreck-raising expenses paid to the Tyne Improvement Commission under s. 74 of the Harbours, Docks, and Piers Clauses Act, 1847 (duly incorporated, as also was s. 56, in the Tyne Improvement Acts, 1850 to 1950) which expenses the defendants were entitled to recover from the plaintiffs under s. 76 of the Act of 1847. By their reply and defence to the counterclaim dated Mar. 11, 1960, the plaintiffs, whilst admitting the Cyprian Coast became an obstruction in the River Tyne and that such obstruction was caused by the improper navigation of the Arabert by the servants or agents of the plaintiffs, objected that the expenses incurred by undertakers in raising the wreck of a sunken vessel were not recoverable from the owner under s. 74 of the Act of 1847; but that if such expenses were recoverable under s. 74, they were not recoverable over from a third party by such owner (except the master or other person having charge of such vessel by whose wilful act or negligence she sank) under s. 76 of the Act of 1847.

On the summons for directions on Nov. 21, 1960, LORD MERRIMAN, P., gave the plaintiffs leave to read and put in evidence the affidavit of Mr. Bertil Svalander, managing director of the plaintiff company, A. R. Appelqvist A/B, who owned the Arabert. This affidavit, sworn on June 17, 1959, in support of the claim to limitation, referred to the facts already set out and added that the wreck-raising expenses amounted to £36,323 8s. 6d. and that the limitation fund was £19,118 16s. The total claims on behalf of the Cyprian Coast were estimated at over £100,000. The case came on for trial before LORD MERRIMAN, P., on Mar. 13, 1961, when counsel on behalf of the defendants, during argument by counsel for the plaintiffs, abandoned the counterclaim for £30,593 17s. 1d.

The enactments and cases enumerated below were cited in argument in addition to those in the judgment‡.

* See [1958] 1 Lloyd's Rep. 387.

† See [1959] 1 Lloyd's Rep. 63.

‡ I.e., s. 56 and s. 74 of the Harbour, Docks, and Piers Clauses Act, 1847; s. 42 of the Tyne Improvement Act, 1890; *The Ella*, [1915] P. 111; *Great Western Ry. Co. v. Mostyn (Owners)*, *The Mostyn*, [1927] All E.R. Rep. 113; 17 Asp. M.L.C. 367; *Dee Conservancy Board v. McConnell*, [1928] All E.R. Rep. 554; 17 Asp. M.L.C. 433; *Tyne Improvement Comrs. v. Armentant Anversois, S.A.*, *The Brabo*, [1947] 2 All E.R. 363; *The Unitia*, [1953] 1 Lloyd's Rep. 481.

J. V. Naisby, Q.C., A. A. Mocatta, Q.C., and H. V. Brandon for the plaintiffs, **A**
the owners of the Arabert.

J. R. Adams, Q.C., and G. N. W. Boyes for the defendants, the owners of the
Cyprian Coast and others.

Cur. adv. vult.

Mar. 27. **LORD MERRIMAN, P.**, read the following judgment in which, **B**
after referring to the facts previously set out, and after stating that counsel for
the defendants had agreed that the question of limitation in relation to the
wreck-raising expenses could be dealt with on the admitted basis that the plain-
tiffs were entitled to recover those expenses as part of the damages in the collision
action, and that, therefore, the sole question left open was whether those expenses
were damages within the meaning of s. 503 of the Merchant Shipping Act, 1894, **C**
or s. 1 of the Merchant Shipping (Liability of Shipowners and others) Act, 1900,
and that the answer depended on whether *The Urka* (1) was rightly decided by
the Court of Session in Scotland, and after stating that he agreed that this
ultimately was the question, **HIS LORDSHIP** continued: The plaintiffs in the
collision action were the owners of the Cyprian Coast, her master and crew
claiming in respect of lost or damaged effects, and the owners of the cargo laden **D**
on board her. I need not distinguish between these several claims, but will refer,
comprehensively, to the ship and her owners throughout. The statement of claim
alleges that the plaintiffs had suffered damage by reason of a collision between
the Cyprian Coast and the Arabert, which collision was solely caused by the
negligent navigation of the Arabert; but the particulars of negligence need not **E**
be repeated here. In the details of the collision it is alleged that the Arabert with
her stem and starboard bow struck the port side of the Cyprian Coast forward of
amidships at an angle of about sixty degrees leading forward on the Cyprian
Coast, damaging her so severely that she very shortly afterwards sank. By
the defence and counterclaim it was alleged on behalf of the Arabert that the
Cyprian Coast with her port side about amidships struck the stem of the Arabert
at about a right angle or a little less, leading forward on the Cyprian Coast, **F**
causing damage. **WILLMER, J.**, held that for the collision so caused the Arabert
was wholly to blame (2), and that decision was upheld in the Court of Appeal (3).

At the risk of undue prolixity I have set out these extracts of the pleadings
in some detail to emphasise the point that, as is common in a collision case, the
cause of action is negligent navigation causing damage. The nature of the claim
will be seen later to be of cardinal importance. **G**

The assessment of damages was referred for determination by the registrar
and merchants. Meanwhile, this present action was brought and the position
of the parties is, as usual, reversed. The plaintiffs [the owners of the Arabert] rely
on the admitted fact that the Arabert has been held solely to blame for the
collision, and on the further admission, already referred to, that the Cyprian
Coast will be entitled to recover as one head of the damages the wreck-raising **H**
expenses which she has incurred in connexion with raising her from the bed of
the harbour.

At first sight it would seem to be a simple proposition that when a wrongdoer
has by negligence sunk another ship in a harbour, thereby making the owners
of the innocent victim liable to the expense of clearing the harbour of the wreck,
the expenses of so doing, whether incurred directly by the owners of the sunken
vessel or indirectly through the interposition of the powers of the harbour author- **I**
ity in respect of wreck-raising, should be payable as special damages reasonably
or probably arising from the negligence; and if these expenses are rightly

(1) See [1953] 1 Lloyd's Rep. 478. In the Scottish Law Times the case is reported as *Clifton Steam Trawlers, Ltd. v. Duncan MacIver, Ltd.* ([1953] S.L.T. 230) and is referred to elsewhere in Scottish reports as *The Portugal*, the name of the injured vessel, while south of the Tweed the case is known as *The Urka*, the name of the wrongdoing ship.

(2) [1958] 1 Lloyd's Rep. 387.

(3) [1959] 1 Lloyd's Rep. 63.

included as damages against the wrongdoer it would seem to follow automatically that the latter is entitled to limit his liability in respect of that head of damage as well, for example, as for the costs of repairing the injured vessel when raised. Indeed, seeing that a ship at the bottom of a harbour cannot very well be repaired in situ, it would seem to be absurd, on the face of it, that the cost of repairs should be recoverable and should be the subject of limitation, whereas the cost of restoring the vessel to the surface where she would be capable of being repaired should be admittedly recoverable, but should not be the subject of limitation. Yet that in substance is the argument put forward on behalf of the owners of the Cyprian Coast, the defendants to the limitation action, who were, as already stated, the plaintiffs in the collision action.

It is right to say, however, that the approach to this proposition is singularly short of direct authority binding on this court, and that what exists is to some extent conflicting. But the problem has to be approached by way of certain propositions which are settled beyond question.

First, the vital words in s. 503 of the Merchant Shipping Act, 1894, are "be liable to damages", thus leading to the principle that "the relief given to ship-owners is in respect of their liability to damages and nothing else". Moreover, although the Merchant Shipping (Liability of Shipowners and others) Act, 1900, undoubtedly provided a large extension of the relief given to shipowners by the Act of 1894, it has been held to be unarguable "that the relief extended so far as to enable shipowners to limit their liability except where their liability lay in damages": *The Stonedale No. 1*, *Richard Abel & Sons, Ltd. (Owners) v. Manchester Ship Canal Co.* (4), per VISCOUNT SIMONDS (5). The other noble Lords agreed with these propositions (6).

Secondly, from this it followed that in a claim by a harbour authority under statutory powers to recover the expenses of raising a wreck, as a debt, it was not open to the owners of the wreck to limit their liability to such a claim. Their Lordships left it open in that case (i.e., *The Stonedale No. 1* (4)) whether, having regard to the wider wording of the Merchant Shipping (Liability of Shipowners and others) Act, 1900, a claim at common law by the harbour authority would or would not be subject to limitation.

Thirdly, it is obvious that a decision that limitation is not available in the case of wreck-raising expenses recoverable as a debt by a harbour authority against the owners of the obstructing wreck, irrespective of any question of negligence, is in a different category from the case where the wreck-raising expenses incurred by the innocent victim of a collision are properly recoverable as damages for negligence against the wrongdoer. Indeed, it might fairly be said that the only common factor is that wreck-raising expenses are involved in each case. Manifestly, as I think, inability of *The Millie* (7), and of *The Stonedale No. 1* (4), to limit against the Manchester Ship Canal Co. has nothing more to do with this case than to establish the proposition that it is liability for damages which founds the right to limitation, and that alone.

Much of the argument on behalf of the defendants turns on the exact wording of s. 503 of the Merchant Shipping Act, 1894, and s. 1 of the Merchant Shipping (Liability of Shipowners and others) Act, 1900. The material words of s. 503 (1) are as follows:

"The owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity; (that is to say,) . . .

(b) Where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board the ship; . . .

(4) [1955] 2 All E.R. 689; [1956] A.C. 1. This case is subsequently referred to as *The Stonedale No. 1*. (5) [1955] 2 All E.R. at p. 692; [1956] A.C. at p. 8.

(6) [1955] 2 All E.R. at p. 695; [1956] A.C. at pp. 12, 13.

(7) [1940] P. 1; 19 Asp. M.L.C. 324.

- (d) Where any loss or damage is caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel, by reason of the improper navigation of the ship; be liable to damages beyond the following amounts; (that is to say,) . . .
- (ii) In respect of loss of, or damage to, vessels, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, an aggregate amount not exceeding £8 for each ton of their ship's tonnage."

The procedure for limitation of liability is set out in s. 504 of the Act of 1894, but it is only necessary for my present purpose to cite the following words:

"Where any liability is alleged to have been incurred by the owner of a British or foreign ship in respect of . . . loss of or damage to vessels or goods, and several claims are made or apprehended in respect of that liability, then . . . [the High Court on application by the owner] may determine the amount of the owner's liability and may distribute that amount rateably among the several claimants . . .",

and so forth.

It will be observed that whereas in s. 503 (1) (d), the words are "Where any loss or damage is caused to any other vessel", in s. 503 (1) (ii) and in s. 504 the words are "in respect of loss of, or damage to, vessels", etc. The latter words, it is argued, are confined solely, so far as loss is concerned, to the actual loss of the vessel, including, it was suggested, a vessel abandoned as a total loss; and by parity of reasoning it was submitted that "damage to" should be confined only to physical damage to the vessel, thus leaving no room for the meaning attributed to the words "damage or loss caused to one or more of those vessels" in s. 1 of the Maritime Conventions Act, 1911, by the Court of Appeal in *The Cairnbahn* (8), to which I refer later.

This difference between the description of the casualty in s. 503 (1) (d) and the limitation of the damage in s. 503 (1) (ii) suggests the possibility that the word "of" following the word "loss" has crept in per incuriam. Some colour is lent to this suggestion, remembering that the Act of 1894 was in the main a consolidation Act, by comparing the words of s. 504 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104) (9) and of s. 54 of the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63) (10) which repealed s. 504 of the Act of 1854. In neither of these sections does the word "of" follow the word "loss". However, let it be assumed that so far as the words "loss of" are concerned they must be confined to the actual loss of the vessel, there still remains in s. 503 "damage to", words which, in my opinion, fall to be construed independently of the word "loss". It will be seen from the detailed reference to the pleadings above that it is alleged in this case that there has been "damage to" the Cyprian Coast caused by the improper navigation of the Arabert.

(8) [1914] P. 25; 12 Asp. M.L.C. 455.

(9) Section 504 of the Act of 1854, so far as material, read: "No owner of any sea-going ship or share therein shall, in cases where all or any of the following events occur without his actual fault or privity, (that is to say,) . . . (2) Where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board any such ship . . . (4) Where any loss or damage is by reason of any such improper navigation of such sea-going ship as aforesaid caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever, on board any other ship or boat; be answerable in damages to an extent beyond the value of his ship and the freight . . . less than £15 per registered ton."

(10) Section 54 of the Act of 1862, so far as material, read: "The owners of any ship, whether British or foreign, shall not, in cases where all or any of the following events occur without their actual fault or privity, that is to say, . . . (2) Where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board any such ship . . . (4) Where any loss or damage is by reason of the improper navigation of such ship as aforesaid caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever on board any other ship or boat; be answerable in damages . . . in respect of loss or damage to ships . . . to an aggregate amount exceeding £8 for each ton of the ship's tonnage . . ."

In *The Cairnbahn* (11), the Court of Appeal was concerned with the construction of s. 1 (1) of the Maritime Conventions Act, 1911, in which the following words occur:

"Where, by the fault of two or more vessels, damage or loss is caused to one or more of those vessels . . . the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault . . ."

LORD SUMNER (12) said:

"The owners of the *Cairnbahn* suffered 'damage' because their ship ran into the hopper which was in tow of the tug *Nunthorpe*. They suffered 'loss' because the owners of the hopper sued them for her injuries and won. They suffered both by the 'fault' of the two vessels, the *Cairnbahn* and the *Nunthorpe*, or rather by the faulty navigation of those in command of them. Why does not s. 1 (1) of the Maritime Conventions Act, 1911, apply to this case? Though damage may be caused to a vessel, loss cannot be, nor is the phrase 'damage is caused to a vessel' apt to express simply that the vessel is damaged. Loss is caused to the owners and charterers of the vessel, and damage is caused to them too when the vessel is damaged. I think the section regulates rights and liabilities between parties in fault and extends to pecuniary prejudice, which may accrue, legally and not too remotely, to persons interested in vessels by reason of the faulty navigation of persons for whom they are responsible. The word 'loss' is wide enough to include that form of pecuniary prejudice which consists in compensating third parties for wrong done to them by the fault of persons for whose misconduct the party prejudiced must answer. It covers the sum recovered by the owners of the hopper against the owners of the *Cairnbahn*. To say that damage to the hopper is not loss to the *Cairnbahn* so as to be loss or damage caused to one or more of 'those vessels', namely, those vessels which are in fault, is to make this remedial legislation unexpectedly onesided."

LORD PARKER OF WADDINGTON (12), simply said:

"The words of s. 1 are wide enough to cover the sum recovered against the *Cairnbahn*, and I think that sum must be apportioned in accordance with the section."

Moreover, I think that the observations by WARRINGTON, J., about the personification of the vessel (13) and about the truth being

"... that for the purpose of ascertaining the legal effect, the word in one context connotes those responsible for the navigation of the vessel; in another those who are interested in her, her cargo or freight; and in another those who are in law answerable for the conduct of those in charge",

are of authority in all Admiralty suits in which it is customary to personify the ship.

It seems to me that in spite of the fact that these judgments were given in reference to an Act passed about seventeen years later than that with which I am concerned, there is sufficient similarity of context to make these observations in *The Cairnbahn* (11) relevant to the present case.

The truth is that the argument on behalf of the defendants in the present suit depends on the authority of a decision in the Court of Session. In fact, two authorities of that court have been cited. First, *G. & G. Hamilton v. British Transport Commission* (14), can be treated shortly as it does not bear directly on the present point. This was a claim for limitation by the pursuers in respect of a collision between their vessel the *Glencloy* and the sea lockgates of the *Crinan Canal* owned by the commission. The claim to limit liability was put

(11) [1914] P. 25; 12 Asp. M.L.C. 455.

(12) [1914] P. at p. 32; 12 Asp. M.L.C. at p. 458.

(13) [1914] P. at p. 34; 12 Asp. M.L.C. at p. 459.

(14) 1957 S.C. 300.

forward on the basis that the pursuers apprehended that they would be made A
 liable to the commission under s. 74 of the Harbours, Docks, and Piers Clauses
 Act, 1847. The point at issue was whether the liability created by s. 74 was or
 was not the proper subject of limitation. LORD CAMERON ruled, strictly in
 accordance with the decision of the House of Lords in *The Stonedale No. 1* (15),
 that under the language of s. 503 it was only those claims in respect of which it
 could be said that they involved liability to damages which could relevantly be B
 quoted in a limitation action. Having examined *The Millie* (16) and *The Stone-*
dale No. 1 (15), and the other wreck-raising case in the Court of Session to which
 I am about to refer, he came to the conclusion that a claim under s. 74 sounded
 in damages, and therefore was the proper subject of limitation.

It will appear from what I have already said that I agree with LORD CAMERON C
 (17) that the wreck-raising expenses recoverable as a debt are in a different
 category from claims under s. 74; and just as the wreck-raising cases did not
 touch the question with which he was concerned, so LORD CAMERON's decision
 does not touch the question with which I am concerned. It would, therefore, be
 impertinent on my part to express any opinion about his conclusion in that
 case, which need not be considered further.

This brings me to the decision of LORD SORN in *The Urka* (18). This was a D
 limitation action by the owners of the *Urka* which, being outward bound from
 Stornoway had come into collision with the Portugal, a coaling hulk moored in
 Stornoway harbour, with the result that the Portugal sank near the approaches
 to that harbour. There was no dispute that in respect of the claim by the owners
 of the Portugal for the value of their vessel the owners of the *Urka* were entitled
 to limit liability. The Portugal, to personify the ship, had put forward another E
 claim which I have taken from LORD SORN's judgment as follows (19):

"Under their statutes, the Stornoway Harbour Commissioners have power
 to require the owners of a wreck to remove it, and in default of compliance
 have power to remove it themselves at the owners' expense. Acting under
 these powers the commissioners required the defenders to remove the
 wreck of the Portugal, and, thinking they could get this done more cheaply F
 than the commissioners would be able to do, the defenders had the wreck
 removed by a firm of shipbreakers at a net cost of £2,000. It is this sum,
 together with some preliminary costs in connexion with the removal, that
 the defenders now claim from the pursuers. The pursuers do not dispute
 their liability for this claim, but contend that they are entitled to limit their
 liability with respect to it. The defenders dispute this." G

From this extract it will be seen that the case raises almost exactly the same
 point as I am called on to decide, save that the claim to limit in *The Urka* (18)
 was founded exclusively on s. 1 of the Act of 1900.

LORD SORN disposed of a preliminary point that the claim to limit liability H
 was premature. He then pointed out that the *Urka's* contention that she could
 limit her liability as regards the claim for cost of removal was based on s. 1
 of the Act of 1900, and added (20):

"Before the passing of that Act, and so long as limitation depended
 upon s. 503 of the Merchant Shipping Act, 1894, the contention could not
 have been stated." I

This sentence affords the basis of the argument for the Cyprian Coast so far as
 s. 503 is concerned.

Having stated this conclusion, his Lordship set out the relevant portions of

(15) [1955] 2 All E.R. 689; [1956] A.C. 1. (16) [1940] P. i; 19 Asp. M.L.C. 324.
 (17) I.e., in *G. & G. Hamilton v. British Transport Commission*, 1957 S.C. 300.
 (18) [1953] 1 Lloyd's Rep. 478; [1953] S.L.T. 230.
 (19) [1953] 1 Lloyd's Rep. at p. 479; [1953] S.L.T. at p. 231.
 (20) [1953] 1 Lloyd's Rep. at p. 479; [1953] S.L.T. at p. 232.

A s. 503 in substantially the same terms as I have already quoted in this judgment, and added (21):

“Under that enactment the privilege of limitation was conferred only as regards liability in respect of loss of, or damage to, a particular kind of property, that is to say, other vessels and anything on board them.”

B Quite so; but the learned judge does not explain why the Portugal, another vessel, is not to be included in that particular kind of property, and it is left at that.

On the contrary, before I continue with the other branch of the judgment in *The Urka* (22), I would refer to some observations of WILLMER, J., to whom that case had been cited in *The Stonedale No. 1* (23). WILLMER, J., says (24):

C “This decision [i.e., *The Urka*] is, of course, in no way binding on me, but in so far as it goes to reinforce the authority of *The Millie* (25), I feel bound to accord it all due respect. At the same time, I am bound to say that I have difficulty in understanding why the claim for limitation was ever put forward under the Act of 1900. With all respect, I should have thought that the expenses of raising the Portugal were part of the loss caused to that vessel, or to her owners, so as to entitle the pursuers to claim limitation under s. 503 (1) (d) of the principal Act.”

He then quotes part of the passage from the judgment of LORD SUMNER in *The Cairnbahn* (26), to which I have already referred, and continues (24):

E “For myself, I do not see why the almost identical phrase of s. 503 (1) (d) of the Merchant Shipping Act, 1894, namely, ‘loss or damage . . . caused to any other vessel’, should not receive the same construction, and, if so, it would seem that the words would have been amply wide enough to cover the expenses incurred by the owners of the Portugal in raising the wreck.”

I feel obliged to point out, however, that WILLMER, J., does not appear to have observed the point about the insertion of the word “of” after “loss” in s. 503 (1) (ii), which, as I have already suggested, affects the comparison with “loss or damage” in *The Cairnbahn* (27), but leaves unaffected the point that the occurrence caused “damage to” the Portugal. Subject to this qualification, I think that WILLMER, J., was right and LORD SORN was mistaken about the application of s. 503 to the Portugal, and thus to the Cyprian Coast.

G Accordingly, I hold that it is established that there has been “damage to” the Cyprian Coast caused by the improper navigation of the Arabert within the meaning of s. 503 of the Act of 1894.

H But even if this is not so, the question remains whether s. 1 of the Act of 1900 applies, inasmuch as it is alleged that the Cyprian Coast is the “property” of her owners, to which “loss or damage has been caused”; or, alternatively, has been caused to “the rights” of her owners, inasmuch as they had a right to the continued use of their vessel on her lawful occasions, which right, it is alleged, has been interfered with by her being put out of action for a time by the negligence of the Arabert. In this context, at any rate, I consider that I am entitled to be guided, even though not bound, by what was said in the judgments in *The Cairnbahn* (28), which I have already quoted.

I In the present case the claim to limitation is based on both statutes, but it goes without saying that if the claim is covered by s. 503 no recourse is necessary to the extension provided by s. 1 of the Act of 1900. Nevertheless, it is necessary

(21) [1953] 1 Lloyd's Rep. at p. 479; [1953] S.L.T. at p. 232.

(22) I.e.; [1953] 1 Lloyd's Rep. at pp. 479-481; [1953] S.L.T. at pp. 232, 233.

(23) [1955] 2 All E.R. 689; [1956] A.C. 1.

(24) [1953] 1 W.L.R. at p. 1251.

(25) [1940] P. 1; 19 Asp. M.L.C. 324.

(26) [1914] P. at p. 33; 12 Asp. M.L.C. at p. 458.

(27) [1914] P. 25; 12 Asp. M.L.C. 455.

(28) I.e., [1914] P. at pp. 32, 34; 12 Asp. M.L.C. at pp. 458, 459.

to consider how LORD SORN in *The Urka* (29) deals with the claim under the latter section. He remarks that the section is not entirely free from obscurity, adding (30):

"So far as it refers to loss or damage to corporeal property, it is simple enough, but the significance of the word 'rights' introduced into the expression 'property or rights of any kind' is not so easy to grasp, especially when the whole expression is qualified by the words 'whether on land or water, or whether fixed or movable'. The second thing is that, wide as the terms of the section are, they do not expressly say that limitation is to extend to all liability resulting from improper navigation. The method of the earlier Acts has been to deal with a particular claim, or a particular type of claim, against which it has been thought that a shipowner ought to have protection, and to permit him to limit his liability in such cases. This latest Act adheres to the same method, and the question is whether the present claim falls within the category of claims defined by the words of the section.

"In order to come within the words of the section, the pursuers' liability for this claim must be held to be a liability in respect of 'loss or damage to property or rights,' etc. First of all, then, can it be said that the liability is in respect of any loss or damage to property or rights of the defenders, the owners of the *Portugal*, who present the claim? Obviously not. The *Portugal* was their property, but its loss is covered by their other claim, and this claim is not in respect of any loss or damage to property of theirs. Nor can it be said to be in respect of any loss or damage to any right of theirs. When they incurred this expenditure they were neither rescuing their property nor vindicating their rights. Counsel for the defenders suggested that this of itself was enough to render the section inapplicable, the argument being that, when the section referred to loss or damage being caused to property or rights, it meant to refer to property or rights of the person making the claim, or, in other words, of the person to whom the liability was owed. The section, however, does not say so, and I think that this construction of it would be unwarrantably narrow. What comes in question, as I see it, is the nature of the claim."

In the absence of a detailed statement of fact in *The Urka* (29), the statement that the loss of the *Portugal* was covered by her owners' "other claim" may mean that the *Portugal*'s owners were recovering her whole value on the basis that, although raised, she seems to have been treated as a total loss in the sense that the wreck-raising contractors received what are called "certain recoveries" as part payment. Even so, I am not convinced that the receipt of the full value of the ship would deprive the owners of the *Portugal* of the right to recover as a separate head of damage the wreck-raising expenses incurred by reason of the negligence of the *Urka*. However that may be, there is no doubt, because it is admitted, that the Cyprian Coast is entitled to recover as damages, the wreck-raising expenses in addition to the damage to the ship herself, minimised as that latter head of damage will be, by the fact that the Cyprian Coast has been salvaged and returned to her owners.

When, however, it is said that it is "unwarrantably narrow" to suggest that the section refers to loss or damage being caused to the property or rights of the person making the claim, or in other words of the person to whom the liability was owed, and that the section does not say so; but that what comes in question is the "nature of the claim", with the greatest respect to LORD SORN I must express my opinion that the section does refer to the property or

(29) [1953] 1 Lloyd's Rep. 478; [1953] S.L.T. 230.

(30) [1953] 1 Lloyd's Rep. at pp. 479, 480; [1953] S.L.T. at p. 232.

A rights of the person making the claim; that is to say, the person to whom the liability is owed, and that this is the "nature of the claim" that matters.

I will try to explain why, in my opinion, this is so. The Arabert is liable to pay damages to the owners of the Cyprian Coast for loss or damage to that vessel. The Cyprian Coast is the property of the defendants, who had the right to her services as a ship. The Arabert seeks to limit the damages payable to £8
B per ton. The expenses of raising the Cyprian Coast (preparatory to repairing her) are admittedly recoverable against the Arabert as part of the damages; so is the cost of the repairs themselves. The Arabert's liability for these damages arises in tort because it was the Arabert's negligent navigation, alone, which caused the Cyprian Coast to sink, thereby causing damage to the defendants' "property", and to their "rights" to her services as a ship. This is the nature
C of the Cyprian Coast's claim, and it is the nature of this claim that matters. To put it more shortly, it is the nature of the claim of the owners of the Cyprian Coast which gives rise to the liability to damages, including the wreck-raising expenses, to limit which to the statutory amount is the object of this action.

It is scarcely necessary to say that it is with the utmost diffidence that I differ from LORD SORN; but as I have come to a conclusion opposite to that expressed
D by him in *The Urka* (31), and as the case of the defendants depends in the main on the contention that *The Urka* (31) was rightly decided, I must express my considered opinion that *The Urka* (31) was wrongly decided, and that the plaintiffs are entitled to include the wreck-raising expenses in their claim for limitation. I give judgment accordingly.

[There followed an argument on the form of the decree and on costs and His
E LORDSHIP ordered that the plaintiffs should pay the defendants' costs of the claim and the defendants should pay the plaintiffs' costs of the counterclaim, counsel to agree the form of decree based on the judgment aforesaid.]

Order accordingly.

Solicitors: *Bentleys, Stokes & Lowless*, agents for *Bramwell, Clayton & Clayton*, Newcastle-upon-Tyne (for the plaintiffs); *Middleton, Lewis & Co.*, agents for *Middleton & Co.*, Sunderland (for the defendants).

[*Reported by N. P. METCALFE, ESQ., Barrister-at-Law.*]

B. v. B.

A

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (SCARMAN, J.), March 20, 1961.]

Divorce—Decree absolute—Arrangements for care and upbringing of children—Decree nisi made absolute before court satisfied as to arrangements—Decree void—Matrimonial Proceedings (Children) Act, 1958 (6 & 7 Eliz. 2 c. 40), s. 2 (1).

B

The requirement in s. 2 (1) of the Matrimonial Proceedings (Children) Act, 1958, that a decree shall not be made absolute until the court is satisfied as to the arrangements for the care and upbringing of the children is mandatory, and a decree absolute made on an inadvertent non-compliance with s. 2 is void.

[As to the effect of irregularity rendering the decree absolute void or voidable, see 12 HALSBURY'S LAWS (3rd Edn.) 409, para. 908; and for cases on the subject, see 27 DIGEST (Repl.) 690, 6609-6614.]

C

For the Matrimonial Proceedings (Children) Act, 1958, s. 2 (1), see 38 HALSBURY'S STATUTES (2nd Edn.) 479.]

Cases referred to:

Marsh v. Marsh, [1945] A.C. 271; 114 L.J.P.C. 89; 27 Digest (Repl.) 690, 2310.

D

R. v. McDevitt, (1917), 39 O.L.R. 138; 42 Digest 710, 1278 i.

Adjourned Summons.

The wife applied by summons for directions as to a decree absolute made on Mar. 21, 1960.

E

The wife petitioned for divorce and prayed for custody of the two children. The husband entered an appearance limited to custody and costs. On July 24, 1959, Mr. Commissioner HERBERT, Q.C., granted the wife a decree nisi and adjourned the question of custody to chambers. At the hearing the commissioner made no declaration pursuant to s. 2 of the Matrimonial Proceedings (Children) Act, 1958, that he was satisfied as to the arrangements for the care and upbringing of the children. On Mar. 21, 1960, through inadvertence or mistake the decree was made absolute although the question whether or not the court was satisfied as to the arrangements for the care and upbringing of the children remained to be considered.

F

On June 14, 1960, the wife issued a summons for custody. The summons came before PHILLIMORE, J., in chambers, on June 28, 1960, but was adjourned.

G

On Feb. 17, 1961, the wife issued a summons seeking directions as to the decree absolute. This summons came before SCARMAN, J., in chambers on Feb. 22, 1961, when His LORDSHIP adjourned it into open court and directed that the papers be sent to the Queen's Proctor pursuant to the Matrimonial Causes Act, 1950, s. 10 (1).

H

R. J. A. Batt for the wife.

N. H. Curtis-Raleigh for the Queen's Proctor.

SCARMAN, J., stated the facts and continued: The Matrimonial Proceedings (Children) Act, 1958, s. 2 (1), reads as follows:

"Subject to the provisions of this section, in any proceedings for divorce, nullity of marriage or judicial separation where the High Court has, by virtue of s. 26 (1) of the Matrimonial Causes Act, 1950, jurisdiction in relation to any child, the court shall not make absolute any decree for divorce or nullity of marriage or pronounce a decree of judicial separation unless and until the court is satisfied as respects every such child who has not attained the age of sixteen years—(a) that arrangements have been made for the care and upbringing of the child and that those arrangements are satisfactory or are the best which can be devised in the circumstances,

I

A or (b) that it is impracticable for the party or parties appearing before the court to make any such arrangements."

The learned commissioner made no declaration under that section, and the court's satisfaction as to the arrangements or otherwise for the care and upbringing of the children was never sought between the decree nisi and the application by the wife for the decree absolute.

B By an error for which, I suppose, responsibility must lie alike on the solicitors for the wife who made the application for the decree absolute and the officials of the Divorce Registry who granted it, the decree was made absolute before the court had in any way considered whether it could, under s. 2 of the Act of 1958, make a declaration that it was satisfied as to the arrangements for the children, and certainly, of course, before any such declaration was made. This unfortunate state of affairs arose purely through inadvertence or mistake, and there is no suggestion of any misconduct or impropriety on the part of anybody. The decree having been made absolute in those circumstances (the relevant circumstance being, of course, that s. 2 of the Act of 1958 had not been fulfilled) the husband quite reasonably acted on it and re-married.

D In due course the application for custody came before the court, that is the application which the learned commissioner had adjourned into chambers, and, in the course of those proceedings, it became apparent that the decree absolute had been granted although the court had not considered whether it was satisfied as to the arrangements for the care and upbringing of the children. That being so, the wife very properly issued this summons asking for the directions of the court as to what is to be done about the decree absolute.

E It is clear that the decree absolute was granted in breach of s. 2 of the Matrimonial Proceedings (Children) Act, 1958. The section is clear. It provides that the court shall not make absolute a decree of divorce until it is satisfied as to the matters therein specified. It is important to observe that the matters therein specified are the care and upbringing of the children—very important matters indeed.

F The question which I have to decide is whether a failure to comply with the requirements of that section makes the decree absolute merely voidable or void. If it be voidable only, it remains a valid decree until some interested person takes the proper steps at the proper time to set it aside. If it is void, it is a nullity; it is immaterial whether I pronounce on it today or not, for it can be and must be totally disregarded in considering the rights and relations and status of the parties affected by it. If it be void, the only real value of my decision today is that the parties will know where they are when they hear the decision.

G The question really depends on whether the statute is to be regarded as compulsory in its effect or merely directory. I agree with both learned counsel who have argued the present case that prior authority on other statutes is not of great assistance to the court in determining the intention of the legislature when this section was enacted. It seems to me that it is my duty to look at this statute, to look at the circumstances in which it was enacted and the purposes that it was intended to serve, and then to come to a conclusion whether the purposes intended this requirement as to the court's action before making a decree absolute to be something without which the parties should have no decree absolute or merely a beneficial requirement which, if ignored by the parties (of course in all innocence), could thereafter be ignored by the law of the land.

I I think undoubtedly that this section, coming as it does in the Matrimonial Proceedings (Children) Act, 1958, must be regarded as a section which Parliament considered a necessary protection for the children who, of course, have directly no voice in these proceedings. In my view the matter is far too serious to be allowed to be regarded as merely a direction. The language of the section and of the Act in which the section appears and the purposes which the Act is designed to serve, all combine together to convince me that the court is faced here with a very peremptory section indeed.

It seems to me, therefore, that, if the court, impressed with the inconvenience and hardship that arises in the present case, should say that the section is merely directory and may be ignored without prejudice to the decree granted, the court would be yielding to arguments of hardship which arise in particular cases and disregarding the duty to the children of the marriage which the section plainly puts on it. For those reasons I find that the present case does fall on that side of the line which requires the court to say that a failure to comply with the requirements of the section goes to jurisdiction and, if there is such a failure and a decree absolute is granted after such a failure, the decree absolute is a nullity. A

I have been referred to a considerable number of cases, and the fact that I do not mention any of them in my judgment should not be taken as any reflection on the skill and industry of counsel who put them before the court or of their helpfulness to me in reaching my decision. I would like to say that I find most helpful on the points raised by this summons the decision of the Privy Council in *Marsh v. Marsh* (1) and in particular the distinction (2) between that which would make a decree void and that which would make it voidable. B C

I also derived considerable assistance from the Canadian case quoted by counsel for the wife of *R. v. McDevitt* (3), and in particular from the following passage of the judgment of MIDDLETON, J., which seems to me to place the matter in such a clear light that it is worthy of quotation. He says (4): D

"The commands of the legislature are peremptory. It is intended that they shall be obeyed. The legislature may simply trust to its officers to yield implicit obedience, or may, if it sees fit, attach a penalty as punishment for disobedience. In either case this is a matter between the legislature and its officers. In the event of the officer disobeying, the question remains as to the effect of the disobedience on the thing done. Was the matter in which there was disobedience so essential and fundamental that the non-compliance with the statute rendered it void, or was it so subsidiary and collateral that it may safely be ignored?" E

I think that that question posed by MIDDLETON, J., when considering a very different statute, is the question which I should pose to myself in determining whether the decree absolute in the present case is a nullity or whether it is valid until lawfully set aside. I find that the decree absolute was a nullity because, looking at the statute, I take the view that the disobedience here to the requirement of s. 2 of the Act (a strong word perhaps to describe the non-compliance with the section) was so fundamental that it does render the decree absolute void. I cannot regard the provision for the care and upbringing of the children in s. 2 of the Act of 1958 as being a matter which the court could call either subsidiary or collateral. It seems to me a matter of such grave importance that I must give effect to it by declaring that the decree absolute is void. F G

R. J. A. Batt for the wife: I would ask your Lordship to declare whether your Lordship feels the arrangements for the care and upbringing of the children are satisfactory. H

SCARMAN, J.: The difficulty is that I have no evidence before me on which at the moment I could make a declaration in either the complete or the very guarded form suggested by s. 2 (1). On the wife's undertaking, however, to bring the question of the arrangements for the children before the court within twenty-eight days (5) I grant leave to make the decree absolute. I

Declaration that decree absolute dated Mar. 21, 1960, was null and void.

Solicitors: *Godfrey Davis & Batt*, Wimbledon (for the wife); *Queen's Proctor*.
[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

(1) [1945] A.C. 271. (2) [1945] A.C. at p. 284. (3) (1917), 39 O.L.R. 138.

(4) (1917), 39 O.L.R. at p. 140.

(5) Section 2 (2) of the Matrimonial Proceedings (Children) Act, 1958; 38 HALSBURY'S STATUTES (2nd Edn.) 479.

AYLING v. WADE.

[COURT OF APPEAL (Ormerod, Willmer and Danckwerts, L.JJ.), April 14, 1961.]

Landlord and Tenant—Repair—Landlord's covenant—Underlease—Landlord liable under repairing covenant in head lease—Covenant by landlord in underlease to "observe" covenants of head lease—Failure to repair—Whether landlord in underlease liable to tenant's assignee for damages or whether landlord's covenant in underlease a covenant only for indemnity.

The assignee of a lease of premises sub-let part of them comprising a restaurant with kitchens and lavatory accommodation to a sub-tenant at a rent of £182 per annum, covenanting as landlord "To pay the rent reserved by and to observe the covenants contained in the lease under which the landlord holds the demised premises and to keep the tenant indemnified against the same..." The head lease contained a landlord's covenant to repair the larger premises thereby demised. As a result of a faulty repair by the landlord to the skylight of a flat roof on top of the restaurant, rain caused damage to property in the restaurant belonging to the sub-tenant's assignee.

Held: the landlord was liable in damages to the sub-tenant's assignee for breach of the covenant in the underlease to "observe the covenants contained in the [head lease]", since this covenant was an express covenant to carry out repairing obligation under the landlord's covenants in the head lease and was not merely a covenant of indemnity, the word "observe" meaning "comply with the obligation" and the covenant being contained, not in an assignment, but in an underlease under which the covenantee, the sub-tenant, and his assignees had an interest in the condition of the premises.

Re Poole and Clarke's Contract ([1904] 2 Ch. 173), *Harris v. Boots, Cash Chemists (Southern), Ltd.* ([1904] 2 Ch. 376) and *Reckitt v. Cody* ([1920] 2 Ch. 452) distinguished.

Appeal allowed.

[As to construction of covenants to repair by the landlord and by assignees, see 23 HALSBURY'S LAWS (3rd Edn.) 586, para. 1268, and 656, para. 1374; and for cases on the subject, see 31 DIGEST (Repl.) 344, 345, 4752-4766, and 460, 461, 5878-5882.]

Cases referred to:

Harris v. Boots, Cash Chemists (Southern), Ltd., [1904] 2 Ch. 376; 73 L.J.Ch. 708; 31 Digest (Repl.) 460, 5879.

Poole and Clarke's Contract, Re, [1904] 2 Ch. 173; 73 L.J.Ch. 612; 91 L.T. 275; 31 Digest (Repl.) 458, 5848.

Reckitt v. Cody, [1920] 2 Ch. 452; 90 L.J.Ch. 27; 124 L.T. 141; 40 Digest (Repl.) 310, 2559.

Appeal.

The plaintiff appealed against an order of His Honour JUDGE LESLIE made in Woolwich County Court on Oct. 31, 1960, dismissing an action for damages for breach of covenant in a sub-lease to the plaintiff of a lock-up shop or restaurant with kitchens and lavatory accommodation at 5, Eltham Road, London, S.E.12. The grounds of appeal were that the judge was wrong in law and misdirected himself in holding that a covenant in the sub-lease on the part of the defendant as mesne landlord was a covenant to indemnify the plaintiff as sub-tenant for breaches by the defendant of his covenants in the head lease and further in holding that the covenant was not a covenant by the defendant to repair the premises demised by the sub-lease to the plaintiff. The repairing covenant in the defendant's head lease provided that the original lessees

"...will during the term at the lessees' costs well and substantially repair support uphold maintain purge pave scour whitewash colour glaze

empty paper tile slate and keep in good substantial and tenable repair and in all cases of fire restore or rebuild to the satisfaction of the lessors' surveyor the said messuage or dwelling-house shop outoffices stable and premises and every part thereof . . ."

A. J. Bateson for the plaintiff.

C. M. G. Butterfield for the defendant.

DANCKWERTS, L.J., gave the first judgment at the request of **ORMEROD, L.J.**: This is an appeal against a decision of His Honour JUDGE LESLIE and turns on the proper construction to be given to the terms of an underlease dated Dec. 31, 1957. The parties to the underlease were William Charles Wade, who is the defendant in the present case, and John Dunys Dennison, who subsequently assigned the term created by the underlease to the present plaintiff. The defendant had acquired a term which had been created by a lease dated June 23, 1877, before he granted this underlease to Mr. Dennison, and by the terms of the underlease part of the property included in the head lease, consisting of (as regards this part of the property) a lock-up shop or restaurant with kitchens and lavatory accommodation at 5, Eltham Road, London, S.E.12, was sub-let to Mr. Dennison for a term of seven years from Dec. 25, 1957, at a rent of £182 per annum. The plaintiff went into possession at Easter, 1958, though the actual assignment of the underlease was not completed apparently until August, 1959. The trouble in the present case arose because apparently there was a skylight in the flat roof on top of the restaurant and, owing to the glass in the skylight having been broken previously and a very ineffective repair having been made by the defendant, the water poured into the restaurant, and the claim to damages was eventually brought down in the hearing before the county court to a sum of £38, representing loss of profits.

The plaintiff claims that the defendant is liable to pay that sum to the plaintiff—i.e., the under-tenant—by virtue of the terms of the underlease. The learned county court judge held that that was the proper amount which was recoverable if the plaintiff was entitled to succeed, but held that on the terms of the underlease there was no right of action.

In the underlease, the tenant's covenants included the usual covenant to pay the reserved rent, and secondly

"to keep the interior of the premises including all doors windows and landlord's fixtures in good and substantial repair and properly painted limewashed papered and varnished as from time to time required."

Apparently it is accepted that a window does not include the skylight in the present case, a matter on which I should have felt some doubt. Then No. 4 of the tenant's covenants was:

"To permit the landlord with workmen and others to enter upon the premises and repair in accordance with the covenants and provisions of the lease under which the landlord holds the premises and so far as any defects remedied by the landlord may be included in the tenant's covenant to repair hereinbefore contained forthwith to repay the costs of remedying such defects to the landlord as a liquidated debt."

That, of course, is merely a permissive covenant in the first part and to enable the intermediate landlord, the defendant, to comply with the covenants to which he is subject under the head lease; but it is said that it does indicate that the carrying out of some repairs by the intermediate landlord is contemplated by the terms of this underlease. Number 7 of the tenant's covenants is the common provision requiring the tenant

"to yield up the premises at the determination of the tenancy in such good and substantial repair as shall be in accordance with the tenant's covenants hereinbefore contained and with all locks keys and fastenings complete."

A Paragraph 3 of the underlease deals with covenants by the landlord. The opening words are "The landlord hereby covenants with the tenant", and No. 1 is:

B "To pay the rent reserved by and to observe the covenants contained in the lease under which the landlord holds the demised premises and to keep the tenant indemnified against the same and against all rates taxes and outgoings whatsoever which now are or hereafter may become payable in respect of the demised premises."

Number 2 is a covenant for quiet enjoyment:

C "That the tenant paying the rent hereby reserved and performing and observing the several covenants on his part herein contained shall peaceably hold and enjoy the demised premises during the said term without any interruption by the landlord or any person rightfully claiming under or in trust for him."

D The argument has turned principally on the terms of para. 3 (1) of the underlease. On the face of it, it is a definite covenant by the landlord—it is one of his covenants—to pay the rent reserved and to observe the covenants contained in the lease under which he (the landlord) holds the demised premises; and, of course, it must be remembered that that included not only the demised premises but also a larger piece of property. The learned county court judge came to the conclusion that this covenant was to be construed merely as a covenant of indemnity, so that apparently no liability would be cast on the intermediate landlord until steps had been taken against him to forfeit the lease; and it was argued that this was a provision which was merely intended to protect the under-tenant against forfeiture of the lease by reason of the fault of his immediate landlord in performing covenants which were binding on him under the terms of the head lease.

E The words on their face seem to me sufficiently plain, but reliance has been placed on certain cases where, it must be admitted, on very similar words the covenant concerned, in the case of assignments, has been held to be no more than a covenant of indemnity, so that an assignor could not sue the assignee in respect of the covenants unless and until the landlord was proceeding against him as being a person liable to the obligations imposed by the covenants in the lease. Those cases are *Re Poole and Clarke's Contract* (1), *Harris v. Boots, Cash Chemists (Southern), Ltd.* (2) and *Reckitt v. Cody* (3). The difference, of course, is that, in the case of assignor and assignee, once the assignor has assigned the premises he is not really interested in the condition of the premises or in anything else except the possibility of being sued by the landlord under his original obligations, because he has no longer any estate or interest in the property, and it is only the assignee who is concerned to see that the tenancy continues without any proceedings by the landlord to determine it under the condition of re-entry.

H In the present case the situation is rather different, because the landlord of the under-tenant is still interested in the property and is still a tenant. He is still liable on the terms of the lease, and he is not only interested in the terms of the head lease by virtue of his position remaining that of tenant, but he is also interested in the condition of the premises because he is the landlord of the under-tenant. Consequently, it seems to me that the rather narrow construction which was put on somewhat similar forms of words in the case of covenants between assignor and assignee is not necessarily that which ought to be applied in an underlease of this kind.

I It is said that, if a landlord is to be subject to liability to repair, plain words must be found in the lease in question, because it is normally the tenant who has to perform various obligations and it is perhaps not so common for the landlord

(1) [1904] 2 Ch. 173.

(2) [1904] 2 Ch. 376.

(3) [1920] 2 Ch. 452.

himself to undertake obligations. It is undoubtedly the case that, whether A
it is the tenant or the landlord, unless there are repairing covenants, generally
speaking there are no obligations to carry out repairs, and it may be that nobody
is under any obligation to do any repairs at all. That is subject to the implied
obligations which are cast on a tenant to keep the premises wind and water-tight,
a matter which is not material in the present case; but it is undoubtedly true
that a landlord is not liable normally to repair the premises, and one must find a B
covenant which casts that obligation on him.

It seems to me that there is such a covenant in the present case. The words
seem to me to be perfectly plain. The words "to pay the rent reserved" must
be an obligation cast on the landlord to pay the rent which is reserved by the
superior lease, and I cannot see why the words which follow, "to observe the
covenants contained in the lease under which the landlord holds the demised C
premises", do not also cast on the intermediate landlord a positive obligation
to carry out those obligations which is enforceable by the under-tenant, because
this is definitely a covenant by the intermediate landlord with the under-tenant.
He has no doubt covenanted also with the superior landlord to perform exactly
similar obligations; but the effect of these words is to make a covenant between
the under-landlord and the tenant, and one that applies to a matter in which D
the sub-tenant is vitally interested. Unless that is the proper construction,
it seems hardly necessary to have inserted these words. It would have been
more accurate conveyancing merely to have placed a covenant in the underlease
by which the landlord undertook to indemnify the under-tenant against any
results of non-performance of the covenants in the superior lease. In other
words, if in this case this covenant is construed merely as a covenant of indemnity, E
one-half only of the provision with which we are concerned is applied, and the
first part of it, which imposes a positive obligation on the under-landlord, is not
applied.

It is said that this produces odd and unexpected results, and it was suggested
that, if the original tenant—i.e., the landlord in the underlease—were to acquire
the superior term, the position would be very obscure and possibly the covenant F
would then have no subject-matter any longer to which it could refer, because
the covenants in question would have ceased to be operative. That may or
may not be the result in such a situation, and I do not think that it is necessary
for me to express a view on the matter. We are faced, however, with construing
the actual words which are inserted by the landlord who prepares a lease in
cases of this kind, and it seems to me that they must be given their plain meaning. G

There is one other point with which it is necessary to deal. The county court
judge was impressed by the fact that the word "observe" only was used in this
connexion and not the word "perform". It was pointed out that in the cove-
nant for quiet enjoyment there was a reference to the tenant performing and
observing the covenants on his part; but it seems to me that nothing much can
be made of that. We were referred to STROUD'S JUDICIAL DICTIONARY (4), H
where there is some discussion of the relative meaning of the words "observe"
and "perform" in respect of negative and positive covenants; but it seems to
me that that discussion has really no relation to the problem with which we have
to deal in this case. The word "observe" is not a purely negative word. It
cannot, I think, mean that the covenantor may simply sit by noticing what is
happening and doing nothing. What it means, I think, is "to comply with the I
obligation" and therefore it has a positive and not merely a negative meaning.
It plainly must have a positive as well as a negative meaning in the present
case because, without that, the indemnity part of the covenant would be useless,
and the indemnity part of the covenant refers to the same covenants as those
referred to in the earlier part of the clause. Consequently, it seems to me that
(wisely or unwisely, it is not necessary to say) the landlord in the present case

(4) See STROUD'S JUDICIAL DICTIONARY (2nd Edn.) 1307, "Observance or Performance".

A had undertaken to carry out the obligations imposed on him by the head lease in such a way as to be liable to his tenant, and that those obligations must contain the repairing covenant, which is a full one, an extract in respect of which has been put in evidence in the present case.

Consequently, I have come to the conclusion that the learned county court judge reached the wrong result, and that the appeal should be allowed.

B **ORMEROD, L.J.:** I agree that the appeal should be allowed; and, although we are disturbing the decision of the learned judge, there is nothing which I wish to add to the reasons which have already been given by DANCKWERTS, L.J.

C **WILLMER, L.J.:** I also agree, and I do not think that there is anything which I can add to what has already been said by DANCKWERTS, L.J.

Appeal allowed.

Solicitors: *H. Ragol-Levy* (for the plaintiff); *Braund & Fedrick* (for the defendant).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

D

SANDERS v. SCOTT.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Gorman and Salmon, JJ.), April 19, 1961.]

E *Road Traffic—Notice of intended prosecution—Objection that notice not given—Alternatives of service on driver or registered owner—Non-compliance with both alternatives must be proved in order to establish defence—Road Traffic Act, 1960 (8 & 9 Eliz. 2 c. 16), s. 241 (2), (3).*

F At the hearing of a prosecution of the driver of a motor vehicle for dangerous driving (an offence to which s. 241 of the Road Traffic Act, 1960, applied), the accused gave evidence that notice of intended prosecution had not been served on him, but did not tender evidence that the registered owner of the vehicle also had not received notice. On appeal against dismissal of the charge for non-compliance with s. 241 (2) (c) (i)* which required service of notice of intended prosecution on the accused or on the registered owner of the vehicle, the proof of which non-compliance lay on the accused by virtue of s. 241 (3)*,

G **Held:** the accused had not proved non-compliance with both alternatives of s. 241 (2) (c) (i), as he had not proved that notice of intended prosecution had not been given to the registered owner of the motor vehicle; accordingly the charge had been wrongly dismissed.

H *Appeal allowed.*

[**Editorial Note.** The proper way of establishing non-compliance with s. 241 (2) (c) (i) is for the driver to give evidence that no notice of intended prosecution was served on him and to call the registered owner to say that neither was notice served on him; see p. 405, letter A, post.

I As to failure to give notice of intended prosecution of driving offences, see 33 HALSBURY'S LAWS (3rd Edn.) 647, para. 1092.

For the Road Traffic Act, 1960, s. 241 (2), (3), see 40 HALSBURY'S STATUTES (2nd Edn.) 914.]

Case Stated.

The prosecutor appealed by Case Stated from the dismissal by Blackpool Magistrates' Court, on Nov. 3, 1960, of an information preferred by him against the respondent. The facts are stated in the judgment of LORD PARKER, C.J.

* The relevant provisions of s. 241 (2) and (3) are printed at p. 404, letters E and F, post.

R. E. Hammerton for the appellant.

The respondent did not appear and was not represented.

LORD PARKER, C.J.: This is an appeal by way of Case Stated by justices acting in and for the county borough of Blackpool, before whom an information was preferred by the appellant against the respondent that on July 29, 1960, he drove a motor vehicle in a manner dangerous to the public, contrary to [s. 2 (1) of the Road Traffic Act, 1960, (1)]. The justices dismissed the information, having come to the conclusion that the requirements with regard to notice of intended prosecution of s. 21 of the Road Traffic Act, 1930, now s. 241 (2) of the Road Traffic Act, 1960, (2), had not been complied with. What happened was this. The respondent was the driver of a motor vehicle at the time of the alleged offence. No warning of intended prosecution was given to him at the time, nor was a summons issued within fourteen days, nor was a notice of intended prosecution served on him within fourteen days or at all. The respondent, having given evidence of that, submitted that the provisions of the section had not been complied with. At that point the police officer dealing with the case did not go into the witness-box and say, as indeed he might have said, "All that is very true, but I did serve the registered owner", which is an alternative to serving the driver under the subsection. In fact he did not do that, but contended before the justices that the burden being on the defence to show that the provisions of the section had not been complied with, it had not been shown that a notice of intended prosecution had not been served on the registered owner. The section—and it is convenient to take s. 241 of the Act of 1960—provides:

"(2) Subject to the following provisions of this section, where a person is prosecuted for an offence to which this section applies (3) he shall not be convicted unless . . . (c) within the said fourteen days a notice of the intended prosecution specifying the nature of the alleged offence and the time and place where it is alleged to have been committed, was—(i) . . . served on or sent by registered post to him or the person, if any, registered as the owner of the vehicle at the time of the commission of the offence . . .

"(3) The requirement of the last foregoing subsection shall in every case be deemed to have been complied with unless and until the contrary is proved."

The justices in this case, and I have some sympathy with them, said this to themselves—"The police knew full well the name and address of the driver and where to get at him. They never did serve him. It is most unlikely, therefore, that they would serve the registered owner. What is more, the police officer is here, and if the registered owner had been served he would have told us so." In those circumstances, they said that they were not satisfied that the requirements of the subsection had been complied with, and dismissed the information. I have some sympathy with them, but I think that this section must be looked at strictly. It is laying down a technical defence, and it is putting the burden on the defence to show that the provisions of the section have not been complied with. The notice of intended prosecution can be served either on the driver or on the registered owner. It does not say that it can be served

(1) Section 2 (1) of the Act of 1960 corresponds to s. 11 (1) of the Road Traffic Act, 1930, which was in operation at the date of the offence, as amended by the Road Traffic Act, 1956, s. 51 and Sch. 8, para. 12 (1).

(2) By s. 270 (1) of the Road Traffic Act, 1960, the provisions of s. 241, among others, came into force on Sept. 1, 1960, i.e., after the offence alleged in this case had been committed but before the information was heard. Section 241 (2) and (3) replaced the similar provisions of s. 21 of the Road Traffic Act, 1930 (24 HALSBURY'S STATUTES (2nd Edn.) 594).

(3) By s. 241 (1) (a) the section applies to an offence under s. 2 (1) of the Road Traffic Act, 1960, which was the offence charged in the present case.

A on the driver or, if the name and address of the driver is not known, on the registered owner. There are two complete alternatives and, by sub-s. (3) the defence must show that neither alternative has been complied with. The proper way of doing that is for the driver to give evidence that no notice was served on him and to call the registered owner in turn to say that equally no notice had been served on him.

B In those circumstances, much as I sympathise with the justices, I do not think that the proof required by sub-s. (3) was forthcoming and, accordingly, there was no ground on which they could dismiss the information, and the case must go back to them with a direction to hear and determine the charge.

C **GORMAN, J.:** I agree completely. In para. 5 of the Case Stated the justices say:

"We were of the opinion that as the prosecution were aware on Aug. 5, 1960, of the identity and permanent address of the driver of the vehicle the notice of intended prosecution should have been sent to him in compliance with the section of the Road Traffic Act."

D Whether that was the intention behind the framers of this Act or not, I do not know, but there is nothing in the section with which we are concerned to decide in what circumstances the notice shall be served on the driver or, alternatively, on the registered owner. The justices may well have thought that since the prosecution knew the address of the driver, they ought to have served him; but that is not in accordance with the Act. Then they go on further to say:

E "and as there was no evidence before us that the required notice had been sent to any other person we came to the conclusion that the requirements as to notice had not been complied with by the appellant."

There again I feel that the justices are in error because, as my Lord has said, it is provided by s. 241 (3), which relates to the sending of notice either to the driver or registered owner:

F "The requirement of the last foregoing subsection shall in every case be deemed to have been complied with unless and until the contrary is proved."

I agree completely with my Lord that the justices were in error in finding as they did, but it is an error which is quite understandable in the circumstances of this case.

G **SALMON, J.:** I agree.

Appeal allowed: case remitted to the justices to hear and determine it.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *A. C. Brewer*, Blackpool (for the appellant).

[*Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.*]

COLEMAN v. SHANG alias QUARTEY.

[PRIVY COUNCIL (Lord Tucker, Lord Hodson and Mr. L. M. D. de Silva), January 26, 30, 31, February 1, March 7, 1961.]

Privy Council—Ghana—Intestacy—Grant of administration—Intestate married first under marriage ordinance and then under customary native law—Potentially polygamous marriage—Application of English statutes—“Wife”—“Widow”—Marriage Ordinance (Laws of the Gold Coast, 1951, c. 127), s. 48 (1)—Courts Ordinance (Laws of the Gold Coast, 1951, c. 4), s. 83—Interpretation Ordinance (Laws of the Gold Coast, 1951, c. 1), s. 3 (31), (45)—Statute 21 Henry 8 c. 5 (1529), s. 2—Statute of Distribution (1670) (22 & 23 Car. 2 c. 10), s. 3.

Statute—Construction—Singular including plural—“Wife”—“Widow”—Marriage Ordinance (Laws of the Gold Coast, 1951, c. 127), s. 48 (1)—Courts Ordinance (Laws of the Gold Coast, 1951, c. 4), s. 83—Interpretation Ordinance (Laws of the Gold Coast, 1951, c. 1), s. 3 (31), (45)—Statute 21 Henry 8 c. 5 (1529), s. 2—Statute of Distribution (1670) (22 & 23 Car. 2 c. 10), s. 3.

C., who died in 1958, first married A.J., and had three children by her, all of whom survived him. Later he married the present appellant's mother, W., under the Gold Coast Marriage Ordinance and had five children by her of whom the appellant was the sole survivor; W. died in 1940. During W.'s lifetime, C. lived and cohabited with the respondent and had ten children by her. After W.'s death, C. married the respondent in accordance with customary law. By the Marriage Ordinance, s. 48*, where any person who was subject to native law or custom contracted a marriage in accordance with that ordinance and died intestate the personal property of such intestate (and also any real property of which the intestate might have disposed by will) was to be distributed or descend in the following manner: two-thirds in accordance with the provisions of the law of England relating to the distribution of the personal estates of intestates in force on Nov. 19, 1884, and one-third in accordance with the provisions of the native customary law. By the Courts Ordinance, s. 83†, the statutes of general application which were in force in England on July 24, 1874, were to be in force within the jurisdiction of the courts of Ghana; and by the Interpretation Ordinance, unless there was something in the subject or context repugnant to such definition, “ordinance” included an Act of the Imperial Parliament applicable to the Gold Coast and in force (s. 3 (31)‡), and words in the singular included the plural and vice versa (s. 3 (45)‡). By virtue of the Courts Ordinance and the Interpretation Ordinance, the statute 21 Henry 8 c. 5 (s. 2 of which provided that, in the case of a person dying intestate, administration of the intestate's goods should be granted to the widow), and the Statute of Distribution (1670) (s. 3 of which provided that an intestate's wife was to receive one-third of the personal estate of the intestate) were included in s. 3 (31) of the Interpretation Ordinance.

On the question whether the appellant or the respondent was the proper person entitled to the grant of letters of administration to C.'s estate,

Held: there would be a joint grant to the appellant and the respondent on the footing that the latter was the widow of C. because

(i) by virtue of the Courts Ordinance and the Interpretation Ordinance, “wife” or “widow” in the statute 21 Henry 8 c. 5, and the Statute of Distribution (1670), were to be read as including “wives” or “widows”, there being nothing in the subject or context repugnant to such construction, the subject and context being the distribution of the personal property

* The relevant portions of s. 48 are set out at p. 408, letters C to H, post.

† Section 83 is set out at p. 409, letter H, post.

‡ Section 3 (31) and (45) are set out at p. 410, letter B, post.

A of an intestate validly married by the native laws and custom of Ghana which recognised the existence of more than one wife or widow (see p. 410, letter E, post), and

(ii) apart from the Interpretation Ordinance, the courts of Ghana were entitled to apply the words "wife" or "widow" to all persons regarded as lawful wives or widows according to the law of Ghana (see p. 411, letter D, post).

B Appeal dismissed.

[For the statute 21 Henry 8 c. 5, s. 2 and the Statute of Distribution (1670), s. 3, see 9 HALSBURY'S STATUTES (2nd Edn.) 652 and 658.]

Cases referred to:

C *Baindail (otherwise Lawson) v. Baindail*, [1946] 1 All E.R. 342; [1946] P. 122; 115 L.J.P. 65; 174 L.T. 320; 11 Digest (Repl.) 457, 921.

Bamgbose v. Daniel, [1954] 3 All E.R. 263; [1955] A.C. 107; [1954] 3 W.L.R. 561; 3rd Digest Supp.

Cheang Thye Phin v. Tan Ah Loy, [1920] A.C. 369; 89 L.J.P.C. 44; 122 L.T. 593; 3 Digest (Repl.) 401, 20.

D *Goodman's Trusts, Re*, (1881), 17 Ch.D. 266; 50 L.J.Ch. 425; 44 L.T. 527; 3 Digest (Repl.) 424, 208.

Khoo Hooi Leong v. Khoo Hean Kwee, [1926] A.C. 529; 95 L.J.P.C. 129; 135 L.T. 170; 3 Digest (Repl.) 402, 21.

Sinha (Peerage) Case, (1939), 171 Lords Journals, 350; see also [1946] 1 All E.R. 348 n.

E Appeal.

F Appeal by Austin Richter Coleman from an order of the Court of Appeal of Ghana (VAN LARE, J.A., as C.J., GRANVILLE SHARP, J.A., and OLLENNU, J.), dated Nov. 23, 1959, reversing a judgment of the High Court of Ghana, Eastern Judicial Division (D. E. GWIRA, Commissioner of Assize and Civil Pleas), dated Mar. 23, 1959, in proceedings for the grant of letters of administration in respect of the estate of Stephen Coleman, deceased. The facts are set out in the judgment of the Board.

R. Millner for the appellant.

Joseph Dean and *Miss E. Aryee* for the respondent.

G LORD TUCKER: This is an appeal from the judgment of the Court of Appeal of Ghana dated Nov. 23, 1959, allowing an appeal from the High Court, Eastern Division, dated Mar. 23, 1959, in proceedings for the grant of letters of administration in respect of the estate of Stephen Coleman, deceased. The High Court had made a grant in favour of the appellant, who was the plaintiff in the action. The Court of Appeal revoked the grant and ordered that letters of administration be granted jointly to the present appellant and the respondent, who was the defendant in the action. The appellant now seeks to restore the judgment of the High Court.

H The following statement of the relevant facts is taken from the judgment of the Court of Appeal. The deceased, Stephen Coleman, an Osu man, first married a woman called Adeline Johnson and had three children by her all of whom survived him. Later he married the present appellant's mother, Wilhelmina, under the Marriage Ordinance and had five children by her of whom the appellant is the sole survivor, Wilhelmina having died in 1940. During the lifetime of Wilhelmina, the deceased lived and cohabited with the present respondent and had ten children by her. After the death of Wilhelmina, the deceased married the respondent in accordance with customary law. The above recital of facts can be accepted for the purpose of deciding the important question which arises in this appeal, namely, whether the respondent is entitled either solely or jointly to a grant of letters of administration. They are described in the judgment as facts which were not in dispute. The accuracy of this statement was challenged by

counsel for the appellant, and reference will be made hereafter to his submission on this matter, but, as already stated, their Lordships are accepting them for the purpose of construing the relevant Acts and ordinances which require to be considered. A

The issue for determination at the trial was settled on the summons for directions as follows:

"Whether the [appellant] or the [respondent] is the proper person entitled to the grant of letters to administer the estate of the above named deceased." B

The contest was, therefore, between the sole survivor of the deceased's marriage under the Marriage Ordinance and the lady whom he had married under customary native law on the death of his former wife.

Section 48 of the Marriage Ordinance (Laws of the Gold Coast, 1951, c. 127) C is as follows:

"(1) Subject to the provisions of the succeeding subsection where any person who is subject to native law or custom contracts a marriage, whether within or without [Ghana], in accordance with the provisions of this ordinance or of any other enactment relating to marriage, or has contracted a marriage prior to the passing of this ordinance which marriage is validated hereby, and such person dies intestate on or after Feb. 15, 1909, leaving a widow or husband or any issue of such marriage; [Amended by 13 of 1951, s. 2]. D

"And also where any person who is issue of any such marriage dies intestate on or after the said Feb. 15, 1909, the personal property of such intestate, and also any real property of which the said intestate might have disposed by will, shall be distributed or descend in manner following, viz.— E

"Two-thirds in accordance with the provisions of the law of England relating to the distribution of the personal estates of intestates in force on Nov. 19, 1884, any native law or custom to the contrary notwithstanding; and one-third in accordance with the provisions of the native customary law which would have obtained if such person had not been married under this ordinance: Provided—(i) That where by the law of England, any portion of the estate of such intestate would become a portion of the casual hereditary revenues of the Crown, such portion shall be distributed in accordance with the provisions of the native customary law, and shall not become a portion of the said casual hereditary revenues; (ii) That real property, the succession to which cannot by the native customary law be affected by testamentary disposition, shall descend in accordance with the provisions of such native customary law, anything herein to the contrary notwithstanding . . ." F G

The first submission of counsel for the appellant was to the effect that, on the proper construction of the ordinance, the only persons entitled to any portion of the two-thirds share of the personal estate of a deceased person dying intestate are his widow whom he had married under the ordinance or the issue of such marriage, and any persons claiming under a marriage contracted by native customary law are relegated to such share of the remaining one-third as they can establish under that law. This is the construction which appears to have been put on the section in some decisions of the courts in Ghana from time to time and would seem to have been adopted by the trial judge towards the end of his judgment where, referring to the present respondent, he said "her status being that of a wife married according to native custom cannot override the claim of the [appellant]". Their Lordships are unable to accept this construction of the section. In the case of intestacy of a person married in accordance with the ordinance, there are two conditions precedent to the application of the law of England relating to the distribution of the personal estates of intestates in force on Nov. 19, 1884. They are (i) a valid marriage under the ordinance, H I

A (ii) the survival of a widow or husband or any issue of such marriage. Once these conditions are satisfied, it remains only to see how the two-thirds portion was distributable under English law in 1884. In the present case, there was a valid ordinance marriage between the deceased and Wilhelmina and there is surviving issue of that marriage, viz., the appellant. Wilhelmina had died during the lifetime of the deceased. We find, therefore, both conditions precedent satisfied, and it remains only to apply the provisions of the Statute of Distribution (1670) which provides that, if a man dies intestate leaving a wife and issue, the wife is entitled to one-third of the personal estate and the children to two-thirds. The question then arises whether, on the facts in this case, the respondent, who was married under customary native law, qualifies as a "wife" within the meaning of that word in the Statute of Distribution as applied to marriages in Ghana which are lawful in that country but were not contracted in accordance with the provisions of the Marriage Ordinance and are potentially polygamous. This leads to the second submission by counsel for the appellant to the effect that the words "wife" and "widow" in an English statute cannot be construed as including the plural as this would be repugnant to the legal conception of marriage in England which does not recognise a potentially polygamous union as a marriage.

D Before proceeding to consider this submission, it will be convenient to set out parts of the relevant statutes and ordinances, and it may be observed at this stage that the most immediately relevant statute is 21 Henry 8 c. 5, as this is the statute which provides for the proper person to whom administration should be granted, as distinct from the persons entitled to share in the distribution, but it raises precisely the same question, namely, whether the "widow" referred to in the statute of Henry 8 or the "wife" mentioned in the Statute of Distribution in the application of these statutes to Ghana includes a "widow" or "wife" of a potentially polygamous marriage. Section 2 of 21 Henry 8 c. 5, provides:

F "... in case any person die intestate . . . then the said ordinary . . . shall grant the administration of the goods of the . . . person deceased to the widow of the same person deceased or to the next of his kin or to both, as by the discretion of the same ordinary shall be thought good . . ."

In England prior to the passing of the Supreme Court of Judicature (Consolidation) Act, 1925, the court in the exercise of its discretion granted administration to the widow of the intestate, to the exclusion of the next of kin or heir at law, except for good cause shown. (See MORTIMER AND COATES ON LAW AND PRACTICE OF THE PROBATE DIVISION (2nd Edn.) p. 293.) The Statute of Distribution (1670) s. 3, enacts that:

H "... all ordinaries and every other person who by this Act is enabled to make distribution of the surplusage of the estate of any person dying intestate shall distribute the whole surplusage of such estate or estates in manner and form following, that is to say, one third part of the said surplusage to the wife of the intestate . . ."

The Courts Ordinance (Laws of the Gold Coast, 1951, c. 4) provides:

I "83. Subject to the terms of this or any other ordinance, the common law, the doctrines of equity, and the statutes of general application which were in force in England on July 24, 1874, shall be in force within the jurisdiction of the courts.

"85. All Imperial laws declared to extend or apply to the jurisdiction of the courts shall be in force so far only as the limits of the local jurisdiction and local circumstances permit, and subject to any existing or future ordinances of the Colonial Legislature; and for the purpose of facilitating the application of the said Imperial laws, it shall be lawful for the said courts to construe the same with such verbal alterations, not affecting the substance, as may be necessary to render the same applicable to the matter before the court; . . ."

The Interpretation Ordinance (Laws of the Gold Coast, 1951, c. 1) provides:

" 3. The following words and expressions shall, if inserted in any ordinance, order, proclamation, rule, regulation, or bye-law, be understood as hereinafter defined or explained, unless it be otherwise expressly provided, or there be something in the subject or context repugnant to such definition or explanation, that is to say:— . . .

" (31) ' Ordinance ' shall include . . . an Order of Her Majesty in Council or an Act of the Imperial Parliament, applicable to the Gold Coast and in force . . .

" (45) Words in the singular include the plural and vice versa."

It is no doubt true that Lord Brougham's Act (13 & 14 Vict. c. 21) applied only to enactments after 1850, and so did not include the Statute of Distribution, and that the English Interpretation Act, 1889, was not in force in 1874 so that, for the purpose of construing the Act of Henry 8 and the Statute of Distribution in an English court prior to 1889, it would not have been permissible, as a matter of construction or in accordance with the common law as applied to the distribution of property within the jurisdiction of the English court, to read " wife " or " widow " as including " wives " and " widows ". But it seems to their Lordships that entirely different considerations arise by reason of the provisions of the Courts Ordinance and the Interpretation Ordinance referred to above, the effect of which is that the Act of Henry 8 and the Statute of Distribution are included in the definition of " Ordinance " as being " Acts of the Imperial Parliament, applicable to the Gold Coast and in force ". Those statutes, therefore, are to be construed in their application to Ghana so that words in the singular include the plural unless there is something in the subject or context repugnant to such construction which is clearly not the case, the subject and context being the distribution of the personal property of an intestate validly married by the native law and custom of Ghana which recognises the existence of more than one wife or widow.

Their Lordships would not, however, desire to rest their decision solely on the language of the Interpretation Ordinance, more especially as this was not referred to in the judgment of the Court of Appeal in Ghana who decided the case in favour of the present respondent on broader grounds with which their Lordships are in general agreement. They do not, however, think that the Privy Council judgments referred to in the Court of Appeal, i.e., *Cheang Thye Phin v. Tan Ah Loy* (1), *Khoo Hooi Leong v. Khoo Hean Kwee* (2) and *Bamgbose v. Daniel* (3), can be regarded as authorities conclusive in favour of the respondent. In the last-mentioned case, the Board was dealing only with the position of children, and in their judgment it was expressly stated that they proposed to say nothing as to what rights, if any, widows would have in the event of a claim being made in a case such as that with which they were then concerned and the following observations of LORD PHILLIMORE in *Khoo Hooi Leong v. Khoo Hean Kwee* (4) were quoted:

" In deciding upon a case where the customs and the laws are so different from British ideas a court may do well to recollect that it is a possible jural conception that a child may be legitimate, though its parents were not and could not be legitimately married. This principle was admitted by the canon law which governed western continental Europe till about a century ago and governed still later, if it does not govern still, the countries of Spanish America."

In *Cheang Thye Phin v. Tan Ah Loy* (1), the position of secondary wives (called " t'sips ") as contrasted with principal wives (called " t'sais ") was the only issue and, at the outset of the judgment delivered by VISCOUNT FINLAY, he said (5):

(1) [1920] A.C. 369.

(2) [1926] A.C. 529.

(3) [1954] 3 All E.R. 263; [1955] A.C. 107.

(4) [1926] A.C. at p. 543.

(5) [1920] A.C. at p. 372.

A "With regard to Chinese settled in Penang, the Supreme Court recognises and applies the Chinese law of marriage. It is not disputed that this law admits of polygamy. By a local ordinance the Statute of Distribution has been applied to Chinese successions, and the courts have treated all the widows of the deceased as entitled among them to the widows' share under the statute. No question has been raised on the present appeal as to the propriety of this practice; the only question is whether Tan Ah Loy was one of the widows."

B None the less, having regard to the attitude of the courts of this country to the status of parties validly married by the laws of the country of their domicile as exemplified by such cases as *Re Goodman's Trusts* (6), the *Sinha (Peerage) Case* (the opinion of LORD MAUGHAM, L.C. (7), in which case is to be found as a note in [1946] 1 All E.R. at p. 348) and *Baindail (otherwise Lawson) v. Baindail* (8), their Lordships are of opinion that, in dealing with personal property in Ghana of an intestate domiciled in Ghana, and validly married in that country in accordance with its laws, the courts of Ghana are not precluded from making a grant of letters of administration to a lady who was validly married to the intestate at his death by reason only of the use of the words "widow" and "wife" in the singular in the Act of Henry 8 and the Statute of Distribution. Apart from the Interpretation Ordinance, their Lordships would hold that, in the application of those statutes to Ghana, the courts of that country would be entitled to apply the words "wife" and "widow" to all persons regarded as lawful wives or widows according to the law of Ghana. In this connexion, reference may be made to the following observations by LORD GREENE, M.R., in *Baindail v. Baindail* (9). Referring to a man married by Hindu law in India he said:

E "... what was his status on May 5, 1939? Unquestionably it was that of a married man. Will that status be recognised in this country? English law certainly does not refuse all recognition of that status. For many purposes, quite obviously, the status would have to be recognised. If a Hindu domiciled in India died intestate in England leaving personal property in this country, the succession to the personal property would be governed by the law of his domicile, and in applying the law of his domicile effect would have to be given to the rights of any children of the Hindu marriage, to the rights of his Hindu widow, and for that purpose the courts of this country would be bound to recognise the validity of a Hindu marriage so far as it bears on the title to personal property left by an intestate here . . ."

G Later on he said (10):

H "The practical question in this case appears to be: Will the courts of this country, in deciding upon the question of the validity of this English marriage, give effect to what was undoubtedly the status possessed by the appellant? That question we have to decide with due regard to common sense and some attention to reasonable policy . . . I think it is certainly a matter which we must bear in mind that the prospect of an English court saying that it will not regard the status of marriage conferred by a Hindu ceremony would be a curious one when the Privy Council might come to a precisely opposite conclusion as to the validity of such a marriage on an Indian appeal."

I Their Lordships recognise that there may be cases in which special circumstances exist which necessitate a distinction between the position of the children of a potentially polygamous marriage and the wives or widows of such marriage as indicated in the passage referred to above in the judgment of the Board

(6) (1881), 17 Ch.D. 266.

(7) (1939), 171 Lords Journals, 350.

(8) [1946] 1 All E.R. 342; [1946] P. 122.

(9) [1946] 1 All E.R. at p. 346; [1946] P. at p. 127.

(10) [1946] 1 All E.R. at p. 346; [1946] P. at p. 129.

delivered by LORD PHILLIMORE as well as in the passage towards the end of the judgment delivered by LORD KEITH OF AVONHOLM in *Bamgbose v. Daniel* (11). There are no such special circumstances in the present case, and their Lordships can find no valid reason for distinguishing in principle between the children and the widow of the marriage which is in question in the present appeal. Difficulties may, no doubt, arise in the application of this decision in cases where there are more than one widow both in dealing with applications for the grant of letters of administration and in the distribution of the estate, but they can be dealt with as and when they arise. Their Lordships are, for the reasons indicated above, in agreement with the decision arrived at by the Court of Appeal in making a joint grant to the appellant and the respondent on the footing that the latter is the widow of the deceased. They would, however, observe that the Court of Appeal appear to have gone rather further than was necessary for the decision of the application for a grant of letters of administration in setting out in some detail the shares of those who will be entitled in the distribution. Such matters are more appropriate to administration proceedings, and the appellant contends that there was no evidence or admission that the children of the deceased's first marriage to Adeline are now surviving. Their Lordships do not think that any persons entitled in the distribution should be precluded by the judgment of the Court of Appeal from contending in the appropriate proceedings that their shares of the personal estate are larger than those indicated in the judgment, provided that it must be accepted that the respondent is entitled to a wife's proportion of the two-thirds of the personal estate over and above any share of the remaining one-third to which she may be entitled by the relevant native customary law.

Their Lordships made reference earlier in this opinion to the challenge by the appellant to some of the facts which were stated as being "not in dispute". It was said that there was no proper proof of either of the marriages by native customary law, or that the deceased was an Osu man, or that the respondent was validly appointed to represent the family. When the court from whose judgment an appeal is brought states that certain facts were admitted or were not in dispute it would, in the absence of agreement by counsel on both sides, require very strong evidence or exceptional circumstances before their Lordships would be disposed to go behind such a statement in a judgment or to judge of its accuracy merely from a perusal of the notes taken in the courts of the country from which the appeal comes. There is nothing in the present case to justify their Lordships questioning the accuracy of this statement subject only to the reservation referred to above as to the effect, if any, of such findings on the shares of those proved to be entitled to participate in the distribution.

For these reasons, their Lordships will report to the President of Ghana as their opinion that this appeal should be dismissed and that the appellant should pay the costs thereof.

Appeal dismissed.

Solicitors: *T. L. Wilson & Co.* (for the appellant); *A. L. Bryden & Williams* (for the respondent).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

A Re HOWARD'S WILL TRUSTS. LEVIN AND OTHERS *v.*
BRADLEY AND OTHERS.

[CHANCERY DIVISION (Wilberforce, J.), March 21, 22, 23, 29, 1961.]

Will—Condition—Certainty—Condition subsequent—Name and arms clause—Clause extending to married women and their husbands—Public policy—Severance of condition—Commencement of period from which time began to run—Acceleration of life interests by release of previous life interest.

B By his will the testator settled the C. estate, the F. estate, and the M. estate (collectively referred to as his settled estates) on strict settlement, by separate dispositions, under which, subject to the life interest of the testator's daughter in the whole of the settled estates, the first life interests were taken by W.L. (a grandson), Mrs. B. (a granddaughter) and Mrs. W. (also a granddaughter), respectively, subject to a name and arms clause (cl. 8) applicable to the settled estates generally. By cl. 8 the testator declared that "every person (other than [the testator's daughter]) who under the limitations hereinbefore contained becomes entitled as tenant for life . . . to the possession . . . of my settled estates or any part thereof and does not at the time of becoming so entitled use and bear the surname and arms of Howard shall within one year after becoming so entitled . . . and also every person (other than [the daughter's then husband] . . .) being the husband of a woman becoming so entitled shall within one year after his marriage or within one year after his wife becomes so entitled . . . (whichever of the . . . last mentioned events last happens) unless in any case prevented by death take use and bear and every person becoming so entitled who already uses the name of Howard shall continue to use and bear in all deeds and writings which he or she shall sign and upon all occasions the surname of Howard . . . and shall also use the arms of Howard . . . And further that in case any person or the husband of any person becoming so entitled (other than [the daughter and her husband] . . .) and not having already taken or used and borne such surname and arms should refuse or neglect within the time aforesaid to take use and bear the same respectively . . . or if any person or the husband of any person so entitled and using or bearing such surname and arms should discontinue to use and bear the same (except in the case of a woman upon marriage) then and in every such case immediately after the expiration of the said term of one year or immediately after such discontinuance as aforesaid as the case may be . . ." the estate of the person concerned should absolutely determine. The testator died in 1934. Both granddaughters were married at the date of his death. The daughter, while tenant for life, released part of her interest in the F. estate to Mrs. B., and in the M. estate to Mrs. W. She died on Jan. 5, 1960. At the date of her death Mrs. B. was a widow. No steps had been taken by any of the persons concerned to comply with cl. 8 of the will. On the question of the validity of the clause,

H **Held:** (i) the name and arms clause was expressed with sufficient precision and distinctness to enable the court and the parties to see from the beginning exactly what had to be done to avoid or bring about a termination of the relevant interest, because (a) the word "discontinue", in its context, was certain and clear and meant that one case of failure brought about a forfeiture (see p. 419, letter H, to p. 420, letter A, post), and (b) the words "on all occasions" referred to all occasions on which a surname was used (see p. 418, letter I, to p. 419, letter B, post); and, therefore, the clause was not void for uncertainty.

I *Re Neeld* ([1960] 2 All E.R. 33), and *Re Drax* ((1906), 75 L.J.Ch.317) applied.

(ii) a name and arms clause was void as contrary to public policy only in so far as it purported to affect either a woman who was married at the date when the obligation to use the name and arms arose or her husband,

but such a clause was not so avoided as regards widows (see p. 422, letters C and F, post); cl. 8 was to be separately and individually applied to each of the three estates which were separately limited by the testator's will, and, since the tenants for life at the relevant date (viz., the date of the death of the testator's daughter) were respectively, a man, a widow and a married woman, cl. 8 was valid in the case of W.L. and Mrs. B., but was void in the case of Mrs. W.

Re Kersey ([1952] W.N. 541) and *Re Fry* ([1945] 2 All E.R. 205) followed.

(iii) the partial release by the testator's daughter of her life interest in the F. estate did not bring into operation the name and arms clause, but the clause began to operate on Jan. 5, 1960, the date of the death of the testator's daughter (see p. 423, letter E, post).

Re Petre's Settlement Trusts ([1910] 1 Ch. 290) applied.

[As to name and arms clauses, see 34 HALSBURY'S LAWS (3rd Edn.) 507-509, paras. 893-897; and for cases on the subject, see 35 DIGEST 705-709, 55-76.]

Cases referred to:

Bouverie, Re, Bouverie v. Marshall, [1952] 1 All E.R. 408; [1952] Ch. 400; 3rd Digest Supp.

Bromley v. Tryon, [1951] 2 All E.R. 1058; [1952] A.C. 265; 3rd Digest Supp. *Cornwallis, Re, Cornwallis v. Wykeham-Martin*, (1886), 32 Ch.D. 388; 55 L.J.Ch. 716; 54 L.T. 844; 35 Digest 705, 61.

Drax, Re, Dunsany v. Sawbridge, (1906), 75 L.J.Ch. 317; 94 L.T. 611; 35 Digest 706, 62.

Duncombe's Will Trusts, Re, Wrixon-Becher v. Faversham (Earl), [1932] All E.R. Rep. 588; [1932] 1 Ch. 622; 101 L.J.Ch. 280; 146 L.T. 412; Digest Supp.

Egerton v. Brownlow (Earl), (1853), 4 H.L. Cas. 1; 8 State Tr. N.S. 193; 23 L.J.Ch. 348; 21 L.T.O.S. 306; 10 E.R. 359; 12 Digest (Repl.) 269, 2072.

Fender v. Mildmay, [1937] 3 All E.R. 402; 106 L.J.K.B. 641; 157 L.T. 340; sub nom. *Fender v. St. John-Mildmay*, [1938] A.C. 1; 12 Digest (Repl.) 298, 2301.

Fry, Re, Reynolds v. Denne, [1945] 2 All E.R. 205; [1945] Ch. 348; 115 L.J.Ch. 3; 173 L.T. 282; 2nd Digest Supp.

Gulliver d. Corrie v. Ashby, (1766), 4 Burr. 1929; 1 Wm. Bl. 607; 98 E.R. 4; 35 Digest 707, 68.

Harris's Will Trusts, Re, (Feb. 28, 1961), "The Times", Mar. 1, 1961.

Kersey, Re, Alington v. Alington, [1952] W.N. 541; 96 Sol. Jo. 851; 3rd Digest Supp.

Lewis' Will Trust, Re, Whitelaw v. Beaumont, [1951] W.N. 591; 95 Sol. Jo. 789; 2nd Digest Supp.

Murray, Re, Martins Bank, Ltd. v. Dill, [1954] 3 All E.R. 129; [1955] Ch. 69; [1954] 3 W.L.R. 521; 3rd Digest Supp.

Neeld, Re, Carpenter v. Inigo-Jones, [1960] 2 All E.R. 33; [1960] Ch. 455; [1960] 2 W.L.R. 730.

Petre's Settlement Trusts, Re, Legh v. Petre, [1910] 1 Ch. 290; 79 L.J.Ch. 145; 101 L.T. 847; 40 Digest (Repl.) 594, 981.

Sifton v. Sifton, [1938] 3 All E.R. 435; [1938] A.C. 656; 107 L.J.P.C. 97; 159 L.T. 289; Digest Supp.

Wood's Will Trusts, Re, Wood v. Donnelly, [1952] 1 All E.R. 740; [1952] Ch. 406; 3rd Digest Supp.

Adjourned Summons.

By their originating summons dated Dec. 14, 1960, the plaintiffs, as the present trustees of the will of Philip John Canning Howard, deceased, applied to the court for the determination of the following questions: (i) whether the provisions of cl. 8 of the will of the testator (as to the assumption of the surname

- A and arms of Howard and as to forfeiture in the event of refusal or neglect to use the same) were (a) valid and binding on all or any of the defendants; or (b) were void for uncertainty or as being contrary to public policy or for some other reason; (ii) if the provisions of cl. 8 were valid and binding, whether the term of one year after refusing or neglecting to assume the surname and arms, prescribed by the clause, commenced as regards the testator's granddaughters
- B (a) on the death of the testator's daughter on Jan. 5, 1960, or (b) the dates of the releases made to the granddaughters by the testator's daughter, or (c) on some other, and if so what, event.

Clause 8 of the testator's will was in the following terms:

- C "I declare that every person (other than Lady Lawson [the testator's daughter] or a peer or peeress) who under the limitations hereinbefore contained becomes entitled as tenant for life or as tenant in tail male or in tail general by purchase to the possession or to the receipt of the rents and profits of my settled estates or any part thereof and does not at the time of becoming so entitled use and bear the surname and arms of Howard shall within one year after becoming so entitled or (being an infant) within one year after attaining the age of twenty-one years and also every person
- D (other than the said Sir Henry Joseph Lawson [the testator's son-in-law] or a peer) being the husband of a woman becoming so entitled shall within one year after his marriage or within one year after his wife becomes so entitled or if he be an infant then within one year after attaining the age of twenty-one years (whichever of the three last mentioned events last happens) unless in any case prevented by death take use and bear and every person becoming so entitled who already uses the name of Howard shall continue to use and bear in all deeds and writings which he or she shall sign and upon all occasions the surname of Howard as to every such person who shall also for the time being be entitled to the possession or receipt of the rents and profits of the Lawson Family Estates in the county of York and elsewhere or upon whom the baronetcy held and enjoyed by the said
- F Sir Henry Joseph Lawson shall devolve in conjunction with the surname of Lawson and so that the surname of Howard shall immediately precede the surname of Lawson and as to every other such person without any other surname and shall also use the arms of Howard As to every such person who shall also for the time being be entitled to the possession or the receipt of the rents and profits of the Lawson Family Estates aforesaid
- G or upon whom the said baronetcy held and enjoyed by the said Sir Henry Joseph Lawson shall devolve quartered with the Lawson family arms and as to every other such person without any other arms and every such person if not having already borne and used the surname and arms of Howard shall apply for and endeavour to obtain the royal licence or take such other steps as may be requisite to authorise the user and bearing of the said
- H surname and arms And further that in case any person or the husband of any person becoming so entitled (other than Lady Lawson and the said Sir Henry Joseph Lawson and not being a peer or peeress) and not having already taken or used and borne such surname and arms should refuse or neglect within the time aforesaid to take use and bear the same respectively or to take such steps as aforesaid or if any person or the husband of any
- I person so entitled and using or bearing such surname and arms should discontinue to use and bear the same (except in the case of a woman upon marriage) then and in every such case immediately after the expiration of the said term of one year or immediately after such discontinuance as aforesaid as the case may be if the person who or whose husband shall so refuse or neglect or discontinue as aforesaid shall be tenant for life the estate for life of that person shall absolutely determine and if the person who or whose husband shall so refuse neglect or discontinue as aforesaid shall be tenant in tail male or in tail general then the estate in tail male or in tail general of

that person shall absolutely determine and my settled estates shall immediately go to the person next in remainder under the limitations hereinbefore contained in the same manner as if in the case of a person whose estate for life is so made to determine that person were dead or in the case of a person whose estate in tail male or in tail general is so made to determine that person were dead and there were a general failure of issue of that person inheritable to that estate which is so made to determine."

The facts are stated in the judgment.

D. C. Potter for the plaintiffs, the trustees of the will.

Robert S. Lazarus, Q.C., and *T. A. C. Burgess* for the adult defendants.

M. Nesbitt for the infant defendants.

Cur. adv. vult.

Mar. 29. **WILBERFORCE, J.**, read the following judgment: The name and arms clause whose validity is in question in this case is contained in the will of Philip John Canning Howard who died on Apr. 22, 1934. The greater part of that will was devoted to dispositions of certain landed property which was collectively referred to as the "settled estates". These, in fact, consisted of three estates known as the Corby Estate, the Foxcote Estate and the Middleton Estate, which were settled on separate branches of the family. Subject to successive life interests to the testator's widow and his daughter and subject also to certain charges which have ceased to be payable, all of which related to the settled estates as a whole, the individual estates were devised as follows. The Corby Estate went to the testator's grandson William Howard Lawson for life, then (in the events which happened) to his son John Philip Lawson for life, with remainder to his son in tail male, with remainder to Hugh William Lawson (the second son of William Howard Lawson) in tail male, with further remainders. The Foxcote Estate was given to the testator's granddaughter Mary Catherine Bradley (who was married at the date of the testator's death) for life, and (she having no issue) then to the testator's granddaughter Aurea Clare Waterkeyn for life, with remainder to her son, Denis Gerard Waterkeyn, for life with remainder to his son, Francis Howard Waterkeyn, in tail male, with further remainders. Mrs. Waterkeyn, on Nov. 1, 1960, surrendered her reversionary life interest in this estate for the benefit of the remaindermen. The Middleton Estate was given to the testator's granddaughter Mrs. Waterkeyn for life (she was married at the date of the testator's death), with similar remainders to those set out above relating to the Foxcote Estate. These separate dispositions having been made of the three estates, cl. 8 of the will contained a name and arms clause, applicable to the settled estates generally, requiring, briefly, any person (other than the testator's daughter) who should become entitled as tenant for life or tenant in tail to the settled estates, or any part thereof, and the husband of any woman so becoming entitled, to assume the name and arms of Howard and to use and bear the same on all occasions, with a provision that on any discontinuance so to do the estate of the person concerned should immediately determine.

It is, of course, well known that the name Howard is one of considerable antiquity and repute in English history, and the same is true of the Howard arms. It was the absence of any male issue to inherit the name that, no doubt, prompted the testator's disposition. The name and arms clause did not apply to the testator's daughter, and the first occasion for its operation arose on Jan. 5, 1960, when she died. If the clause is valid and effective (and subject to a subsidiary point to be noticed later), a forfeiture occurred on Jan. 5, 1961, of the interests of those persons who took the first life interests, namely William Howard Lawson, Mary Catherine Bradley and Aurea Clare Waterkeyn. There are two other matters of fact to be stated at this point. First, there were certain partial releases of the life interest of the testator's daughter in the Middleton and the Foxcote (but not the Corby) Estates, so that pro tanto, the interests of Mrs.

Bradley and Mrs. Waterkeyn were accelerated. This gives rise to the subsidiary point, which is whether these releases brought the name and arms clause into immediate operation. Secondly, there was executed on July 23, 1953, between all the parties interested in the settled estates who were at that date adults, a deed of family arrangement in which, after reciting that it was apprehended that the name and arms clause was invalid, it was agreed that the will should be read as if the name and arms clause were omitted therefrom. In other words, the adult beneficiaries agreed among themselves not to take advantage of any forfeiture which might have occurred. Consequently (and perhaps also for other reasons), no step has been taken by any of the relevant persons, subsequently to Jan. 5, 1960, to comply with the clause, and, as regards some of them, it is already too late for them to do so.

There are some general observations which I should like to make before examining the clause in detail. Name and arms clauses have been in use, and examples of them can be found in books of conveyancing precedents, for a century at least, and, so far as reported cases go, no general objection was raised to them until after the world war of 1939-45, although, undoubtedly, opportunities for such objection arose. From 1945 onwards a wind of change of increasing force developed against them. VAISEY, J., held such a clause void in 1945 (1) on grounds (inter alia) of public policy and followed this with two further decisions, in 1951 (2) and 1952 (3), the latter followed immediately by a decision (4) of WYNN-PARRY, J., in which the invalidity was based on uncertainty. Later in 1952 DANCKWERTS, J., held (5) that a clause almost identical with that with which I am concerned was void for uncertainty and also as being contrary to public policy, and described it as out of date and inconsistent with the spirit of the times. It is not surprising that the editors of KEY AND ELPHINSTONE'S PRECEDENTS IN CONVEYANCING (15th Edn.) (1953), Vol. 2, at p. 784, should, with some degree of defeatism, have recommended to their readers to abandon the attempt to construct a binding clause and to limit themselves to a provision having only precatory force. So far the tide flows strongly in one direction, but in 1960 (6) CROSS, J., again on a clause very similar to the present, held that it was not void for uncertainty, and, though expressing his willingness to follow DANCKWERTS, J., on the issue of public policy in similar circumstances, found that the particular clause in that case, being almost exclusively directed towards male persons, was not contrary to public policy. Finally, in the course of this year (7), PLOWMAN, J., followed DANCKWERTS, J., in holding a shorter clause contrary to public policy, but stated that he would not have rejected it on grounds of uncertainty alone. To this brief summary of the cases I should add that in 1954 (8), after UPJOHN, J., had upheld a clause not unlike the present, the Court of Appeal rejected it on account of certain special difficulties inherent in its drafting, but did not express or indicate favour or disfavour of the trend of decisions given at first instance. In this labyrinth it is obvious that it is not easy for a judge of first instance to find his way.

I will now consider the criticisms which have been made of the clause. It is attacked, first, on grounds of uncertainty. As to this line of objection, I make two observations. First, it is apparent that the clause—as, indeed, the whole of this will—is drafted, not only professionally, but by a skilled draftsman with knowledge of the precedents and of the decided cases. It differs little from the precedent given in DAVIDSON'S PRECEDENTS & FORMS IN CONVEYANCING (2nd Edn.) (1864), Vol. 4, at p. 407, and I bear in mind the words of

(1) *In Re Fry, Reynolds v. Denne*, [1945] 2 All E.R. 205; [1945] Ch. 348.

(2) *Re Lewis' Will Trust, Whitelaw v. Beaumont*, [1951] W.N. 591.

(3) *Re Bouverie, Bouverie v. Marshall*, [1952] 1 All E.R. 408; [1952] Ch. 400.

(4) *Re Wood's Will Trusts, Wood v. Donnelly*, [1952] 1 All E.R. 740; [1952] Ch. 406.

(5) *In Re Kersey, Alington v. Alington*, [1952] W.N. 541.

(6) *In Re Neeld, Carpenter v. Inigo-Jones*, [1960] 2 All E.R. 33; [1960] Ch. 455.

(7) *In Re Harris's Will Trusts*, (Feb. 28, 1961), "The Times", Mar. 1, 1961.

(8) *In Re Murray, Martins Bank, Ltd. v. Dill*, [1954] 3 All E.R. 129; [1955] Ch. 69.

LORD SIMONDS, L.C., in *Bromley v. Tryon* (9) on the attitude of the courts towards well-trying and established conveyancing precedents. Secondly, I bear in mind that I am concerned with a condition subsequent, which may have the effect of shifting or divesting a vested estate, and that, for the condition to be effective, it must be expressed with sufficient precision and distinctness to enable the court and (accepting LORD ROMER's addition in *Sifton v. Sifton* (10)) the parties to see from the beginning exactly what it is that must be done to avoid or to bring about a termination of the relevant interest. It is right to look at the clause carefully and even critically, but I do not accept any suggestion that it should be examined with hostility, and I am inclined to think that sometimes an excessive degree of ingenuity has been deployed in attacking similar clauses. I accept the principle of reasonable construction adopted by CROSS, J., in *Re Neeld, Carpenter v. Inigo-Jones* (11) with a view to seeing whether some real, not fanciful, objection through lack of precision or distinctness exists. I think that the same approach, also involving a refusal to be intimidated by possible difficulties of application, was adopted by both the Court of Appeal and the House of Lords in *Bromley v. Tryon* (12).

Turning now to detail, the main criticism was directed against the word "discontinue". It was said that this word indicates the cessation of a habit, or of a settled course of action, and that it is impossible to say what degree of cessation, or for how long, is necessary to terminate the interest. Apart from authority, I should not be willing to accept this argument. The forfeiture provision follows, and would normally represent the counterpart of, the preceding portion of the clause which contains the positive injunction to take and use the name and arms. The two should, if possible, be construed together. Now, the positive injunction is "take use and bear", and, in the case of a person who already uses the name of Howard, to

"... continue to use and bear in all deeds and writings which he or she shall sign and upon all occasions the surname of Howard..."

The meaning of this injunction appears to me to be clear and stringent. The name is to be used on all occasions, and one case of failure to use would be a breach of it. To this the forfeiture clause provides a corresponding sequel: the words used are "... if any person ... should discontinue to use and bear the same ...", and these words, in my judgment, naturally and aptly mean that one case of failure brings a forfeiture about—a person who fails to use on one occasion evidently does not continue to use on all occasions. The words do not naturally or aptly suggest that before a forfeiture occurs there must be a period of cessation. The conception of a single, once-for-all breach, is, to my mind, strengthened by the following words:

"... then and in every such case immediately after the expiration of the said term of one year or immediately after such discontinuance as aforesaid ... the estate ... shall absolutely determine..."

I find, then, that the word "discontinue" is, in its context, certain and clear.

Attack was also made on the very words to which I have already referred as being, to my mind, significant, namely, "upon all occasions". It was said that these words are themselves uncertain, because there must be occasions when the surname is not used or required to be used, such as when writing to a member of the family, and, these latter occasions being incapable of definition, the compulsory occasions must equally be uncertain. I do not find this argument impressive. The words, to me, appear, clearly enough, to refer to all occasions—and only those occasions on which a surname is used—to all "surname

(9) [1951] 2 All E.R. at p. 1065; [1952] A.C. at pp. 274, 275.

—(10) [1938] 3 All E.R. at p. 445; [1938] A.C. at p. 675.

(11) [1960] 2 All E.R. 33; [1960] Ch. 455.

(12) C.A., sub nom. *Re Wilson's Will Trusts*, [1950] 2 All E.R. 955; H.L., [1951] 2 All E.R. 1058; [1952] A.C. 265.

A occasions", and not to "Christian name occasions" or "nickname occasions", or, one might add, "pseudonym occasions": so to interpret the words appears to me to fall well within the limits of careful and critical interpretation which the law requires, and, so interpreted, the words present no difficulty. On this approach to the clause, I therefore find it lacking in destructive uncertainty.

B But there are authorities to be considered. In *Re Lewis' Will Trust, Whitelaw v. Beaumont* (13) the word was "disuse", and VAISEY, J., read this (14) as

"...referable not so much to an identifiable act, performed at one moment, as to a continuous process, the beginning of which might be very difficult to identify."

He also said (14):

"This word does not appear to me to have the same meaning as 'discontinue the use of', a phrase which seems to indicate an overt act, the happening of which can be identified."

In *Re Bouverie, Bouverie v. Marshall* (15), the word was again "disuse", but VAISEY, J., expressed second thoughts about the words "to discontinue". He said this (16):

"Although...the word 'discontinue' is probably in not much better case, I thought at one time that it was more descriptive of a single act than the word 'disuse'. I am, however, not at all certain that the word 'discontinue' is not open to the same objection as the word 'disuse', but I am not going to say anything further about that because that is not the word which is in question here."

These second thoughts were made the basis of the decision in *Re Wood's Will Trusts, Wood v. Donnelly* (17). In that case the positive injunction was to assume and use the surname and arms either alone or together with his or her own surname and arms, and WYNN-PARRY, J., held that the clause was void for uncertainty, as the phrase "discontinue to bear and use" was indistinguishable from the word "disuse". The word "discontinue" again figured in *Re Kersey, Alington v. Alington* (18), and, though the report is not a full one, it is clear that DANCKWERTS, J., had cited to him, and relied on, *Re Wood's Will Trusts* (17).

In *Re Neeld* (19) there were two names and arms clauses, one relating to the name Inigo-Jones and one relating to the name Neeld. The Neeld clause had in it the word "discontinue", and also, in the positive injunction, the words "upon all occasions". CROSS, J., treated the addition of these words as decisive: he held (20) that "discontinue to use" obviously referred back to the earlier use of the word "use" and meant "discontinue to use on all occasions". Not only was this his opinion, but he found support for it in *Re Drax, Dunsany v. Sawbridge* (21), where SWINFEN EADY, J., held that "upon all other occasions" referred to all occasions when a surname is ordinarily used. I would only add to these modern decisions *Re Cornwallis, Cornwallis v. Wykeham-Martin* (22), where the word "discontinue" was used, followed by the words "for six calendar months", thus clearly, by the context, indicating a cessation of a habit. In these circumstances, it is clear that I have ample support—without myself importing any unduly fine distinctions based on the different wordings used—for the interpretation which, *prima facie*, appeals to me and for holding that the word "discontinue" may bear a different meaning in different contexts. I

(13) [1951] W.N. 591.

(14) [1951] W.N. at p. 592.

(15) [1952] 1 All E.R. 408; [1952] Ch. 400.

(16) [1952] 1 All E.R. at p. 411; [1952] Ch. at p. 405.

(17) [1952] 1 All E.R. 740; [1952] Ch. 406.

(18) [1952] W.N. 541.

(19) [1960] 2 All E.R. 33; [1960] Ch. 455.

(20) [1960] 2 All E.R. at p. 39; [1960] Ch. at p. 466. (21) (1906), 75 L.J.Ch. 317.

(22) (1886), 32 Ch.D. 388.

propose to align myself on this point with CROSS, J., and SWINFEN EADY, J., whose reasoning seems to me entirely relevant to this clause, and to hold that the clause is not void for uncertainty. A

I now pass to the issue of public policy, and here I think it convenient, first, to consider the state of the authorities directly bearing on name and arms clauses. In the first place, in spite of the long history of these clauses, it was never, so far as I know, suggested, still less decided, that they were contrary to public policy until the decision of VAISEY, J., in *Re Fry, Reynolds v. Denne* (23) in 1945. In that case the learned judge had to consider a clause which applied to all persons becoming entitled, not to a life interest or an estate tail, but to an absolute interest, and whether they were male or female. It did not apply to the husband of married women. The clause was fatally defective in other respects, but VAISEY, J., also held that it was void as being against public policy. After stating that he did so with hesitation and that there might be cases in which it could be applied to a woman with "absolute propriety", he held (24) that: B C

"... the use of different surnames by a man and his wife cannot fail to be productive of many embarrassments and inconveniences, not only to themselves, their children and relatives, but to their friends and acquaintances, and indeed to society generally." D

He referred to the clause as operating "by the coercive and quasi-punitive method of a defeasance", and then said (25):

"The precedent books show that the right form of a name-clause where the beneficiary is or may become a married woman is to place the obligation not upon her alone but upon her husband as well." E

From these citations it is obvious that the decision in *Re Fry* (23), so far from supporting a contention adverse to the present clause, goes some distance the other way, in view of the description given by VAISEY, J., of a clause like the present as "the right form of a name-clause". The objection which he felt in that case, at any rate, was based on a degree of embarrassment extending beyond the persons immediately affected by the condition and reaching the public at large. In *Re Lewis' Will Trust* (26) VAISEY, J., followed this decision in a case where the person immediately concerned was an unmarried woman, but said that he did so "not without hesitation". F

There followed the decision of DANCKWERTS, J., in *Re Kersey* (27) in 1952. That case involved a clause identical, I think, with the present. In particular it sought (as VAISEY, J., said that it properly should) to impose the obligation on the husband of a married woman. The case is only briefly reported, and DANCKWERTS, J., is reported as saying (28): G

"It was very undesirable that a wife should have to bring pressure upon her husband to change his name in order that she might not be deprived of an estate to which she had succeeded. He (his Lordship) could not conceive anything more likely to cause differences between husband and wife than a clause containing a provision of this character. It illustrated the fatuity of trying to impose obligations of this sort which were out of date and inconsistent with the spirit of the times." H

From this passage I understand the sole ground on which the clause was held to be contrary to public policy to have been that differences would be caused between husband and wife. The reference to the clause being out of date and inconsistent with the spirit of the times was not, as I read it, to provide an additional basis of invalidity. It has never been the function of the judges on grounds of public policy to excise anachronistic practices from conveyancing (or surely they would have rid the law of the restraint on anticipation long before their

(23) [1945] 2 All E.R. 205; [1945] Ch. 348.

(24) [1945] 2 All E.R. at p. 207; [1945] Ch. at p. 354.

(25) [1945] 2 All E.R. at p. 208; [1945] Ch. at p. 354.

(27) [1952] W.N. 541.

(26) [1951] W.N. 591.

(28) [1952] W.N. at p. 542.

A statutory abolition), and I take the words of DANCKWERTS, J., as of a descriptive character, corresponding to the adjective used by LORD MANSFIELD in *Gulliver d. Corrie v. Ashby* (29).

Re Kersey (30) was adverted to in *Re Neeld* (31), when CROSS, J., said that he would have followed the decision had it been applicable; in fact, he distinguished it; and it was recently followed by PLOWMAN, J., in *Re Harris's Will Trusts* (32).

B The current of authority, then, is not inconsiderable and is all one way, and I have to consider whether I am justified in resisting it. I say "resisting" advisedly, because before me the whole issue of public policy was fully argued on its merits, and, speaking for myself, forceful and lucid though the argument of counsel for the adult beneficiaries was, I found it, though possibly compelling, to carry less than perfect conviction. To hold such a clause to be, from the public point of view, comparatively innocuous may well, I recognise, depend, just as much as a finding against it, on "the idiosyncratic inferences" of one judicial mind (I adapt from LORD ATKIN's famous opinion in *Fender v. Mildmay* (33)). Nevertheless, search as I may, I cannot find either that the act required to be done (the assumption of the name and arms of Howard) is a harmful act, or that the condition may have harmful tendencies. I apply the test suggested by LORD ATKIN (34) (and, in passing, I should say that the relevance of the tests, which are applied to contracts, to conditions is established by *Egerton v. Earl Brownlow* (35) and the use of that case in *Fender v. Mildmay* (36)): would the condition "in a majority of cases, [or] at any rate, in a considerable number of cases" expose the parties "to a real temptation" such "that it is likely that they will yield to it": is there likely to be a general tendency to do wrong?

E To answer these questions in the affirmative involves two steps, either of which I would be reluctant to take. The first involves assuming that, in a decision on matters which, after all, involve the interests of both spouses (since both are interested in the wife succeeding to the estate and both are concerned with a change of name), the normal give-and-take of married life is unable, in a significant number of cases, adequately to arrive at an agreement. The second involves assuming that, if a difference of opinion, or even a disagreement, between the spouses is caused, that is likely to assume the dimensions of an evil which it is the public policy of the law to prevent. If such a doctrine to this effect were to prevail, it is difficult to see where it would stop: would a condition as to residence or religion (attached to a gift of property) be similarly treated? If not, how can the court compare a man's attachment to his name with his attachment to his house or to his religion? I even seem to detect some inconsistency between, on the one hand, the proposition that a testator's wish to continue his name is silly and anachronistic and ought to be rejected, and, on the other hand, the argument that a husband's reluctance to change his name for his wife's fortune is normal and ought to be respected. Be that as it may, just as *pacta sunt servanda*, so is the preservation of liberty, and in England liberty has always, happily, included eccentricity of testamentary disposition, an important objective of public policy, and I have not been persuaded that I could find here a contrary objective of equal or comparable weight.

I In this, however, I am, as the recent cases show, speaking for myself, and it is evidently undesirable that, on a subject so much a matter of appreciation, different judges of the same Division should speak with different voices. (The risk of their doing so is, of course, one of the main arguments against applying considerations of public policy to any but the clearest cases.) There is a series

(29) (1766), 4 Burr. at p. 1941, where LORD MANSFIELD referred to "so silly a condition as this".

(30) [1952] W.N. 541.

(31) [1960] 2 All E.R. at p. 39; [1960] Ch. at p. 467.

(32) (Feb. 28, 1961), "The Times", Mar. 1, 1961.

(33) [1937] 3 All E.R. at p. 407; [1938] A.C. at p. 12.

(34) [1937] 3 All E.R. at p. 408; [1938] A.C. at p. 13. (35) (1853), 4 H.L. Cas. 1.

(36) [1937] 3 All E.R. 402; [1938] A.C. 1.

of decisions one way and none, apart from two dicta of VAISEY, J., in *Re Fry* (37), the other way. These decisions may well have been acted on—I have already noted the warning of the editors of KEY AND ELPHINSTONE'S PRECEDENTS IN CONVEYANCING (15th Edn.), Vol. 2, at p. 784, and they have been acted on by the beneficiaries in the present case, as the recital in the deed of family arrangement, executed shortly after the decision in *Re Kersey* (38), shows. The principle stare decisis seems to me to apply in full force in such a situation, and all the more since the clause here is identical with the clause in *Re Kersey* (38); and I have come to the conclusion that I ought to follow the precedents. A
B

How far, then, do the decisions go? In my judgment, they go no further than to declare the clause void in so far as it affects married women. *Re Fry* (37), *Re Kersey* (38) and *Re Harris's Will Trusts* (39) were all concerned with married women, and the ratio decidendi of *Re Kersey* (38) is applicable to married women alone. I see no reason to apply it to single women or to men. The only cited case in which the principle has been applied to unmarried women is *Re Lewis' Will Trust* (40), where, as I have said, VAISEY, J., followed his own decision in *Re Fry* (37), not without hesitation, but gave no additional reasons for applying that case to unmarried women. C

It has been argued (on the analogy of covenants in restraint of trade) that I cannot sever the condition, that it is either wholly good or wholly bad. But I do not think that the analogy is a true one. In covenants in restraint of trade the court is faced, ex hypothesi, with a single covenant in consideration of which some other promise has been made. To sever the covenant would be to change the consideration and so to alter the parties' bargain. In this will, the testator has attempted to apply the condition to men, single women and to married women, and I see no reason why, because it is void for a special reason as to married women, it should be void as to the others—any more than if a testator sought to apply a restraint on anticipation to every person, male or female, married or unmarried, interested under his will. In this case, moreover, the three separate estates were separately limited, the tenant for life at the relevant date being respectively a man, a widow and a married woman, and it seems to me that cl. 8 should be separately and individually applied to each case. I am much assisted in reaching this conclusion by the fact that a similar approach was adopted by Cross, J., in *Re Neeld* (41). In distinguishing *Re Kersey* (38), he said (42): D
E
F

"... here the beneficiary who is immediately affected is the first defendant, Ralph Christopher Inigo-Jones, and it is only in very improbable and remote contingencies that any female can possibly be affected at all. I do not think the fact that a clause may be invalid so far as it applies to married women and their husbands is any sufficient reason for holding it totally void as applied to males or spinsters." G

With respect, I adopt this passage, and I would add widows to the latter class. H

I must now deal with the subsidiary point which arose from the circumstance that the testator's daughter released her life interest in parts of the Middleton and Foxcote Estates before her death. The question is whether, as regards the portion included in the releases, the name and arms clause operated immediately on the release, or whether it only operated when the life tenant died. This depends on the true construction of cl. 8. The clause commences in this way (43): I

"I declare that every person (other than Lady Lawson or a peer or peeress) who under the limitations hereinbefore contained becomes entitled as tenant for life or as tenant in tail male or in tail general by purchase to the

(37) [1945] 2 All E.R. 205; [1945] Ch. 348.

(38) [1952] W.N. 541.

(39) (Feb. 28, 1961), "The Times", Mar. 1, 1961.

(40) [1951] W.N. 591.

(41) [1960] 2 All E.R. 33; [1960] Ch. 455.

(42) [1960] 2 All E.R. at p. 39; [1960] Ch. at p. 467.

(43) The clause is set out in full at p. 415, letter B, ante.

A possession or to the receipt of the rents and profits of my settled estates or any part thereof and does not at the time of becoming so entitled use and bear the surname and arms of Howard . . .”

The first argument was directed to the words “under the limitations hereinbefore contained”, and it was said that the granddaughters did not become so entitled, they became entitled under the releases. A similar point arose in *Re Petre's*

B *Settlement Trusts*, *Legh v. Petre* (44), where the reverse situation occurred, the reversioner assigned to the tenant for life in possession. JOYCE, J., however, considered both cases and said (45) that the words “entitled to the actual possession under the limitations [of the settlement]” meant “entitled to such possession, looking to the terms of the settlement, and not regarding anything else”. The word “actual” does not appear in the present will, but that seems to me immaterial, and otherwise the decision is relevant and helpful. It was followed by *Re Duncombe's Will Trusts*, *Wrixon-Becher v. Earl of Faversham* (46), where the phrase was

“in the actual possession or [construed as ‘that is to say’] entitled to the receipt of the rents and profits of . . .”

D ROMER, L.J., relied on the absence of some words as “under the limitations of” or “under or by virtue of” the settlement to distinguish *Re Petre's Settlement Trusts* (44) (which, on its facts, he appeared to accept) and to show that “actual possession”, not “entitlement”, was intended.

In my judgment the words in cl. 8, “under the limitations hereinbefore contained”, bring the case under the principle stated in *Re Petre's Settlement*

E *Trusts* (45), with the result that release, total or partial, by way of acceleration does not bring the clause into operation. I should add that the words “or any part thereof” appear to me to relate to the three separate estates which are compendiously dealt with in this clause, and do not contemplate a case of partial release. Accordingly, I hold that the name and arms clause did not begin to operate until the death of the testator's daughter on Jan. 5, 1960.

F One other point should be mentioned. It was suggested that the forfeiture provision had never operated, because no beneficiary had “refused or neglected” to assume the name and arms. “Neglect”, it was said, pre-supposes knowledge, actual or constructive, of a duty, and the parties did not know, at any rate until after the judgment of Cross, J., in *Re Neeld* (47), that they had a duty to comply with. I do not accept this. The beneficiaries were clearly aware of the existence of the clause, and, acting advisedly, they did not comply with it. Such mistake as they made was purely a mistake of law, and they have clearly neglected to act under the clause.

I therefore decide: (i) that the clause is not void for uncertainty; (ii) that the clause is void as contrary to public policy in so far as it purports to affect married women (i.e., women who are married at the date when the obligation to use the name and arms arises) or their husbands, but no further; the invalidity does not apply to widows; (iii) that the effective date on which cl. 8 began to operate was the death of the testator's daughter on Jan. 5, 1960; and declarations will be made accordingly.

Declaration accordingly.

Solicitors: *Blount, Petre & Co.* (for all parties).

[Reported by R. D. H. OSBORNE, Esq., *Barrister-at-Law.*]

(44) [1910] 1 Ch. 290.

(46) [1932] All E.R. Rep. 588; [1932] 1 Ch. 622.

(47) [1960] 2 All E.R. 33; [1960] Ch. 455.

(45) [1910] 1 Ch. at p. 296.

CRABB (INSPECTOR OF TAXES) v. BLUE STAR LINE, LTD. A

[CHANCERY DIVISION (Buckley, J.), March 23, 24, 1961.]

Income Tax—Profits—Insurance moneys—Ship-building contracts—Insurances against late delivery of ships to be built—Whether payments under policies revenue or capital receipts—Income Tax Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 10), Sch. D.

In order to replace losses by enemy action during the war, shipowners ordered seven new ships from ship-builders and in connexion with each of them effected a policy of insurance with Lloyd's under which they were entitled to receive £500 per day in respect of each day's delay in delivery beyond fourteen days after the due delivery date, up to a period of ninety days. They received late delivery of two of the ships and were paid sums in respect thereof under the policies. It was found as a fact that they frequently entered into ship-building contracts under which the purchase price of the ship was to be increased in the event of delivery before the due date and reduced in the event of delayed delivery.

Held: the sums received under the policies of insurance were of a capital nature and should not be taken into account in the computation of the shipowners' income for income tax purposes under Sch. D to the Income Tax Act, 1952, since the sums were not compensation for loss of profits or quantified by reference to profits which would have been earned by assets employed in the shipowners' business, but were payments under insurances against the possibility of late delivery of the ships in which event the ship-builders' services, as actually rendered, would be less valuable than the services that they had contracted to give.

Burmah Steam Ship Co., Ltd. v. Inland Revenue Comrs. (1931 S.C. 156) and *R. v. British Columbia Fir and Cedar Lumber Co., Ltd.* ([1932] All E.R. Rep. 147) distinguished.

Appeal dismissed.

[As to insurance moneys constituting income for income tax purposes, see 20 HALSBURY'S LAWS (3rd Edn.) 152, para. 266; and for cases on the subject, see 28 Digest (Repl.) 38, 170-172.]

Cases referred to:

Burmah Steam Ship Co., Ltd. v. Inland Revenue Comrs., 1931 S.C. 156; 16 Tax Cas. 67; 28 Digest (Repl.) 45, 127.

Gliksten (J.) & Son, Ltd. v. Green, [1929] All E.R. Rep. 383; [1929] A.C. 381; 98 L.J.K.B. 363; 140 L.T. 625; 14 Tax Cas. 364; 28 Digest (Repl.) 38, 170.

Newcastle Breweries, Ltd. v. Inland Revenue Comrs., [1927] All E.R. Rep. 287; 96 L.J.K.B. 735; 137 L.T. 426; sub nom. *Inland Revenue Comrs. v. Newcastle Breweries, Ltd.*, 12 Tax Cas. 927; 28 Digest (Repl.) 413, 1833.

R. v. British Columbia Fir and Cedar Lumber Co., Ltd., [1932] All E.R. Rep. 147; [1932] A.C. 441; 101 L.J.P.C. 113; 147 L.T. 1; 38 Digest (Repl.) 475, 120.

Case Stated.

The taxpayers appealed to the Special Commissioners of Income Tax against an assessment made on them for 1955-56 under Sch. D to the Income Tax Act, 1952, in the sum of £2,000,000, subject to capital allowances and losses brought forward for set-off from previous years amounting to £178,741. Their grounds of appeal were that in computing the amounts of the losses certain sums received by the taxpayers under policies of insurance ought not to have been taken into account and deducted therefrom. The sums were received in respect of delay in the delivery of two new ships ordered from ship-builders against which the taxpayers had taken out the policies of insurance. The taxpayers contended that the sums received and the premiums paid were receipts and payments of a

A capital nature and fell to be excluded from the computation of losses incurred by the taxpayers in their trade for the years of assessment in which they were received. The Crown contended that the sums received and the premiums paid were receipts and payments of a revenue nature and fell to be included in the computation of losses. The commissioners held that the sums received and premiums paid were receipts and payments of a capital nature and should be excluded from the computation of losses. The Crown appealed by way of Case Stated to the High Court.

F. N. Bucher, Q.C., and A. S. Orr for the Crown.

Heyworth Talbot, Q.C., and G. B. Graham for the taxpayers.

C **BUCKLEY, J.:** This is an appeal by the inspector of taxes against a determination of the Special Commissioners. It is an appeal against an assessment made on the Blue Star Line, Ltd., the taxpayers, for 1955-56 under Sch. D to the Income Tax Act, 1952, in circumstances which appear from the Case Stated. The taxpayers are a company incorporated under the Companies Acts many years ago, and carry on the business of shipowners, mainly concerned with refrigerated cargo liners.

D During the second world war, the taxpayers lost the major part of their fleet by enemy action, and consequently after the war they took steps to replace the losses. By Dec. 31, 1950, seven new ships had been ordered, and in connexion with each of these a policy of insurance was effected with Lloyd's which insured that, in the event of the vessel to which the policy related not being delivered within fourteen days after the due delivery date under the contract between the taxpayers and the ship-builders, the insurers would pay £500 per day for each day's delay in delivery, up to a period of ninety days.

E The premiums paid under the seven policies totalled £4,074, of which £1,101 was charged against the profits of the taxpayers in their accounts for the year ended Dec. 31, 1948, and was claimed as an allowance, a deduction, in computing the profits for the purposes of assessment; and £2,973 was charged against a reserve of the taxpayers called the fleet replacement reserve in their accounts for the year ended Dec. 31, 1950.

F Two of the ships were not delivered punctually, and the question for determination on this appeal is whether the sums payable under the policies relating to those ships ought or ought not to be regarded as income for the purposes of ascertaining the profits and losses of the taxpayers. In respect of one of the ships, the English Star, payments were made under the policy for the full period of ninety days provided for by the policy, and in the case of the other, the Scottish Star, payments were made in respect of a period of forty-one days' delay. It is found in the Case as a fact that, in respect of other ships not the subject-matter of the seven contracts which I have mentioned, the taxpayers frequently entered into contracts which contained provisions the effect of which was to increase the purchase price paid by the taxpayers in the event of the ship-builders delivering the ship before the contract date for delivery, and to decrease the purchase price payable by the taxpayers in the event of the ship being delivered late.

G H I The total amounts received under the two policies in respect of the English Star and the Scottish Star amounted to £64,845, and these have been credited in the accounts of the taxpayers to their fleet replacement reserve for the year ended Dec. 31, 1950. The question which I have to determine is whether, on the facts as found in the Case, there was evidence on which the commissioners could hold, as they did, that that sum of £64,845 was a receipt of a capital nature and so should be excluded from the computation of the taxpayers' losses.

It has been contended for the Crown that the sums payable under the policies were sums payable by way of compensation for loss of user of the ships in question, and are therefore receipts of a revenue nature, analogous to damages for loss of profits where such a claim arises in tort or contract. I have been referred by counsel for the Crown to two authorities on which he principally relies, the

earlier in time of which is *Burmah Steam Ship Co., Ltd. v. Inland Revenue Comrs.* (1). In that case, the appellant company, in conjunction with another company, had bought a motor vessel second-hand and had placed it in the hands of repairers for overhaul. The contract stipulated that the repairs should be completed by a particular date, and the repairers failed to complete the repairs punctually in accordance with the contract. The appellant company and the other company concerned accordingly claimed damages against the repairers, and the damages which they recovered were calculated by reference to the estimated profit which would have been earned by the vessel had she been trading during the period from the date when the repairs ought to have been completed according to the contract to the date when they were in fact completed. The claim was compromised, and under the compromise the two companies, the owners of the vessel, received £3,000 from the repairers by way of damages, which they divided equally between them. The £1,500 which was so received by the appellant company was included in the assessment to income tax of the company for the year 1929-30, and that assessment was confirmed by the Special Commissioners. The case came before the court on appeal from the Special Commissioners, and the decision was upheld and the assessment confirmed.

The ground on which the case was decided is to be found set out in the judgment of the Lord President (LORD CLYDE). First of all, he pointed out that the injury which the appellant company had suffered was not an injury to its capital asset—viz., the vessel—and he said that it was very relevant to inquire whether the thing in respect of which the taxpayer company had recovered damages or compensation was deprivation of one of the capital assets of its trading enterprise or was, short of that, a mere restriction of its trading opportunities. He came to the conclusion that, on a true view of the facts, it was a case which fell within the latter alternative. LORD BLACKBURN and LORD MORISON concurred in that view; LORD SANDS was not prepared to dissent, although he certainly felt more difficulty about the principles on which the case should be decided.

That case is distinguishable from the present case on two grounds. One is that the amount with which the court was there concerned was an amount ascertained by reference to the profits which would have been earned had the vessel been completely repaired by the contract date. That is not a conclusive test whether the payment ought to be regarded as a capital payment or a revenue payment, for there may be a case in which the price paid by someone for property which is a capital asset of the vendor may be a price to be measured by reference to the profits which can be earned by the use of the asset, and in such a case, prima facie at any rate, the price paid would not be received by the vendor as income or profits of his business, but as the price for the asset disposed of would be a capital receipt. The method of quantifying a payment by reference to profits is not a conclusive test, but nevertheless it is one of the matters which the court has to take into consideration in trying to ascertain the true character of the payment.

The other ground on which *Burmah Steam Ship Co., Ltd. v. Inland Revenue Comrs.* (1) is distinguishable from the present case is that, whereas in that case the appellant company already owned the vessel when the contract with the repairers was entered into, so that the capital asset, the vessel, was always a capital asset of the company, in the present case, when the policies were entered into, the ships to which they related did not exist at all; and, as counsel for the taxpayers says, the policies were effected as an incident to the acquisition of the ships.

The other case to which counsel for the Crown has referred me is a case in the Privy Council called *R. v. British Columbia Fir and Cedar Lumber Co., Ltd.* (2).

(1) 16 Tax Cas. 67.

(2) [1932] All E.R. Rep. 147; [1932] A.C. 441.

A That was a case on the British Columbia Taxation Act, and the headnote of the case reads:

B "Money received by manufacturers under fire policies insuring them in respect of loss of net profits that would have accrued had there been no interruption of business caused by fire is income from a business within the meaning of s. 2 of the (British Columbia) Taxation Act (R.S.B.C. 1924, c. 254), and accordingly is to be brought into account in computing the net income chargeable to tax under that Act."

In deciding that case, the Privy Council followed an earlier decision in the House of Lords of *J. Gliksten & Son, Ltd. v. Green* (3).

C I quote a passage from the opinion of the Privy Council which was delivered by LORD BLANESBURGH (4):

D "The main purpose of the respondents, as it is of all similar industrial units, is the acquisition of gain, such acquisition in the case of each unit being effected by the exercise of such of the powers conferred upon it by its constitution as it may determine to exercise. In the case of the respondents acquisition of gain was primarily to result from their carrying on of the business of manufacturers of and dealers in lumber and lumber products. In the conduct of that business they were exposed to the grave risk of fire, and the insurance of their premises and plant was an insurance against a possible capital loss dictated by every consideration of prudence. If the risk were not so guarded against, then by a fire sufficiently disastrous the whole operations of the respondents might definitely be brought to a close and acquisition of gain for them definitely ended. But such a fire, even if so far insured against, might still prove a hindrance more or less prolonged to the unbroken acquisition of gain from their business by reason of the fact that its continuance might not be possible during the period of reinstatement. This insurance receipt, therefore, was the product of a revenue payment prudently made by the respondents to secure that the gains which might have been expected to accrue to them had there been no fire should not be lost, but should be replaced by a sum equivalent to their estimated amount."

E "Further, this was a receipt which had to be brought into the respondents' revenue account, so that it might enter into the calculation necessary to determine their profits available for dividend. It had been produced by a premium out of revenue, and, therefore, out of potential profits—a premium paid for the express purpose of ensuring in an event a sum in substitution for and the equivalent of net business profits over a defined period of time. All this is clear from the terms of the insurances themselves. Accordingly, this insurance receipt was necessarily a revenue receipt of the business, which must not only have been brought into the respondents' revenue account, but if, for instance, it had happened that any of the stockholders were specially interested in the profits of a particular year, being, for example, non-cumulative preference stockholders, then the receipt must have been brought into credit proportionately for the years in which the profits represented would, but for the stoppage, presumably have been earned."

H A little further down LORD BLANESBURGH (5) says:

I "This receipt was inseparably connected with the ownership and conduct of the respondents' business. Had the respondents not been insured under their main fire policies, these particular use and occupancy policies would not have been available to them. As a result, the respondents have secured for themselves a net receipt involving gain—an unusual mode of deriving

(3) [1929] All E.R. Rep. 383; 14 Tax Cas. 364.

(4) [1932] All E.R. Rep. at pp. 149, 150; [1932] A.C. at p. 446.

(5) [1932] All E.R. Rep. at p. 150; [1932] A.C. at p. 447.

gain from the business, it may be agreed, but, as WARRINGTON, L.J., said in similar circumstances in *Inland Revenue Comrs. v. Newcastle Breweries, Ltd.* (6), not so divorced from the business as to prevent it entering the accounts as a receipt arising therefrom. And it was not a windfall. As observed by SARGANT, L.J., in *J. Gliksten & Son, Ltd. v. Green* (7), it was an ordinary receipt in the sense, not that it would occur every year or regularly at stated intervals, but in the sense that in the case of a business prudently conducted it would ordinarily be received so often as the risk insured against materialised."

Those observations are observations which LORD BLANESBURGH made in the course of what he described as ascertaining, apart from any question of income tax, the precise place and character in the economy of the respondents' business of the particular receipt with which the case was concerned. Now, in that case also, of course, the policies with which the Privy Council was concerned were policies taken out in relation to profits which would, but for fire, have been earned by the assets of the company in its possession and employed in its business. They were also, as it happens, policies to ensure payments of sums calculated as equivalent to and in substitution for those lost profits; and the policies were of a kind which the Board considered were policies which would properly and normally be taken out and regularly maintained in connexion with a business of that sort. In those respects, I think that *R. v. British Columbia Fir and Cedar Lumber Co., Ltd.* (8) is also distinguishable from the present case.

Counsel arguing the case for the taxpayers before me has founded his argument on the fact that the policies with which I am concerned were policies which were incidental to the acquisition of new assets, and he says that, in substance, the insurance was intended to produce the same effect as would a clause in the contract with the ship-builders which would decrease the price of the ship in the event of the ship not being delivered by a certain date. *Bis dat qui cito dat* is a familiar Latin tag; and he who delivers goods punctually does something that is of greater value than he who delivers goods late. I think that a purchaser is entitled, when he negotiates his purchase of goods or services, to say to himself and to the other party: "These goods or these services will be worth £x to me if I get them by a certain specified date, but if I only get them six months later they will be worth only half of £x to me."

In that connexion, counsel for the taxpayers relies on the contracts entered into by the taxpayers in relation to other ships which I have already mentioned, which contained clauses which had precisely that effect as between the taxpayers and the ship-builders—and those are contracts of a kind which the Case finds are frequently entered into by these taxpayers. He says that in the particular cases with which I am concerned the contracts with the ship-builders did not contain a clause operating on the price to be paid to the ship-builders in that kind of way; instead of that, the taxpayers covered the position by insurance. There seems to be very great force in the argument that, if the contracts in respect of the two ships with which I am concerned had stipulated that, if the ship-builders did not deliver within fourteen days after the due date of delivery, the purchase price would be reduced by £500 a day over a period of time, then it would be exceedingly difficult, if not impossible, for the Revenue to suggest that that reduction in the price to be paid by the taxpayers could be regarded as a revenue receipt by the taxpayers. Counsel for the taxpayers says that, if that is so, then, by parity of reasoning, the £500 payable under the insurances are also not revenue receipts, but are sums which the taxpayers secured for themselves to protect themselves against the risk of not obtaining full value from this contract with the ship-builders.

(6) 12 Tax Cas. at p. 947. (7) 14 Tax Cas. at p. 380; [1928] 2 K.B. at p. 203.

(8) [1932] All E.R. Rep. 147; [1932] A.C. 441.

Moreover, counsel for the taxpayers says that at the time when the contracts to build the ships were entered into, and at the time when the policies were entered into, no one could predicate with any certainty that the taxpayers would ever use these ships at all in their business. They might have chosen to sell the ships before the process of building the ships was completed, in which case there never would have been any question of their earning any profits by employing the ships in their business at all. In that connexion, it seems to me to be significant that these policies are not policies to secure payments of sums to be quantified by reference to loss of profits by the taxpayers, but are policies securing flat rate payments of £500 a day.

For these reasons, it seems to me that, on the true view of this case, the sums secured by these policies are not in essence compensation for loss of profits, although in a sense they are associated with the fact that, if due delivery were not made, the taxpayers would be deprived of profits if they then wished to take the ships into service in their business. I think that these policies are really associated with the price which the taxpayers felt justified in paying for the services which the ship-builders were contracting to give, and were insurances against the possibility of the ship-builders not providing as valuable services as by the contract they were promising to provide. On that view of the matter, it seems to me that the view which was taken by the Special Commissioners was the right view, and that this appeal fails.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Chas. H. Wright & Brown* (for the taxpayers).

[*Reported by F. A. AMES, Esq., Barrister-at-Law.*]

Re ST. EDBURGA'S, ABBERTON.

[COURT OF ARCHES (Dean of Arches, Sir Henry U. Willink, Q.C.), March 23, 24, April 13, 1961.]

Ecclesiastical Law—Jurisdiction—Faculty—Spire removal.

Ecclesiastical Law—Faculty—Appeal from Consistory Court—Function of Court of Arches.

(i) The ecclesiastical court has jurisdiction to grant a faculty to demolish a church, and a fortiori to remove a spire of a church.

(ii) The proper attitude to be adopted by the Court of Arches, when hearing an appeal in a faculty case, is the same as the attitude which is adopted by the Court of Appeal when hearing appeals and which was described in *Benmax v. Austin Motor Co., Ltd.* ([1955] 1 All E.R. 326); and if, on the hearing of such an appeal, it appears that the discretion of the Chancellor has been exercised on the basis of an erroneous evaluation of the facts taken as whole, the Court of Arches has jurisdiction to allow the appeal.

Appeal allowed.

[As to faculties for pulling down and re-building a church, see 13 HALSBURY'S LAWS (3rd Edn.) 415, para. 922, note (f); and for cases on the subject, see 19 DIGEST 356, 1729-1731.]

As to appeals in faculty cases, see 13 HALSBURY'S LAWS (3rd Edn.) 518, para. 1113; and for cases on the subject, see 19 DIGEST 310, 311, 1112-1117.]

Cases referred to:

Benmax v. Austin Motor Co., Ltd., [1955] 1 All E.R. 326; [1955] A.C. 370; [1955] 2 W.L.R. 418; 3rd Digest Supp.

Markham v. Shirebrook Overseers, [1906] P. 239; 19 Digest 311, 1115.

Paris v. Stepney Borough Council, [1951] 1 All E.R. 42; [1951] A.C. 367; A 115 J.P. 22; 2nd Digest Supp.

Appeal.

This was an appeal by the Minister of Aviation against the decision of Chancellor BOYDELL (ante, p. 1) whereby he rejected the minister's petition to remove the spire of Abberton parish church. Since the date of the chancellor's judgment an appearance had been entered, with no objection by the minister, by the Lord Bishop of Worcester.

J. F. E. Stephenson, Q.C., for the minister.

E. Garth Moore for the bishop.

Cur. adv. vult.

Apr. 13. **THE DEAN** read the following judgment: There is one matter which I should mention before dealing with the main issue in the case. In the Consistory Court a preliminary point of law, namely whether the minister had "locus standi" as a person entitled to present the petition, was raised, argued and decided in favour of the minister by the learned chancellor. On this point there was no cross-appeal and the question, therefore, was not discussed before me. It is right that I should make it clear that the chancellor's decision has the status of a decision of the Consistory Court, and that I am not expressing any opinion on it either by way of approval or disapproval.

It will be convenient that, before examining the facts in the case, I should make two observations with regard to the law in such a case as this, on which counsel stated their agreement. In the first place it is common ground that the ecclesiastical courts have jurisdiction to grant such a faculty as is here sought. To make so substantial an alteration to the structure of a church is a serious matter for the justification of which there must be weighty grounds. It is, however, agreed that demolition of a church is within the jurisdiction of the court—"a fortiori" the removal of a spire. This being the case, I cannot give weight to a suggestion by counsel for the bishop that the absence of specific legislation dealing with ecclesiastical property affects, to a degree that was not made clear to me, the function of the ecclesiastical court.

In the second place, counsel were at one with regard to the attitude proper to this court when sitting as a court of appeal in a faculty case of this nature. The relevant rule is r. 1 of the Rules and Regulations of the Arches Court, issued in 1903 and set out in a footnote to the report of *Markham v. Shirebrook Overseers* (1), which so far as is material runs as follows: "All appeals to the Court of Arches in cases of application for a faculty shall be by way of re-hearing . . .". Counsel were not able to refer me to any case in which an ecclesiastical court had considered this rule, but the Rules of the Supreme Court contain the same words when dealing with appeals to the Court of Appeal. Counsel were in agreement that the attitude of this court should correspond with that adopted by the Court of Appeal and I accept this as correct.

What this attitude should be has been recently described with the highest authority by the House of Lords in *Benmax v. Austin Motor Co., Ltd.* (2). It will differ according to the circumstances of the case. For example, it will be strongly affected in favour of upholding the judgment of the trial judge where his decision is based on the credibility of witnesses whom he has seen. In the circumstances of the present appeal the proper attitude for the court is thus defined by LORD REID (3):

"But in cases where there is no question of the credibility or reliability of any witness, and in cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal court is generally in as good a

(1) [1906] P. at p. 262.

(2) [1955] 1 All E.R. 326; [1955] A.C. 370.

(3) [1955] 1 All E.R. at p. 329; [1955] A.C. at p. 376.

A position to evaluate the evidence as the trial judge... though it ought, of course, to give weight to his opinion."

B Elsewhere in the speeches in that case a distinction is drawn between the finding of primary facts and their evaluation when so found. A faculty case gives rise to the exercise of discretion, but if it appears to this court that the discretion of the chancellor has been based on an erroneous evaluation of the facts taken as a whole, it is within the jurisdiction of this court to allow an appeal.

C It was further agreed by counsel on both sides that there was little, if any, criticism to be made of the findings of primary fact set out, with admirable clarity, in the chancellor's judgment, and it is unnecessary for me to recite them in such detail. I can, I believe, summarise what he found. I take first the facts with regard to the diocese, the parish and the church itself. There is no strong opposition from the diocesan or parochial authorities. The parish is very small; such somewhat infrequent services as are held in the church would not be affected by the removal of the spire. The parishioners have a considerable degree of sympathy with the minister, feeling that if the spire has to be removed for reasons of safety they would accept the situation fairly cheerfully. They like their spire and would certainly want it replaced if for any reason it would no longer be dangerous to aircraft.

D From the point of view of aesthetic and architectural merit, though the diocesan surveyor supported the petition, the weight of evidence was to the effect that the loss of the spire would be very regrettable. Though the church is not ancient—it was entirely rebuilt in 1881—the removal of the spire was strongly opposed by Sir Hubert Worthington, giving evidence primarily on behalf of the Central Council for the Care of Churches but also giving his personal view, and by Mr. Matley Moore on behalf of the Diocesan Advisory Committee. It would seem clear that their objection was in substance twofold. Spires are rare in this part of Worcestershire and this spire is a very pleasing feature of the landscape. In the second place, they felt that a faculty for the removal of a church spire in the interests of aviation was a most dangerous precedent. To this latter point I shall return later on in this judgment.

E I turn to the circumstances of the Pershore Airfield and suggestions that the embarrassment said on behalf of the minister to be caused by the spire could be avoided by means other than its removal. No case was made to the effect that those responsible for the airfield had been careless as to its lay-out with reference to Abberton church; such difficulty as it causes is due to the increased and still increasing speed and weight of aircraft. It was, however, suggested that in the new circumstances a fresh runway could be constructed or the very important work done at Pershore could be transferred to some other airfield. The learned chancellor did not base his judgment on either of these suggestions. Both appeared on the evidence to be so expensive and for other reasons so extremely difficult as to be properly described as impracticable. The third suggestion was that there must be a modification of practice on the airfield, mitigating or removing the risk. As I read the chancellor's judgment this last suggestion turned the scale in his mind.

H I come therefore to what the chancellor rightly described as "the heart of the case", namely, the risk of accident caused by the spire as compared with the situation if the highest point above ground level were to be reduced by forty-five degrees as would be effected by the demolition of the spire and the substitution of a low tower surmounted by a light.

I The spire is directly in line with the runway, just over two miles from the point at which aircraft flying in from the north-east should touch down. Measured from this point the angle to the top of the spire is one in forty-four. On the evidence Pershore should be classified as a class 1 airfield, for which class of airfield there should not, in principle, be any obstacle at such a distance as

Abberton church preventing an approach at a gradient of one in a hundred. A
It is recognised that such conditions cannot always be secured but at no airfield
should there be, in principle, an obstacle increasing the approach angle beyond
one in fifty. The minister's proposals in the present case would reduce the
approach angle to one in fifty-five.

In considering any question of risk it is highly relevant—as pointed out by
the House of Lords in *Paris v. Stepney Borough Council* (4)—to consider both B
the likelihood of accident and also the degree of injury should an accident
occur. It is on his assessment of these two factors in combination that I find
myself in disagreement with the learned chancellor.

[The DEAN considered the evidence and continued:] It would be wholly unjust
to the learned chancellor to suggest that in his careful judgment he had failed
to take into account any part of the evidence. None the less I differ from his C
conclusion. I do not think that he took sufficiently into account the fact that
the risk caused by unanticipated conditions of emergency cannot be excluded
by standard rules or modifications of practice, nor do I think that he gave
adequate weight to the evidence which, in my judgment, established that the
spire causes a real, not fanciful, risk of an accident of great gravity—a risk D
which this court, in spite of its reluctance to permit such interference with a
parish church, ought not to leave as a potential danger to those concerned with
the work of the airfield and to those living in the village of Abberton.

There is one other matter to which I should refer. Mr. Orchard, an assistant
secretary in the Ministry of Aviation, described the proposal to remove the spire
as “far-reaching” and the learned chancellor himself used this adjective as an E
epithet descriptive of what he was being asked to sanction. I wish to make it
very clear that I do not agree. The present case arises on facts entirely special
to itself. It has raised a difficult question of the weight to be given to the
various considerations that arise in a particular case. It is in no sense a prece-
dent. All that I have decided is that on a balance of factors the discretion of
the court should be in favour of the minister. For these reasons I allow the F
appeal, but on terms. Counsel agreed that the matter should now be remitted
to the Consistory Court, which, no doubt with the aid of the Diocesan Advisory
Committee will settle the architectural details of the tower and light which will
replace the spire. It is agreed that the chancellor's order should embody an
undertaking on behalf of the Crown to store the material of the spire and to
re-build it if at any time in the future it would no longer be a source of danger.
It is agreed that the whole cost of the alterations to the church and of the pro- G
ceedings both in this court and in the Consistory Court, save as to the costs of
the amicus in the Consistory Court, should be borne by the minister, and I
would anticipate that the chancellor will include a provision for an annual
payment to be made as was suggested by counsel for the bishop either to the
diocese or to the parish.

Appeal allowed.

Solicitors: *Treasury Solicitor* (for the minister); *Lee, Bolton & Lee* (for the
bishop).

[*Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.*]

A STOCK v. WANSTEAD AND WOODFORD BOROUGH COUNCIL AND ANOTHER.

[QUEEN'S BENCH DIVISION (Stevenson, J.), April 19, 20, 1961.]

Land Charge—Local land charge—Official certificate of search—Error in certificate—Certificate conclusive in favour of purchaser against "persons interested" in matter required to be registered—Compensation notice in respect of a refusal of development permission registered but not disclosed by certificate—Certificate conclusive against Minister as a person interested in the compensation notice—Purchaser not liable to repay compensation to Minister on developing land and, having repaid it, not entitled to recover the amount from the local authority for issuing an erroneous certificate—Land Charges Act, 1925 (15 & 16 Geo. 5 c. 22), s. 17 (3).

An intending purchaser of land obtained from the local authority an official certificate of search of the register of local land charges kept by the authority. In Part III (c) of the certificate, which related to planning charges, "nil" was entered. In fact a compensation notice under s. 28 of the Town and Country Planning Act, 1954, was registered, and the certificate was inaccurate. Relying on the certificate the purchaser bought the land for £1,750. Subsequently the Minister of Housing and Local Government claimed the sum of £1,612 11s. as being payable under s. 29 (1) of the Act of 1954 before the land could be developed, and the purchaser paid the £1,612 11s. In an action by the purchaser against the local authority and their clerk to recover by way of damages the £1,612 11s.,

Held: the certificate had been conclusive, by virtue of s. 17 (3)* of the Land Charges Act, 1925, in favour of the purchaser as against the Minister, since the Minister was a "person interested" within s. 17 (3) under the compensation notice, that there was no planning charge and accordingly the purchaser had not been liable to pay the £1,612 11s. to the Minister; the purchaser, therefore, could not recover the amount from the defendants.

[As to local land charges generally, see 23 HALSBURY'S LAWS (3rd Edn.) 99, 100, paras. 208, 209, and as to protection of purchasers, see *ibid.*, p. 98, para. 205.

For the Land Charges Act, 1925, s. 17 (3), see 20 HALSBURY'S STATUTES (2nd Edn.) 1094, and for the Town and Country Planning Act, 1954, s. 28 (5) and s. 29 (1), see 34 HALSBURY'S STATUTES (2nd Edn.) 950, 951.]

Action.

In this action the plaintiff, a building contractor, claimed damages from the defendant local authority and their town clerk for the issue of an inaccurate certificate of search of the register of local land charges kept by the defendant local authority pursuant to the Land Charges Act, 1925. On Sept. 20, 1957, the defendant local authority issued, pursuant to the plaintiff's requisition, an official certificate of search of the register against the land which the plaintiff was then in negotiation to purchase. The certificate stated that the search revealed no subsisting entry in Part III (c), which related to planning charges. In fact a compensation notice pursuant to s. 28 and s. 46 of the Town and Country Planning Act, 1954, was registered. The plaintiff alleged that he bought the land in reliance on the certificate, and that he suffered loss owing to the inaccuracy of the certificate in that he would be obliged to pay (as in fact he did pay) £1,612 11s. to the Minister of Housing and Local Government pursuant to the Minister's claim for payment of that sum, by reason of the registered compensation notice, before the land could be developed by the plaintiff. The facts, the relevant statutory provisions, and the contentions of the parties are stated in the judgment.

D. G. A. Lowe for the plaintiff.

J. H. L. Royle for the defendants.

Cur. adv. vult.

* The terms of s. 17 (3) are printed at p. 435, letter E, post.

Apr. 20. **STEVENSON, J.**, read the following judgment: In this action the plaintiff seeks to recover damages against the defendant authority, Wanstead and Woodford Borough Council, and the second defendant who was at all material times their clerk, in respect of the issue to the plaintiff or to solicitors on his behalf of an inaccurate certificate of search of the register of local land charges kept by the second defendant as the proper officer (1) charged with the duty of keeping that register under the Land Charges Act, 1925.

The plaintiff's claim is based on the allegation of a contract between himself and the defendants or the second defendant constituted by a written requisition in writing for an official search of the register of local land charges and the payment by the plaintiff of the prescribed fee for such search in respect of which a receipt was issued by the defendant authority on Dec. 12, 1957. Alternatively, the plaintiff founds his claim on an alleged breach by the defendants of their statutory duty to search the register of local land charges and give certificates of the result of such search. As a further alternative the plaintiff seeks to found his claim on negligence by the defendants.

In September, 1957, the plaintiff was negotiating for the purchase of some land in Woodford on which he intended to build a number of houses for sale by him. While he was so negotiating, solicitors on his behalf made a requisition in writing on Sept. 11, 1957, for an official search of the register of local land charges for subsisting entries against the land for which the plaintiff was negotiating which is identified in the written requisition, and a sum of 16s. was paid to the defendant authority on the plaintiff's behalf, being the fee in respect of such search.

On Sept. 20, 1957, the second defendant issued an official certificate of search against the land specified in the requisition which, under that part of the official certificate relating to planning charges registrable under the Town and Country Planning Acts, 1947 to 1954, recorded the word "nil". It is common ground that this was an inaccurate certificate in that under Part III (c) of the register of local land charges, relating to planning charges registrable under the Town and Country Planning Acts, 1947 to 1954, there was registered a compensation notice pursuant to the Town and Country Planning Act, 1954, s. 28 and s. 46, in the following terms: "Notice is hereby given that compensation amounting to £2,645 12s. 6d. has become payable in respect of land at Wanstead, Essex", and then follows a precise description of the land. This compensation had become payable by reason of a refusal by Essex County Council as planning authority of permission for residential development in respect of the land in question in the month of August, 1953, (2).

The plaintiff, in reliance on the certificate of search issued by the defendants, and in ignorance of the compensation notice to which I have referred, continued to negotiate for the purchase of the land in question, and on Dec. 20, 1957, contracted to purchase it for the sum of £1,750. On Dec. 30, 1957, he submitted an outline application for permission to develop the land in question, and on Jan. 31, 1958, outline permission to develop was granted. On Feb. 17, 1958, the purchase was completed by a conveyance to the plaintiff of that date.

On Mar. 17, 1958, the Ministry of Housing and Local Government wrote to the plaintiff pointing out, as was the fact, that compensation had been paid by that Ministry under Part 5 of the Town and Country Planning Act, 1954, in respect of land including that which the plaintiff had purchased and that a notice of such compensation had been registered in the register of local land charges under

(1) As to who is the proper officer, see s. 15 (6) (c) of the Land Charges Act, 1925, and r. 4 of the Local Land Charges Rules, 1934 (S.R. & O. 1934 No. 285), as amended by S.R. & O. 1938 No. 499.

(2) Under Part 5 (s. 42 to s. 46) of the Town and Country Planning Act, 1954, compensation is payable for planning decisions made before the commencement of the Act, viz., before Jan. 1, 1955, whereby (inter alia) permission to carry out new development was refused.

A s. 28 of that Act (3). The Minister claimed that a sum of £1,612 11s. was payable to the Minister by the plaintiff before he could proceed with the development which he contemplated of the land which he had bought. This claim was made under s. 29 (1) of the Town and Country Planning Act, 1954 (4), and the sum of £1,612 11s. represented an apportionment (5) of the total compensation formerly paid by the Minister to the land which the plaintiff had acquired. After further
B correspondence with the Ministry and with the defendant authority the plaintiff paid the sum demanded by the Ministry.

On July 28, 1958, the plaintiff's solicitors wrote to the second defendant in his capacity as local registrar at the office of the defendant authority claiming that the sum so paid represented loss which resulted from the inaccurate certificate given by the defendants, and outlining the claim now embodied in the
C statement of claim in the present proceedings.

The defendants by their defence allege amongst other matters that the certificate of search issued to the plaintiff was, and is, conclusive in favour of the plaintiff as a person who at the time that it was issued was a purchaser or intending purchaser of the land in question, as against persons interested in or in respect of matters or documents whereof entries were required to be made with the
D registry of local land charges, and that the Minister of Housing and Local Government was at all material times, and is, a person so interested in respect of the notice of compensation. The defendants therefore contend that the plaintiff was not under any liability to pay the sum of £1,612 11s. demanded by the Minister and cannot therefore recover that or any sum in this action.

This contention is based on s. 17 of the Land Charges Act, 1925, which provides
E for official certificates of search. Section 17 (3) is in these terms:

"In favour of a purchaser or an intending purchaser, as against persons interested under or in respect of matters or documents whereof entries are required or allowed as aforesaid, the certificate, according to the tenor thereof, shall be conclusive, affirmatively or negatively, as the case may be."

F Counsel for the plaintiff has argued before me that the Minister is not a person interested within the meaning of this subsection. It seems to me plain that the notice of compensation registered in September, 1956, places the Minister within the class described as "persons interested under or in respect of matters or documents whereof entries are required or allowed" to be registered, and that the certificate issued to the plaintiff became conclusive negatively in favour of
G the plaintiff as an intending purchaser of the land which he acquired.

It has been agreed by counsel in this case that notice of the fact that compensation has been paid is one of those matters that are registrable as a local land charge (6), and is subject to the provisions to which I have just referred relating to searches in the local land register.

I am forced to the conclusion that the effect of s. 17 (3) of the Act of 1925 was
H to absolve the plaintiff from any liability to meet the demand made by the Minister and that the right to develop the land in question could not have

(3) By s. 46 (4) of the Town and Country Planning Act, 1954, the provisions of s. 28 which relate to compensation payable under Part 2 of the Act, are applied to compensation payable under Part 5 of the Act for planning decisions made before the commencement of the Act on Jan. 1, 1955. By s. 28 (4) where compensation exceeding £20 has become payable the Minister shall deposit notice of that fact with the local
I planning authority, and under s. 28 (5), notices deposited under sub-s. (4) are required to be registered in the register of local land charges.

(4) Section 29 (1), which by virtue of s. 46 (4) of the Act of 1954 applies to compensation paid under Part 5 of the Act, provides that: "No person shall carry out any new development . . . on land in respect of which a notice (. . . referred to as a 'compensation notice') is registered under [s. 28], until such amount (if any) as is recoverable under this section in respect of the compensation specified in the notice has been paid or secured to the satisfaction of the Minister."

(5) See s. 29 (3) (b) of the Town and Country Planning Act, 1954.

(6) See s. 28 (5) and s. 46 (4) of the Town and Country Planning Act, 1954.

been defeated by non-payment of this sum under s. 29 of the Town and Country Planning Act, 1954 (7). A

In these circumstances, it is not necessary for me to decide, and I express no opinion on, the question whether the issue to the plaintiff of an inaccurate certificate of search amounted to a breach of contract or a breach of a statutory or any other duty owed by the defendants to the plaintiff, and I dismiss this action. B

Judgment for the defendants.

Solicitors: *Lees, Smith & Crabb* (for the plaintiff); *William Charles Crocker* (for the defendants).

[Reported by WENDY SHOCKETT, Barrister-at-Law.] C

MOHAMED FALIL ABDUL CAFFOOR AND OTHERS (TRUSTEES OF THE ABDUL GAFFOOR TRUST) v. COMMISSIONER OF INCOME TAX, COLOMBO. D

[PRIVY COUNCIL (Lord Morton of Henryton, Lord Radcliffe, Lord Morris of Borth-y-Gest and Mr. L. M. D. de Silva), March 1, 2, 7, 8, April 19, 1961.] E

Privy Council—Ceylon—Charity—Education—Public element—Selection of beneficiaries—Primary trust for the education of relatives of grantor, provided they were young, deserving and of the Islamic Faith—Exemption from income tax allowed for a previous year—Res judicata—Ceylon Income Tax Ordinance (c. 188, Legislative Enactments of Ceylon, 1938), s. 7 (1) (c).

Charity—Education—Public element—Selection of beneficiaries—Primary trust for the education of relatives of grantor, provided they were young, deserving and of the Islamic Faith. F

Under a trust established by a grantor by deed the whole of the trust income was, for the purposes of the present case, to be treated as if appropriated for the "education instruction or training . . . of deserving youths of the Islamic Faith in such professions vocations occupations industries arts or crafts trades employments subjects lines or any other departments of learning or human activity whatsoever" as a board, set up under the deed, might in their discretion decide. Under the provisions of the deed, so long as there were male descendants in either the male or female line of the grantor or any of his brothers or sisters for whose education the board were prepared to provide or reserve money on the ground that they qualified as deserving youths of the Islamic Faith, no other youth of that faith could obtain any benefit under the trust purpose. In 1954, on an appeal made by the trustees to the board of review constituted under the Ceylon Income Tax Ordinance, against assessment to tax of the trust income for the year 1949-50, that board exempted the income from tax on the ground that the trust was of a public character established solely for charitable purposes within the meaning of s. 7 (1) (c) of the Ceylon Income Tax Ordinance. Assessments to income tax having nevertheless been made on the trust income for the five years 1950-51 to 1954-55, G

Held: (i) the decision of 1954 did not set up an estoppel per rem judicatum on the question whether the trust income was exempt from tax, since the dispute which alone could be determined by that decision was limited to the H

(7) The relevant terms of s. 29 are printed in footnote (4), ante. I

A amount of assessable income for the year in which the assessment was challenged, i.e., 1949-50, and the consideration of questions of law or construction for the purpose of reaching the decision were collateral or incidental to the determination of the main issue; in the present case, however, the issues were of assessment for different years and the liability for those years (see p. 441, letters E and F, and p. 443, letter B, post).

B *Broken Hill Proprietary Co., Ltd. v. Broken Hill Municipal Council* ([1925] All E.R. Rep. 672) and *Society of Medical Officers of Health v. Hope (Valuation Officer)* ([1960] 1 All E.R. 317) applied.

Hoystead v. Taxation Comr. ([1925] All E.R. Rep. 56) not followed.

C (ii) although educational purposes were charitable purposes, no trust under which the beneficiaries were defined by reference to a purely personal relationship with a named propositus could be a valid charitable gift; in the present case the effect of the trust was to create a primary disposition of the trust income in favour of the grantor's family, and thus the trust lacked the necessary element of being for the benefit of a section of the community and was not a charitable trust (see p. 443, letter I, and p. 444, letter H, post).

D *Re Koettgen, Westminster Bank, Ltd. v. Family Welfare Asscn. Trustees, Ltd.* ([1954] 1 All E.R. 581) considered and doubted.

E Per CURIAM: a trust which provides for the education of a section of the public does not necessarily lose its charitable status or its public character merely because members of the founder's family are mentioned explicitly as qualified to share in the educational benefits or even, possibly, are given some kind of preference in the selection (see p. 444, letter G, post).

Appeal dismissed.

[As to gifts for the education of a particular class, see 4 HALSBURY'S LAWS (3rd Edn.) 218, para. 497; and for cases on the subject, see 8 DIGEST (Repl.) 326-330, 91-118.]

F As to the essentials of res judicata, see 15 HALSBURY'S LAWS (3rd Edn.) 185, para. 358; and for cases on the subject, see 21 DIGEST 159-163, 213-221.]

Cases referred to:

Broken Hill Proprietary Co., Ltd. v. Broken Hill Municipal Council, [1925] All E.R. Rep. 672; [1926] A.C. 94; 95 L.J.P.C. 33; 134 L.T. 335; Digest Supp.

G *Compton, Re, Powell v. Compton*, [1945] 1 All E.R. 198; [1945] Ch. 123; 114 L.J.Ch. 99; 172 L.T. 158; 8 Digest (Repl.) 330, 123.

Hoystead v. Taxation Comr., [1925] All E.R. Rep. 56; [1926] A.C. 155; 95 L.J.P.C. 79; 134 L.T. 354; Digest Supp.

Income Tax Special Purposes Comrs. v. Pemsel, [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 3 Tax Cas. 53; 8 Digest (Repl.) 312, 1.

H *Inland Revenue Comrs. v. Sneath*, [1932] All E.R. Rep. 739; [1932] 2 K.B. 362; 101 L.J.K.B. 330; 146 L.T. 434; 17 Tax Cas. 149; 28 Digest (Repl.) 353, 1563.

Koettgen, Re, Westminster Bank, Ltd. v. Family Welfare Asscn. Trustees, Ltd., [1954] 1 All E.R. 581; [1954] Ch. 252; [1954] 2 W.L.R. 166; 3rd Digest Supp.

I *Oppenheim v. Tobacco Securities Trust Co., Ltd.*, [1951] 1 All E.R. 31; [1951] A.C. 297; 8 Digest (Repl.) 321, 55.

Patuck v. Lloyd, (1944), 171 L.T. 340; 26 Tax Cas. 284; 2nd Digest Supp.

R. v. Hutchings, (1881), 6 Q.B.D. 300; 50 L.J.M.C. 35; 44 L.T. 364; 45 J.P. 504; 21 Digest 232, 631.

Shell Co. of Australia, Ltd. v. Federal Comr. of Taxation, [1930] All E.R. Rep. 671; [1931] A.C. 275; 100 L.J.P.C. 55; 144 L.T. 421; 8 Digest (Repl.) 792, 507.

Society of Medical Officers of Health v. Hope (Valuation Officer), [1960] 1 All E.R. 317; [1960] A.C. 551; 124 J.P. 128; [1960] 2 W.L.R. 404. A

Appeal.

Appeal by Mohamed Falil Abdul Caffoor, Mohamed Mohideer Abdul Caffoor, Mohamed Rafi Abdul Caffoor and Abdul Hameed Mohamed Ismail, trustees of the Abdul Gaffoor Trust, from a judgment and decree of the Supreme Court of Ceylon (H. N. G. FERNANDO and SINNETAMBY, JJ.), dated Nov. 26, 1958, allowing an appeal by the respondent, the Commissioner of Income Tax, Colombo, by way of Case Stated from a decision of the board of review constituted under the Ceylon Income Tax Ordinance. The board of review had allowed an appeal by the appellants against a determination of the respondent dated July 2, 1956, confirming assessments to income tax made on the appellants, as trustees, for the years 1950-51 to 1954-55 inclusive. The facts are set out in the judgment of the Board. B C

E. F. N. Gratiaen, Q.C. (Ceylon), M. P. Nolan, S. Sanmugamayagan and S. Basnayake (both of the Ceylon Bar) for the appellants.

Sir John Senter, Q.C., and *W. Jayawardena* for the respondent.

LORD RADCLIFFE: This appeal from a judgment of the Supreme Court of Ceylon dated Nov. 26, 1958, concerns five assessments to income tax for the revenue years 1950-51 to 1954-55 which have been made on the income of a trust, styled the Abdul Gaffoor Trust, of which the appellants are the trustees. The appellants' case is that these assessments ought to be discharged because the trust is an "institution or trust of a public character established solely for charitable purposes" within the meaning of s. 7 (1) (c) of the Ceylon Income Tax Ordinance, and its income is, accordingly, exempt from liability to the tax. For the moment, it is sufficient to note that, by virtue of the interpretation section of the ordinance, s. 2, "charitable purpose" is to be held to include "relief of the poor, education, and medical relief." D E

The trust in question was set up by a deed dated Dec. 24, 1942, executed by one Noor Deen Hadjar Abdul Caffoor, the grantor, of the one part and certain persons of the other part who were to act as the intended trustees. The trust property was stated to be of the value of Rs. 2,050,000, lawful money of Ceylon, at the date of the deed. The overriding trust in the deed was that, during the life of the grantor, the trustees were to apply the whole of the income for such purposes and in such manner as the grantor himself should in his absolute discretion direct, whether or not such purposes should fall within those directed by the deed to be operative after the grantor's death. It is plain, therefore, that, until his death, which took place on Nov. 1, 1948, the current trust income was not in any sense devoted to charitable purposes. Accordingly, it can be argued that, for this reason alone, the Abdul Gaffoor Trust is not capable of being described as "established solely for charitable purposes". This argument was placed before the Supreme Court by the respondent, and was there rejected on the ground that the word "established" had no essential connexion with the date of the founding trust deed, and that the critical test for the purposes of the exemption of income from tax was the nature of the trusts that were operative in the year to which the claimed exemption related. The respondent's submission was repeated to their Lordships on the ground that it was desired to keep the point open. The point was not fully developed in argument and, for reasons which will shortly appear, their Lordships find it unnecessary to express any opinion on it. F G H I

Once the grantor was dead, his overriding trust came to an end. The trust income thereafter was to be held by the trustees on trust, after reserving a sum of Rs. 1,000 a month for upkeep and maintenance of the trust property, for all or any of a number of enumerated purposes which were set out in sub-heads (a) to (g) inclusive of para. 2 of the trust deed. The application of the income for

A or among these purposes was left to the absolute and uncontrolled discretion of a board, to be set up under the trust, consisting of the trustees and certain other named persons. It is more convenient to set out these trust purposes in full as expressed in the deed than to try to reduce the expression of them by an abridgment. They are as follows:

B “(a) A sum not exceeding one thousand rupees (Rs. 1,000/-) a month for the remuneration of the trustees and the expenses incurred by them in connexion with the administration of the trust and for the payment of the costs of professional accountants solicitors counsel or agents or managers or other persons whomsoever for or relating to any services rendered or other things done in connexion with matters relating to the trusts hereby created or the trust property.

C “(b) A sum not exceeding in all one thousand rupees (Rs. 1,000/-) a month for the education instruction or training in England or elsewhere abroad of deserving youths of the Islamic Faith in such professions vocations occupations industries arts or crafts trades employments subjects lines or any other departments of learning or human activity whatsoever as the board may in its aforesaid discretion decide in the case of each such deserving youth with a like discretion in the board from time to time to change modify or alter or completely discontinue in the case of each such youth either the object or objects of instruction education or training selected for him by the board (from among the objects enumerated above) or the place or places or countries whereat such education training or instruction is being given from time to time. The board may under a like discretion partially or wholly discontinue any assistance it may have given or may be giving in the case of any such youths. It shall be lawful for the board out of the said sum to pay for or provide the whole or any part of the cost of any such youth going abroad from or in returning to Ceylon once or oftener as the board may under such discretion aforesaid from time to time decide. The recipients of the benefits provided for in this clause shall be selected by the board from the following classes of persons and in the following order:—
D (i) male descendants along either the male or female line of the grantor or of any of his brothers or sisters failing whom (ii) youths of the Islamic Faith not being male descendants as aforesaid of the grantor or of his brothers or sisters born of Muslim parents of the Ceylon Moorish Community permanently resident in the city of Colombo (wherever such youths may have been or be resident from time to time) failing whom (iii) youths of the Islamic Faith not being male descendants as aforesaid of the grantor or of his brothers or sisters born of Muslim parents of the Ceylon Moorish Community permanently resident anywhere else in the said Island of Ceylon other than in Colombo (wherever such youths may have been or be resident from time to time).
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“ (c) A sum not exceeding two hundred and fifty rupees (Rs. 250/-) a month for the education of deserving youths of the Islamic Faith born of Muslim parents of the Ceylon Moorish Community permanently resident in Ceylon at either the University of Ceylon or any institution associated with or affiliated to it or the Ceylon Law College or any other scholastic or vocational or professional or agricultural or industrial or other technical institution public or private in Ceylon.

“ (d) A sum not exceeding two hundred and fifty rupees (Rs. 250/-) a month for providing dowries for poor girls of the Islamic Faith wherever resident born of Muslim parents of the Ceylon Moorish Community permanently resident in the city of Colombo.

“ (e) A sum not exceeding two hundred and fifty rupees (Rs. 250/-) a month for supplementing the income of the Ghaffooriyah Arabic School at Maharagama in the said Island founded by the grantor in the event of the

funds already provided for the said school under the relative trusts proving insufficient . . . A

“(f) A sum not exceeding one thousand rupees (Rs. 1,000/-) a month to be accumulated from month to month and distributed for charity once a year during the month of Ramadan.

“(g) Any surplus or any sums not expended on any of the above objects shall be credited to a reserve fund to be used in such proportions to such extents at such time or times and from time to time and in such manner as the board may in its absolute and uncontrolled discretion decide (i) for the purpose of meeting any unforeseen expenditure or contingency in connexion with the trust property (ii) in furtherance of all or any one or more of the various objects of the trust (iii) for educating in a secondary school or secondary schools in Ceylon poor deserving boys of the Islamic Faith born of Muslim parents permanently resident in Ceylon (wherever such boys may have been or be resident from time to time) and (iv) for the relief of poverty distress or sickness amongst members of the Islamic Faith in Ceylon.” B C

If one accepts, as their Lordships do, the Supreme Court's reading of the words “for charity” in sub-head (f) as meaning no more than “for the relief of the poor”, it appears that, in any year after the grantor's death, the whole of the trust income, after allowing for administrative expenses, was destined to be applied for purposes that can broadly be described as serving education or the relief of poverty or of sickness or distress. *Prima facie*, these would qualify as charitable purposes. D

The first main point taken on behalf of the appellants is that, as between themselves and the respondent, the question of exemption has been conclusively decided in their favour by a decision of the board of review, constituted under the Income Tax Ordinance, which decision was given on Dec. 22, 1954, on an appeal made by them to that board against assessment for the revenue year 1949-50. It is not in dispute that this decision was given, or that the ground on which exemption was allowed was that the income was that of a trust of a public character established solely for charitable purposes. The appellants, therefore, are seeking to treat the decision of the board of review as setting up an estoppel *per rem judicatam* on the question of the trust income's right to be exempted from tax. This plea has not hitherto prevailed in the various hearings in Ceylon. It has been rejected in turn by the Commissioner of Income Tax, acting under s. 69 of the Ordinance, by the board of review, acting under s. 73, and by the Supreme Court, under s. 74. For the reasons which will appear, their Lordships are also of opinion that it cannot succeed. E F

The grounds for rejecting the estoppel in the courts of Ceylon have been stated either as G

“the previous decision of the board of review which relates to an assessment for a year previous to the years of assessment which are now before us is not binding on us” H

(decision of the board of review, para. 2), or as depending on the question whether the board of review performs judicial and not merely administrative functions or, to put it in yet another way, on the question whether the board was intended to function as a court of competent jurisdiction to decide litigation between the subject and the Crown (judgment of the Supreme Court). These different ways of approaching the issue reflect differences of formulation which are to be found in judgments in this country on similar or analogous issues. It is to be observed, however, that such differences could well lead to different conclusions in certain circumstances; for, if the fundamental reason why there is no estoppel is based on the idea that the board of review does not possess adequate status as a judicial court of competent jurisdiction, it might seem to follow that a decision of the Supreme Court on the other hand when given on a Case Stated to it would set I

A up an estoppel per rem judicatam in respect of tax for other years; whereas, if the essence of the matter is that a question of liability to tax for one year is always to be treated as inherently a different issue from that of liability for another year, even though there may appear to be similarity or identity in the questions of law on which they respectively depend, it would seem to be the consequence on the contrary that a Supreme Court decision would no more be

B capable of setting up an estoppel than would one made by the board of review, whatever its precise status as a judicial tribunal.

In their Lordships' opinion, the question of estoppel cannot be decided merely by inquiring to what extent the board of review exercises judicial functions. The critical test is not the bare issue whether or not such a board exercises judicial power, an issue which can, indeed, arise in other contexts, such as

C of *Taxation* (1). What is important here is that the board of review is a tribunal set up under the Income Tax Ordinance for the purpose of deciding income tax appeals at a certain stage of their prosecution, and that decisions given with regard to such appeals are effective only within the limited jurisdiction that the ordinance creates for all tribunals that deal with the matter of an appeal. All

D such appeals remain in one sense a part of the process of assessment since all the tribunals, including the Supreme Court, have independent power to increase or reduce the assessment under appeal. While, therefore, it is unexceptionable to say that the board of review when exercising its powers under s. 73 is acting in a sense judicially, that the dispute which it has to determine is at any rate somewhat analogous to a *lis inter partes* and that the assessor who made the

E assessment or some other representative of the commissioner (s. 73 (3)) resembles a party hostile to the appellant, these considerations are not those that are critical to the issue of estoppel. The critical thing is that the dispute which alone can be determined by any decision given in the course of these proceedings is limited to one subject only, the amount of the assessable income for the year in which the assessment is challenged. It is only the amount of that assessable

F income that is concluded by an assessment or by a decision on an appeal against it (see s. 75). Although, of course, the process of arriving at the necessary decision is likely to involve the consideration of questions of law, turning on the construction of the ordinance or of other statutes or on the general law, and the tribunal will have to form its view on those questions, all these questions have to be treated as collateral or incidental to what is the only issue that is truly sub-

G mitted to determination (cf. *R. v. Hutchings* (2)).

It is in this sense that, in matters of a recurring annual tax, a decision on appeal with regard to one year's assessment is said not to deal with "*eadem quaestio*" as that which arises in respect of an assessment for another year and, consequently, not to set up an estoppel. It is precisely that point that was raised and accepted by this Board in 1925 in *Broken Hill Proprietary Co., Ltd. v. Broken Hill Municipal Council* (3), where it is said:

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"The decision of the High Court related to a valuation and a liability to a tax in a previous year, and no doubt as regards that year the decision could not be disputed. The present case relates to a new question, viz., the valuation for a different year and the liability for that year. It is not *eadem quaestio*, and therefore the principle of *res judicata* cannot apply."

I The *Broken Hill* decision (4) is in itself a striking application of the principle involved, since the earlier judgment which it was sought to set up as an estoppel was one given by the High Court of Australia on a rating assessment referred to it by way of appeal under the tax procedure. It underlines the point that it is not the status of the tribunal itself, judicial or administrative, that forms the

(1) [1930] All E.R. Rep. 671; [1931] A.C. 275.

(2) (1881), 6 Q.B.D. 300.

(3) [1925] All E.R. Rep. at p. 675; [1926] A.C. at p. 100.

(4) [1925] All E.R. Rep. 672; [1926] A.C. 94.

determining element for estoppel in cases of this kind but the limited nature of the question that is within the tribunal's jurisdiction. The judgment of the High Court that had been given in the earlier year was explicitly directed to the construction of a particular section of the rating Act and to the correct measurement of the liability in the light of that construction. Precisely the same point arose in the later year and was ultimately decided by this Board in a sense contrary to that which had previously been adopted. So, in the present appeal, the earlier decision of the board of review governing the 1949-50 assessment was based on a construction of s. 7 (1) (c) of the Income Tax Ordinance as applied to the income of the Abdul Gaffoor Trust; and the same point of construction now arises again but in respect of assessments of that income for other and later years. In their Lordships' opinion, it is not possible to distinguish the principle of the *Broken Hill* decision (5) from that which should prevail in the present case on any such ground as that here the earlier decision related to the taxpayer's "status" as an exempt person, while in the *Broken Hill* case (5) the decision "merely" related to the correct amount of the assessment; for, in truth, as has been explained, in all these cases which arise under income tax or rating appeal procedure the decision is essentially as to the correct amount (if any) of the assessment, and in the one case as much as in the other the decision was based on a question of law, the proper interpretation of one of the provisions of the taxing Act.

To apply the principle of the *Broken Hill* decision (5) to the case now before their Lordships is to bring it into line with what seems to be by now the regular course of authority with regard to appeals in successive years against income tax or rating assessments—see *Inland Revenue Comrs. v. Sneath* (6); *Patrick v. Lloyd* (7); *R. v. Hutchings* (8); and *Society of Medical Officers of Health v. Hope (Valuation Officer)* (9). It may be that the principles applied in these cases form a somewhat anomalous branch of the general law of estoppel per rem judicatam and are not easily derived from or transferred to other branches of litigation in which such estoppels have to be considered; but, in their Lordships' opinion, they are well established in their own field, and it is not by any means to be assumed that the result is one that should be regretted in the public interest.

The decision of this Board in *Hoystead v. Taxation Comr.* (10) is not consistent with this line of authority, and the appellants naturally relied on it in their argument. What happened in that case was that an assessment to federal land tax in Australia for the year 1918-19 had been the subject of appeal and a Case was stated for the opinion of the High Court on a point of law that determined the assessment, the correct interpretation of the taxing statute with regard to joint interests in land taken by the assessees under their father's will. There was a later appeal in respect of the assessment for the year 1920-21; and the question that was brought to this Board was whether the Commissioner of Taxation was estopped in the matter of that assessment by the judgment that had been delivered by the High Court in the earlier proceedings. The Board decided that he was. Unfortunately, however, the argument that the determination of an assessment for one year could not set up an estoppel on an assessment for another year, an argument that was accepted by the Board at almost the same time in the *Broken Hill* case (5), does not appear either to have been presented to the Board or to have been noticed or adjudicated on in the opinion which was delivered by LORD SHAW. It is not possible to explain why the matter was dealt with in this way; and it is fair to note that, in the majority judgment of the High Court, which was reversed on the appeal, there is a reference, though a passing one, to the point of "eadem quaestio". In the result, however, the attention of the Board in delivering its opinion was wholly occupied with a discussion of what is quite a

(5) [1925] All E.R. Rep. 672; [1926] A.C. 94.

(6) [1932] All E.R. Rep. 739; [1932] 2 K.B. 362. (7) (1944), 171 L.T. 340.

(8) (1881), 6 Q.B.D. 300. (9) [1960] 1 All E.R. 317; [1960] A.C. 551.

(10) [1925] All E.R. Rep. 56; [1926] A.C. 155.

A different issue in connexion with estoppel, whether there can in law be estoppel per rem judicatam in respect of an issue of law which, though fundamental to the issue, has been conceded and not argued in an earlier proceeding.

Their Lordships are of opinion that it is impossible for them to treat *Hoystead's* case (11) as constituting a legal authority on the question of estoppels in respect of successive years of tax assessment. So to treat it would bring it into direct conflict with the contemporaneous decision in the *Broken Hill* case (12); and to follow it would involve preferring a decision in which the particular point was either assumed without argument or not noticed to a decision, in itself consistent with much other authority, in which the point was explicitly raised and explicitly determined. For these reasons, their Lordships are satisfied that the respondent is not stopped by the 1954 decision of the board of review from challenging the appellants' claim that the income of the Abdul Gaffoor Trust is exempt from tax under s. 7 of the Income Tax Ordinance.

It is necessary now to turn to the question of exemption. To qualify at all, there must be income of an "established" trust. Having regard to the nature of the Abdul Gaffoor Trust, it cannot be validly established unless it falls within the definition of "charitable trust" which is contained in s. 99 (1) of the Trusts Ordinance (c. 72, Legislative Enactments of Ceylon, 1938). This definition includes any trust "for the benefit of the public or any section of the public" falling within any one of a number of categories which extend to such purposes as the relief of poverty and the advancement of education or knowledge. To satisfy the definition contained in the Income Tax Ordinance, therefore, the Abdul Gaffoor Trust must be a charitable trust "of a public character"; to be a subsisting charitable trust at all, it must be a trust for the benefit of the public or some section of it.

In order to determine this question, their Lordships think that the following principles may safely be applied in the interpretation of the Ceylon Ordinances. First, the general principles that govern the English law as to the validity of charitable trusts can be invoked. It seems plain that both the conception of a trust itself and the conception of what constitutes a charitable trust have been much influenced by English law. Secondly, there is no necessity to include in those general principles rules of the English law that appear to be specially associated with English local conditions or English history or which appear to be now accepted as anomalous incidents of the general law. Thirdly, there is no significant difference between the meaning of "of a public character" and the meaning of "for the benefit of the public or any section of it". The two phrases are often used interchangeably in English decisions and text-books—see, e.g., the quotation from *TUDOR ON CHARITIES* (5th Edn.), p. 11, employed by LORD GREENE, M.R., in *Re Compton, Powell v. Compton* (13)—

"a universal rule that the law recognises no purpose as charitable unless it is of a public character. That is to say, a purpose must . . . be directed to the benefit of the community or a section of the community."

Charitable trusts must be "trusts of a public nature" (see LORD MACNAGHTEN in *Income Tax Special Purposes Comrs. v. Pemsel* (14)). Fourthly, although educational purposes are themselves charitable purposes, no trust under which the beneficiaries are defined by reference to a purely personal relationship with a named propositus can be a valid charitable gift. If, therefore, persons for whose benefit an educational trust is created derive their title to their benefits by proving their qualifications in this way, whether as descendants of a named person or as employees of a named company, the trust must be regarded merely as a family trust and not as one for the benefit of a section of the community (see *Re Compton*

(11) [1925] All E.R. Rep. 56; [1926] A.C. 155.

(12) [1925] All E.R. Rep. 672; [1926] A.C. 94.

(13) [1945] 1 All E.R. at p. 200; [1945] Ch. at p. 128. (14) [1891] A.C. at p. 580.

(15), *Oppenheim v. Tobacco Securities Trust Co., Ltd.* (16)). Their Lordships do not think that it would be consistent with these principles to apply to the law of Ceylon any doctrine that had as its foundation the ancient English institution of educational provision for "Founder's Kin" in certain schools and colleges or old English decisions about charitable relief for poor relations of a testator. The former provisions were commonly accepted as validly instituted, though there seems to be virtually no direct authority as to the principle on which they rested and they should probably be regarded as belonging more to history than to doctrine; the latter are today treated as no more than an anomaly in the general law.

Is, then, the Abdul Gaffoor Trust a charitable trust? It was not disputed that, to determine this, it is necessary to treat the whole trust income as if it were appropriated for the purposes specified in para. 2 (b). This is so because the form in which the various trust sub-heads are expressed is such that no definite sum of money is dedicated to any one, and the power given by sub-head (g) makes it possible for the whole of the income to be carried to a reserve fund which could then be expended as from time to time the board thought proper in the exclusive implementation of the purposes of sub-head (b). To test whether any particular trust is a charitable one, what must be asked is whether the income is bound with certainty to be applied to charitable purposes, not whether it may be so applied. Unless, therefore, sub-head (b) itself declares a valid charitable purpose, no part of the trust comes within the exempting provision of the ordinance. There are several material constituents in this particular purpose. The money is to be used for "education instruction or training" in any department of human activity. Their Lordships will assume, without deciding, that this could be called an educational purpose. The recipients of the benefit are "deserving youths of the Islamic Faith". So long, however, as there are male descendants in either the male or female line of the grantor or any of his brothers or sisters for whose education the board are prepared to provide or reserve money on the ground that they qualify as deserving youths of the Islamic Faith, no other youth of that faith can obtain any benefit under the trust purpose. They can only come in "failing" the line of the descendants. It was argued with plausibility for the appellants that what this trust amounted to was a trust whose general purpose was the education of deserving young people of the Islamic Faith, and that its required public character was not destroyed by the circumstance that a preference in the selection of deserving recipients was directed to be given to members of the grantor's own family. Their Lordships go with the argument so far as to say that they do not think that a trust which provides for the education of a section of the public necessarily loses its charitable status or its public character merely because members of the founder's family are mentioned explicitly as qualified to share in the educational benefits or even, possibly, are given some kind of preference in the selection. They part with the argument, however, because they do not consider that the trust which is now before them comes within the range of any such qualified exception. Considering what is, in effect, the absolute priority to the benefit of the trust income which is conferred on the grantor's own family by cl. (i) of sub-head (b), the only fair way to describe this trust is as a family trust under which the income is made available to provide for the education or training of relatives of the propositus, in this case the grantor himself, provided only that they are young, deserving and of the required faith. These conditions do not make it the less a family trust. Such a trust is not a trust of a public character solely for charitable purposes. In the Supreme Court judgment, much consideration was given to the English decision *Re Koettgen, Westminster Bank, Ltd. v. Family Welfare Assn. Trustees, Ltd.* (17), the facts of which have much in common with those of the present case.

(15) [1945] 1 All E.R. 198; [1945] Ch. 123.

(16) [1951] 1 All E.R. 31; [1951] A.C. 297.

(17) [1954] 1 All E.R. 581; [1954] Ch. 252.

A The trust there created was expressed to be for the promotion and furtherance of commercial education; the persons eligible were British born subjects without sufficient means to obtain at their own expense an education for a higher commercial career; and in selecting beneficiaries the trustees were directed to give preference to employees or members of the families of employees of a named company. It is evident that the court's decision, which upheld the trust as

B a valid trust for charitable purposes, turned on the exact construction which was given to the words of the will. It was argued (18) that the trust was one

"... primarily for the benefit of the employees... and their families, and that it was only if there were insufficient employees or members of their families that the public could come in as beneficiaries under the trust."

C The learned judge (UPJOHN, J.) says in his judgment (18) that he did not accept that as the true construction of the clause in question; if he had accepted it, it is evident that he would have rejected the trust as a charitable bequest. The construction that he adopted as correct was that the primary class of beneficiaries consisted of persons without sufficient means to obtain commercial education at their own expense, and that the preference given merely amounted to a duty in

D the trustees to select employees or members of their families, if available, out of this primary class.

It is not necessary for their Lordships to say whether they would have put the same construction on the will there in question as the learned judge did, or whether they regard the distinction which he made as ultimately maintainable. The decision edges very near to being inconsistent with *Oppenheim's* case (19), but it is sufficient to say that the construction of the gift which was there adopted does not tally with the construction which their Lordships are bound to place on the trust which is now before them. Here, the effect of the wording of para. 2 (b) (i) is to create a primary disposition of the trust income in favour of the family of the grantor.

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For the reasons which have been set out above, their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the respondent's costs of the appeal.

Appeal dismissed.

Solicitors: *Smiles & Co.* (for the appellants); *T. L. Wilson & Co.* (for the respondent).

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

(18) [1954] 1 All E.R. at p. 584; [1954] Ch. at p. 257.

(19) [1951] 1 All E.R. 31; [1951] A.C. 297.

SHAW v. DIRECTOR OF PUBLIC PROSECUTIONS.

[HOUSE OF LORDS (Viscount Simonds, Lord Reid, Lord Tucker, Lord Morris of Borth-y-Gest and Lord Hodson), March 13, 14, 15, 16, 20, 21, 22, May 4, 1961.]

Criminal Law—Conspiracy—Conspiracy to corrupt public morals—Whether an indictable misdemeanour at common law—Whether s. 2 (4) of the Obscene Publications Act, 1959 (7 & 8 Eliz. 2 c. 66), prohibited prosecution.

Criminal Law—Prostitution—Living on earnings of prostitution—Publication containing advertisements by prostitutes published with object of enabling prostitutes to carry on their trade—Whether living on profits derived therefrom was living on earnings of prostitution—Sexual Offences Act, 1956 (4 & 5 Eliz. 2 c. 69), s. 30.

The appellant, with the object of assisting prostitutes to ply their trade, published a magazine called "Ladies Directory". It contained the names, addresses and telephone numbers of prostitutes with photographs of nude female figures, and in some cases details which conveyed to initiates willingness to indulge not only in ordinary sexual intercourse but also in various perverse practices. The appellant received fees from the prostitutes whom he canvassed and advertised and the prostitutes paid for advertisements out of the earnings of their profession and some of them obtained custom by means of the advertisements. The appellant also derived profit from the magazine from certainly one person to whom he sold copies for re-sale. On appeal against conviction (i) of conspiring with others to corrupt public morals by means of the "Ladies Directory", and (ii) of living wholly or in part on the earnings of prostitution, contrary to s. 30 (1) of the Sexual Offences Act, 1956,

Held: (i) (LORD REID dissenting) (a) an offence of conspiracy to corrupt public morals existed at common law, and (per LORD TUCKER, LORD MORRIS OF BORTH-Y-GEST and LORD HODSON concurring) was indictable as a conspiracy to commit a wrongful act which was calculated to cause public injury or, possibly, as a conspiracy to commit a criminal offence, the criminal offence being conduct calculated and intended to corrupt public morals (see p. 451, letter I, to p. 452, letter A, and p. 466, letter C, post).

R. v. Newland ([1953] 2 All E.R. 1067); *R. v. Delaval* ((1763), 3 Burr. 1434); *R. v. Mears & Chalk* ((1851), 4 Cox, C.C. 423); *R. v. Howell* ((1864), 4 F. & F. 160); and *R. v. Berg, Britt, Carré & Lummins*, ((1927), 20 Cr. App. Rep. 38) applied.

(b) section 2 (4) of the Obscene Publications Act, 1959, did not prohibit the prosecution of the appellant therefor because the offence alleged, the conspiracy to corrupt public morals, did not "consist of the publication" of the magazine but consisted of an agreement to corrupt public morals by means of the magazine (see p. 466, letter F, post); and the appellant had been rightly convicted of conspiracy to corrupt public morals.

(ii) (a) (per VISCOUNT SIMONDS; LORD TUCKER, LORD MORRIS OF BORTH-Y-GEST and LORD HODSON concurring) a person "lived . . . on the earnings of prostitution", within the meaning of s. 30 (1) of the Sexual Offences Act, 1956, if he was paid by prostitutes for goods or services which were supplied by him to them for the purpose of their prostitution and which he would not have supplied but for the fact that they were prostitutes (see p. 450, letter D, post); and, by making a business of accepting these advertisements for reward the appellant had knowingly lived in part on the earnings of prostitution.

R. v. Thomas ([1957] 2 All E.R. 342) considered.

(b) (per LORD REID) the words "living on" normally connoted living parasitically, and the appellant was living on the earnings of prostitution since his occupation of gathering and publishing the advertisements would

not have existed if his customers were not prostitutes (see p. 453, letter H, to p. 454, letter B, post).

Decision of the COURT OF CRIMINAL APPEAL (sub nom. *R. v. Shaw*) ([1961] 1 All E.R. 330) affirmed.

[**Editorial Note.** On the approach that should be made towards relating the application of common law offences to the changing standards of life in succeeding generations, reference may be made particularly to the opinions of VISCOUNT SIMONDS at p. 452, letter G, to p. 453, letter B, post, and of LORD TUCKER, citing per PARKE, J., in *Mirehouse v. Rennell* ((1833), 1 Cl. & Fin. at p. 546), at p. 465, letter H, to p. 466, letter B, post.

As to criminal conspiracy affecting public morals and decency, see 10 HALSBURY'S LAWS (3rd Edn.) 313, para. 570, note (e); and for cases on the subject, see 14 DIGEST (Repl.) 129, 130, 916-919.

As to living on immoral earnings, see 10 HALSBURY'S LAWS (3rd Edn.) 676, para. 1294; and for cases on the subject, see 15 DIGEST (Repl.) 1023, 1024, 10,052-10,057.

For the Sexual Offences Act, 1956, s. 30, see 36 HALSBURY'S STATUTES (2nd Edn.) 232.

For the Obscene Publications Act, 1959, s. 2, see 39 HALSBURY'S STATUTES (2nd Edn.) 269.]

Cases referred to:

Bowman v. Secular Society, Ltd., [1917] A.C. 406; 86 L.J.Ch. 568; 117 L.T. 161; 15 Digest (Repl.) 880, 8489.

Calvert v. Mayes, [1954] 1 All E.R. 41; [1954] 1 Q.B. 342; 118 J.P. 76; [1954] 2 W.L.R. 18; 15 Digest (Repl.) 1023, 10,053.

Crofter Hand Woven Harris Tweed Co., Ltd. v. Veitch, [1942] 1 All E.R. 142; [1942] A.C. 435; 111 L.J.P.C. 17; 166 L.T. 172; 2nd Digest Supp.

Grey's (Lord) Case, (1682), 9 State Tr. 127; Skin. 61; 90 E.R. 29; 14 Digest (Repl.) 129, 916.

Jones v. Randall, (1774), 1 Cowp. 17; Lofft 383; 98 E.R. 944, 706; 22 Digest (Repl.) 289, 2942.

Mirehouse v. Rennell, (1833), 1 Cl. & Fin. 527; 7 Bli. N.S. 241; 8 Bing. 490; 1 Moo. & S. 683; 6 E.R. 1015; 19 Digest 229, 70.

Mogul S.S. Co. v. McGregor, Gow & Co., [1892] A.C. 25; 61 L.J.Q.B. 295; 66 L.T. 1; 56 J.P. 101; 7 Asp. M.L.C. 120; 43 Digest 10, 51.

Pearce v. Brooks, (1866), L.R. 1 Exch. 213; 35 L.J.Ex. 134; 14 L.T. 288; 30 J.P. 295; 12 Digest (Repl.) 294, 2264.

Quinn v. Leathem, [1901] A.C. 495; 70 L.J.P.C. 76; 85 L.T. 289; 65 J.P. 708; 14 Digest (Repl.) 123, 860.

R. v. Bassey, (1931), 47 T.L.R. 222; 22 Cr. App. Rep. 160; 14 Digest (Repl.) 129, 911.

R. v. Berg, Britt, Carré & Lummies, (1927), 20 Cr. App. Rep. 38; 15 Digest (Repl.) 902, 8702.

R. v. Brailsford, [1905] 2 K.B. 730; 75 L.J.K.B. 64; 93 L.T. 401; 69 J.P. 370; 14 Digest (Repl.) 129, 909.

R. v. Curl, (1727), 2 Stra. 788; 1 Barn. K.B. 29; 17 State Tr. 153; 93 E.R. 849; 15 Digest (Repl.) 895, 8624.

R. v. Dale, (1960), Central Criminal Court, unreported.

R. v. Delaval, (1763), 3 Burr. 1434; 1 Wm. Bl. 439; 97 E.R. 913; 14 Digest (Repl.) 129, 918.

R. v. Higgins, (1801), 2 East, 5; 102 E.R. 269; 14 Digest (Repl.) 119, 822.

R. v. Howell, (1864), 4 F. & F. 160; 176 E.R. 513; 14 Digest (Repl.) 129, 919.

R. v. Mears & Chalk, (1851), 2 Den. 79; 20 L.J.M.C. 59; 16 L.T.O.S. 515; 15 J.P. 81; 4 Cox, C.C. 423; 169 E.R. 426; 14 Digest (Repl.) 129, 917.

R. v. Newland, [1953] 2 All E.R. 1067; [1954] 1 Q.B. 158; 117 J.P. 573; 37 Cr. App. Rep. 154; [1953] 3 W.L.R. 826; 15 Digest (Repl.) 913, 8787.

- R. v. Porter*, [1910] 1 K.B. 369; 79 L.J.K.B. 241; 102 L.T. 255; 74 J.P. 159; A 22 Cox, C.C. 295; 3 Cr. App. Rep. 237; 14 Digest (Repl.) 129, 908.
- R. v. Saunders*, (1875), 1 Q.B.D. 15; 45 L.J.M.C. 11; 33 L.T. 677; 13 Cox, C.C. 116; 15 Digest (Repl.) 894, 8620.
- R. v. Sidley*, (1863), 1 Sid. 168; 82 E.R. 1036; sub nom. *Sydlyes' Case*, 1 Keb. 620; 83 E.R. 1146; 15 Digest (Repl.) 892, 8596.
- R. v. Silver*, [1956] 1 All E.R. 716; 120 J.P. 233; 40 Cr. App. Rep. 32; [1956] B 1 W.L.R. 281; 3rd Digest Supp.
- R. v. Thomas*, [1957] 2 All E.R. 181; 41 Cr. App. Rep. 117; [1957] 1 W.L.R. 747; *affd.* C.C.A., [1957] 2 All E.R. 342; 121 J.P. 338; 41 Cr. App. Rep. 121; [1957] 1 W.L.R. 1091; 3rd Digest Supp.
- Richardson v. Mellish*, (1824), 2 Bing. 229; 9 Moore C.P. 435; 1 C. & P. 241; 3 L.J.O.S.C.P. 265; 130 E.R. 294; 12 Digest (Repl.) 270, 2078.
- Upfill v. Wright*, [1911] 1 K.B. 506; 80 L.J.K.B. 254; 103 L.T. 834; 12 Digest (Repl.) 309, 2379.

Appeal.

Appeal by Frederick Charles Shaw from an order of the Court of Criminal Appeal (LORD PARKER, C.J., STREATFIELD and ASHWORTH, JJ.), dated Dec. 21, 1960, and reported sub nom. *R. v. Shaw*, [1961] 1 All E.R. 330, dismissing the appellant's appeal against his conviction at the Central Criminal Court on Sept. 21, 1960, before the commissioner (Judge MAXWELL-TURNER) and a jury on three counts, namely: 1. Conspiring to corrupt public morals by means of a magazine entitled "Ladies Directory"; 2. Living wholly or in part on the earnings of prostitution, contrary to s. 30 (1) of the Sexual Offences Act, 1956; 3. Publishing an obscene article, namely, an edition of "Ladies Directory No. 9" contrary to s. 2 (1) of the Obscene Publications Act, 1959. Leave to appeal to the House of Lords was granted by the Court of Criminal Appeal in respect of counts 1 and 2. The facts are set out in the opinion of VISCOUNT SIMONDS.

W. R. Rees-Davies and P. S. C. Lewis for the appellant.

The Solicitor-General (Sir Jocelyn Simon, Q.C.), *J. H. Buzzard* and *M. D. L. Worsley* for the Crown.

Their Lordships took time for consideration.

May 4. The following opinions were read.

VISCOUNT SIMONDS: My Lords, the appellant, Frederick Charles Shaw, was, on Sept. 21, 1960, convicted at the Central Criminal Court on an indictment containing three counts which alleged the following offences:— (i) conspiracy to corrupt public morals; (ii) living on the earnings of prostitution contrary to s. 30 of the Sexual Offences Act, 1956; and (iii) publishing an obscene publication contrary to s. 2 of the Obscene Publications Act, 1959. He appealed against conviction to the Court of Criminal Appeal on all three counts. His appeal was dismissed, but that court certified that points of law of general public importance were involved in the decisions on the first and second counts and gave him leave to appeal on them to this House. They refused so to certify in respect of the third count. I propose, my Lords, to deal in this opinion in the first place with the second count, for I have had the privilege of reading the speech which my noble and learned friend, LORD TUCKER, is about to deliver on the first count and so fully agree with him that I find it convenient to add some general observations which can be regarded as supplementary to what he says.

My Lords, the particulars of the offence charged in the second count were that, on divers days unknown between Oct. 1, 1959, and July 23, 1960, the appellant lived wholly or in part on the earnings of prostitution. Before I refer to the statute on which the charge is based, I must refer briefly to the relevant facts. When the *Street Offences Act, 1959*, came into operation, it was no longer possible for prostitutes to ply their trade by soliciting in the streets, and it became necessary for them to find some other means of advertising the services that

A they were prepared to render. It occurred to the appellant that he could with advantage to himself assist them to this end. The device that he adopted was to publish on divers days between the dates mentioned in the particulars of offences a magazine or booklet which was called "Ladies Directory". It contained the names, addresses and telephone numbers of prostitutes with photographs of nude female figures, and in some cases details which conveyed
 B to initiates willingness to indulge not only in ordinary sexual intercourse but also in various perverse practices. Learned counsel for the appellant made some point of the fact that the magazine contained also advertisements of models and clubs. I, therefore, mention it, but I do not think that it is of any importance. The profit derived by the appellant from this enterprise was twofold. From the prostitutes whom he canvassed and advertised, he received
 C fees ranging from two guineas for quarter-page advertisements without photographs to ten guineas for full-page advertisements with photographs. There was evidence that one issue produced from this source a sum of £250 19s. Secondly, the appellant sold copies of the magazine to a Mr. Blass, the proprietor of a sweet and cigarette kiosk, and, perhaps, though this is not very clear, to other persons at a price of 5s. per copy. The weekly sales of Mr. Blass were said
 D by him to have started at thirty to forty and eventually reached about eighty. It is manifest that the appellant received substantial sums from his undertaking. It is also clear from the evidence that the prostitutes paid for advertisement out of the earnings of their profession and that they or some of them obtained custom by means of it.

E It is in these circumstances that the question must be asked whether the appellant lived wholly or in part on the earnings of prostitution, and I turn at once to the statute that makes it an offence to do so. That is now s. 30 of the Sexual Offences Act, 1956, which is as follows:

"(1) It is an offence for a man knowingly to live wholly or in part on the earnings of prostitution.

F "(2) For the purposes of this section a man who lives with or is habitually in the company of a prostitute, or who exercises control, direction or influence over a prostitute's movements in a way which shows he is aiding, abetting or compelling her prostitution with others, shall be presumed to be knowingly living on the earnings of prostitution, unless he proves the contrary."

G This section stems from s. 1 of the Vagrancy Act, 1898, as amended by s. 7 of the Criminal Law Amendment Act, 1912. The earlier of these two Acts was itself an amendment of the Vagrancy Act, 1824, but I do not think that any assistance is to be derived from a consideration of its ancestry. The Act of 1824 may be regarded as a convenient peg on which to hang divers offences to which the words "vagabondage and roguery" would not be entirely appropriate.
 H Nor do I think that sub-s. (2) can throw much light on the meaning of the words "live ... on the earnings of prostitution" in sub-s. (1). It was at one time argued that the two subsections were co-extensive, but this argument was abandoned by counsel who presented the appellant's case with candour and ability. It is, I think, clear that the second subsection is probative and explanatory of the first but is not an exhaustive definition of it.

I What, then, is meant by living in whole or in part on the earnings of prostitution? It was not contended by the Crown that these words in their context bear the very wide meaning which might possibly be ascribed to them. The subsection does not cover every person whose livelihood depends in whole or in part on payment to him by prostitutes for services rendered or goods supplied, clear though it may be that payment is made out of the earnings of prostitution. The grocer who supplies groceries, the doctor or lawyer who renders professional service, to a prostitute do not commit an offence under the Act. It is not to be supposed that it is its policy to deny to her the necessities or even the luxuries

of life if she can pay for them. I would say, however, that, though a person who is paid for goods or services out of the earnings of prostitution does not necessarily commit an offence under the Act, yet a person does not necessarily escape from its provisions by receiving payment for the goods or services that he supplies to a prostitute. The argument that such a person lives on his own earnings not on hers is inconclusive. To give effect to it would be to exclude from the operation of the Act the very persons, the tout, the bully or protector, whom it was designed to catch. For they would surely claim that they served the prostitute, however despicable their service might seem to others. Somewhere the line must be drawn, and I do not find it easy to draw it. It is not enough to say that here are plain English words and that it must be left to a jury to say in regard to any particular conduct whether the statutory offence has been committed. I have said enough, for instance, to show that the wider meaning of which the words are clearly capable is inadmissible. The jury should be directed that some limitation must be put on the words. What is the limitation?

My Lords, I think that (apart from the operation of sub-s. (2)) a person may fairly be said to be living in whole or in part on the earnings of prostitution if he is paid by prostitutes for goods or services supplied by him to them for the purpose of their prostitution which he would not supply but for the fact that they were prostitutes. I emphasise the negative part of this proposition, for I wish to distinguish beyond all misconception such a case from that in which the service supplied could be supplied to a woman whether a prostitute or not. It may be that circumstances will be equivocal, though no example readily occurs to me. But a case which is beyond all doubt is one where the service is of its nature referable to prostitution and to nothing else. No better example of this could be found than payment by a prostitute for advertisement of her readiness to prostitute herself. I do not doubt that a person who makes a business of accepting such advertisements for reward knowingly lives in part on the earnings of prostitution. In one of the cases to which I shall refer, a person receiving payment from a prostitute for services rendered by him is described as her coadjutor and in another as trading in prostitution. These expressions indicate the distinction that I have in mind, though neither of them accurately defines a legal relation. Thus, a man who advertises prostitutes and receives payment from them for doing so embarks with them on a joint venture, the object of which is that they may earn money by prostitution and in turn pay him for his services. No doubt, all that he is paid is not profit, for he has the expenses of publishing. But his net reward is the direct and intended result of their prostitution. If he had no other means of livelihood it would be truly said that he lived on their earnings; if he had other means, he would be doing so in part.

I must add a few words on the authorities that were called to our attention. In *R. v. Thomas* (1), the accused, who was charged under the Vagrancy Act, 1898, as amended by the Act of 1912, had agreed with a woman whom he knew to be a convicted prostitute that she should have the use of a room between the hours of 9 p.m. and 2 a.m. at a charge of £3 per night. He was convicted on a direction by PILCHER, J., which was subsequently approved by the Court of Criminal Appeal. The learned judge said (2) that

"... if there is evidence that the accused has let a room, or a flat, at a grossly inflated rent to a prostitute for the express purpose of allowing her to ply her immoral trade, then it is for the jury to determine on the facts of each particular case, whether the accused is in fact knowingly living wholly or in part on the earnings of prostitution."

(1) [1957] 2 All E.R. 181; *affd.* C.C.A., [1957] 2 All E.R. 342.

(2) [1957] 2 All E.R. at pp. 182, 183.

- A The only criticism that I would make of this direction is that it does not distinguish between rooms and a flat, and in that case that it attaches undue importance to the rent being "grossly inflated" or, as is sometimes said, "exorbitant". It appears to me that, whatever the rent, the jury might have concluded that the accommodation was provided for no other purpose than prostitution, and would not have been provided for her unless she was a prostitute.
- B The exorbitance of the rent would, in my opinion, become important only if there had been evidence that this sort of accommodation was a necessity or luxury commonly required by other women for other purposes than prostitution, a thing which is not easily imaginable. In reaching this conclusion, PILCHER, J., had found it necessary to differ from a ruling given by JUDGE MAUDE at the Central Criminal Court in *R. v. Silver* (3), and in this, too, his
- C decision was approved by the Court of Criminal Appeal. JUDGE MAUDE in that case held that it was not an offence for landlords and their agents to let flats to prostitutes at what were described as exorbitant rents and by the learned judge as "prostitute rents" knowing that they would be used for the purpose of prostitution. I find this a more difficult case. If premises are let only for the purpose of prostitution and not also for occupation by the prostitute, as was the
- D room in *R. v. Thomas* (4), it is easy to conclude that an offence has been committed. But, if the flat is let for occupation, I am not prepared to say that the landlord commits an offence merely because he knows that his tenant is a prostitute and must be assumed to know that she will there ply her trade. The prostitute must live somewhere just as she must eat and drink to live. It is, I think, too fine a distinction to say that a grocer supplying her with groceries
- E does not, but a landlord letting her a flat does, commit an offence. It is true that the flat is the scene of her prostitution, but, if she did not eat and drink, she would not have a body to prostitute. Therefore, in such a case as *R. v. Silver* (3) (where the flats appear to have been let for occupation), the landlord can only be convicted of an offence on the ground that the rent is exorbitant. This may be a tenable view on the footing that, to the extent to which the rent is
- F in excess of normal, he extorts it from the prostitute on no other ground than that she is a prostitute. He may be said, therefore, knowingly to live or, as was said in the course of the argument, to prey on her earnings. But, as I have said, I find this a difficult case and would express no final opinion on it. A third case to which I would refer is *Calvert v. Mayes* (5). It was, I think, a very clear case, the substantial point in which was that the accused received payment not
- G from the prostitutes but from the American airmen who availed themselves of their services. The argument that for this reason he did not live in part on their earnings was rightly rejected by the Court of Criminal Appeal. It is interesting in that SELLERS, J., in the course of his judgment referred to the accused as (6) "trading in prostitution", an expression which, as I have already pointed out, is an apt, if colloquial, way of describing a person who lives on the earnings of
- H prostitution. Your Lordships were also referred to some civil cases, such as *Pearce v. Brooks* (7) and *Upfill v. Wright* (8). They, I think, give little assistance on the interpretation of the relevant words in the Sexual Offences Act, 1956. But it is at least satisfactory to know that the conclusion, to which your Lordships come on that Act, marches with the view taken in civil cases of a contract made for an immoral purpose.
- I My Lords, as I have already said, the first count in the indictment is "Conspiracy to corrupt public morals", and the particulars of offence will have sufficiently appeared. I am concerned only to assert what was vigorously denied by counsel for the appellant, that such an offence is known to the common law and that it was open to the jury to find on the facts of this case that the

* (3) [1956] 1 All E.R. 716.

(4) [1957] 2 All E.R. 181.

(5) [1954] 1 All E.R. 41; [1954] 1 Q.B. 342.

(6) [1954] 1 All E.R. at p. 46; [1954] 1 Q.B. at p. 349.

(7) (1866), L.R. 1 Exch. 213.

(8) [1911] 1 K.B. 506.

appellant was guilty of such an offence. I must say categorically that, if it were not so, Her Majesty's courts would strangely have failed in their duty as servants and guardians of the common law. Need I say, my Lords, that I am no advocate of the right of the judges to create new criminal offences? I will repeat well-known words:

"Amongst many other points of happiness and freedom which your Majesty's subjects have enjoyed there is none which they have accounted more dear and precious than this, to be guided and governed by certain rules of law which giveth both to the head and members that which of right belongeth to them and not by any arbitrary or uncertain form of government."

These words are as true today as they were in the seventeenth century and command the allegiance of us all. But I am at a loss to understand how it can be said either that the law does not recognise a conspiracy to corrupt public morals or that, though there may not be an exact precedent for such a conspiracy as this case reveals, it does not fall fairly within the general words by which it is described. I do not propose to examine all the relevant authorities. That will be done by my noble and learned friend. The fallacy in the argument that was addressed to us lay in the attempt to exclude from the scope of general words acts well calculated to corrupt public morals just because they had not been committed or had not been brought to the notice of the court before. It is not thus that the common law has developed. We are, perhaps, more accustomed to hear this matter discussed on the question whether such and such a transaction is contrary to public policy. At once the controversy arises. On the one hand it is said that it is not possible in the twentieth century for the court to create a new head of public policy, on the other it is said that this is but a new example of a well-established head. In the sphere of criminal law, I entertain no doubt that there remains in the courts of law a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the state, and that it is their duty to guard it against attacks which may be the more insidious because they are novel and unprepared for. That is the broad head (call it public policy if you wish) within which the present indictment falls. It matters little what label is given to the offending act. To one of your Lordships it may appear an affront to public decency, to another, considering that it may succeed in its obvious intention of provoking libidinous desires, it will seem a corruption of public morals. Yet others may deem it aptly described as the creation of a public mischief or the undermining of moral conduct. The same act will not in all ages be regarded in the same way. The law must be related to the changing standards of life, not yielding to every shifting impulse of the popular will but having regard to fundamental assessments of human values and the purposes of society. Today a denial of the fundamental Christian doctrine, which in past centuries would have been regarded by the ecclesiastical courts as heresy and by the common law as blasphemy, will no longer be an offence if the decencies of controversy are observed. When LORD MANSFIELD, speaking long after the Star Chamber had been abolished, said (9) that the Court of King's Bench was the *custos morum* of the people and had the superintendency of offences contra bonos mores, he was asserting, as I now assert, that there is in that court a residual power, where no statute has yet intervened to supersede the common law, to superintend those offences which are prejudicial to the public welfare. Such occasions will be rare, for Parliament has not been slow to legislate when attention has been sufficiently aroused. But gaps remain and will always remain since no one can foresee every way in which the wickedness of man may disrupt the order of society. Let me take a single instance to which my noble and learned friend,

(9) In *R. v. Delaval*, (1763), 3 Burr. at p. 1438,

A LORD TUCKER, refers. Let it be supposed that, at some future, perhaps, early, date homosexual practices between adult consenting males are no longer a crime. Would it not be an offence if, even without obscenity, such practices were publicly advocated and encouraged by pamphlet and advertisement? Or must we wait until Parliament finds time to deal with such conduct? I say, my Lords, that, if the common law is powerless in such an event, then we should no longer do

B her reverence. But I say that her hand is still powerful and that it is for Her Majesty's judges to play the part which LORD MANSFIELD pointed out to them.

I have so far paid little regard to the fact that the charge here is of conspiracy. But, if I have correctly described the conduct of the appellant, it is an irresistible inference that a conspiracy between him and others to do such acts is indictable. It is irrelevant to this charge that s. 2 (4) of the Obscene Publications Act, 1959,

C might bar proceedings against him if no conspiracy were alleged. It may be thought superfluous, where that Act can be invoked, to bring a charge also of conspiracy to corrupt public morals, but I can well understand the desirability of doing so where a doubt exists whether obscenity within the meaning of the Act can be proved.

I will say a final word on an aspect of the case which was urged by counsel.

D No one doubts—and I have put it in the forefront of this opinion—that certainty is a most desirable attribute of the criminal and civil law alike. Nevertheless, there are matters which must ultimately depend on the opinion of a jury. In the civil law I will take an example which comes, perhaps, nearest to the criminal law—the tort of negligence. It is for a jury to decide not only whether the defendant has committed the act complained of but whether, in doing it, he has

E fallen short of the standard of care which the circumstances require. Till their verdict is given, it is uncertain what the law requires. The same branch of the civil law supplies another interesting analogy. For, though in the Factory Acts and the regulations made under them the measure of care required of an employer is defined in the greatest detail, no one supposes that he may not be guilty of negligence in a manner unforeseen and unprovided for. That will be a

F matter for the jury to decide. There are still, as has recently been said, “unravished remnants of the common law”. So, in the case of a charge of conspiracy to corrupt public morals, the uncertainty that necessarily arises from the vagueness of general words can only be resolved by the opinion of twelve chosen men and women. I am content to leave it to them.

The appeal on both counts should, in my opinion, be dismissed.

G LORD REID: My Lords, I agree with my noble and learned friend that the appeal on the second count ought to be dismissed, but I regret that I am unable to concur in his reasons and I feel bound to express my own view because, in my opinion, those reasons could result in cases not within the scope of the Act being brought in and cases within its scope being left out. I would begin

H by asking two questions: What was the mischief which Parliament must have had in mind? and: What is the natural meaning of the words “to live . . . on the earnings of prostitution”?

The mischief is plain enough. It is well known that there were, and are, men who live parasitically on prostitutes and their earnings. They may be welcome and merely cohabit, or they may bully women into earning money in this way. They prey or batten on the women. Such men are clearly living on the earnings of prostitution; if they have or earn some other income, then they are living in part on such earnings. The question, to my mind, is how

I much further the Sexual Offences Act, 1956, must be held to go, bearing in mind that it is a penal statute and, therefore, should not be extended to apply to cases which its terms do not clearly cover. Such men may render services as protectors or as touts, but that cannot make any difference, even if their relationship were dressed up as a contract of service; and a man could not escape because he acted in some such capacity for a number of women. His occupation would still be

parasitic; it would not exist if the women were not prostitutes.¹ It appears to me that the accused in this case comes well within this class. His occupation of gathering and publishing these advertisements would not exist if his customers were not prostitutes. He was really no more than a tout using this means of bringing men to the prostitutes from whom he received money. A

If this were an ordinary case, I would be content to leave it there because, if I go further, I am in effect pre-judging cases which are not before us and of which the facts may be beyond the sphere of common knowledge; but I appreciate the desirability of giving some general guidance as to the meaning of this Act. So I pass to my second question, the natural meaning of the words in the Act. "living on" normally, I think, connotes living parasitically. It could have a wider meaning but, if it is to be applied at all to those who are in no sense parasites, then I think its meaning must be the same, whether we are considering the earnings of prostitution or of any other occupation or trade. If a merchant sells goods to tradesmen, is he living on the earnings of their trades? or if a landlord lets premises for business purposes, is he living on the earnings of those businesses? or if he lets to a man of leisure, is he living on that man's dividends? Those are the sources of the rent which he receives, but I do not think that one would normally say that he is living on those sources. It is not an impossible use of the words—only unusual. And a penal statute ought not to be widened by reading its words in an unusual sense unless there is very good reason for doing so. D And would it make any difference if the merchant supplied goods which could only be used for the purposes of the purchaser's trade or which he knew that the purchaser could not require if he were not engaged in that trade? I do not think so. E I find it impossible to say that a merchant who sold goods to a farmer would be living on the earnings of agriculture if the goods could only be used for agriculture, but would not be living on the earnings of agriculture if the goods, though paid for out of the profits of agriculture, were for purely personal use or might be used either for agriculture or for some other purpose. Why, then, should the words mean something different when we are dealing with the earnings of prostitution? F One reason would be that the context requires it, but I find nothing in this context to require it. Another might be that otherwise cases plainly within the mischief would escape. But, even if that were a good reason, I do not think that it applies here.

What kind of case would escape if one takes what I think is the natural meaning of the words? I take first the landlord. Suppose a landlord lets a flat to an apparently respectable woman, and later discovers that she is carrying on prostitution there as her means of livelihood. Is he thereafter knowingly living on the earnings of prostitution? And would it make a difference if, when he let it, he either suspected or expected that she would use it for prostitution? We were informed that prostitutes sometimes live in one flat and use another for prostitution, and sometimes they live and carry on their trade in the same place. Is a landlord guilty in the former case but innocent in the latter? And if, in the latter case, the woman decides to go somewhere else to live, does the landlord thereupon become guilty if he continues to take rent from her? I can find nothing in the words or the policy of the Act to require us to pick and choose in such cases. G But I am far from saying that a landlord can never be guilty of living on the immoral earnings of his tenant. To my mind, the most obvious case is where he takes advantage of her difficulty in getting accommodation to extract from her in the guise of rent sums beyond any normal commercial rent. I In reality, he is not then merely acting as landlord; he is making her engage in a joint adventure with him which will bring to him a part of her immoral earnings over and above rent. And there may well be other ways in which he can make himself a participator in her earnings and not merely a recipient of rent. The line may sometimes be difficult to draw but juries often have to decide broad questions of that kind.

A Then I take the tradesman. Is the criterion to be whether he supplied goods or services which he knew that this woman would not require if she were not a prostitute, or is it to be whether the goods or services are of a kind which no honest woman would require? I doubt very much whether either distinction would be easy to draw in practice. Presumably Brooks in *Pearce v. Brooks* (10) would not have required the brougham if she had not been a prostitute. Whether
 B the brougham was of a kind which some honest woman might have required I do not know. If a case of that kind occurred today, would it depend on such niceties whether Pearce was living on Brooks' immoral earnings. We were informed that sometimes decorators or furnishers are asked to do or supply something which it is at least unlikely that an honest woman would require.
 C But it is, perhaps, difficult to set limits to honest eccentricity. I suppose there might be a tradesman who was as purely parasitical as the accused, and there might be a tradesman who used his trade as a means to become a joint adventurer with prostitutes. But, leaving such possible cases aside, I could not hold that a tradesman who supplies goods or services to a prostitute in the ordinary course of his business is living on her immoral earnings. I cannot find or think of any case which cannot be adequately dealt with on what I think to be the ordinary
 D and natural meaning of the words of the Act.

My Lords, I turn to the first count. With regard to it, I have had the advantage of reading the speech about to be delivered by my noble and learned friend, LORD TUCKER, but I regret to say that I find myself in fundamental disagreement with it. I must, therefore, state my reasons with some particularity. In my opinion, there is no such general offence known to the law as conspiracy
 E to corrupt public morals. Undoubtedly there is an offence of criminal conspiracy and undoubtedly it is of fairly wide scope. In my view, its scope cannot be determined without having regard first to the history of the matter and then to the broad general principles which have generally been thought to underlie our system of law and government and in particular our system of criminal law.

It appears to be generally accepted that the offence of criminal conspiracy
 F was the creature of the Star Chamber. So far as I am able to judge, the summary in KENNY'S OUTLINES OF CRIMINAL LAW (17th Edn.), s. 59, is a fair one. There it is said that the criminal side of conspiracy was

"... emphasised by the Star Chamber, which recognised its possibilities as an engine of government and moulded it into a substantive offence of wide scope, whose attractions were such that its principles were gradually adopted
 G by the common law courts..."

The Star Chamber, perhaps, had more merits than its detractors will admit, but its methods and principles were superseded and what it did is of no authority today. The question is how far the common law courts in fact went in borrowing
 V from it. I think that LORD GODDARD, C.J., was repeating the generally accepted view when he said: "A conspiracy consists of agreeing or acting in concert to achieve an unlawful act or to do a lawful act by unlawful means" (*R. v. Newland* (11)). But what is an "unlawful act"? To commit a crime—yes, but what about offences which can only be dealt with summarily and punished lightly; they are certainly unlawful acts but (I quote from the LAW OF CRIMINAL CONSPIRACIES AND AGREEMENTS by R. S. WRIGHT, p. 83) they
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"are not in themselves of grave enough consequence to be matters for indictment; and, if so, it must in general be immaterial whether the results are produced by one person or by two or more persons. To permit two persons to be indicted for a conspiracy to make a slide in the street of a town, or to catch hedge sparrows in April, would be to destroy that distinction between crimes and minor offences which in every country it is held important to preserve."
 I

(10) (1866), L.R. 1 Exch. 213.

(11) [1953] 2 All E.R. at p. 1071; [1954] 1 Q.B. at p. 166.

To commit a tort—yes in certain cases, but for somewhat similar reasons it seems to be at least doubtful whether it is an offence to conspire to commit a tort which is neither malicious nor fraudulent nor accompanied by violence. Then there is undoubtedly a third class of act which an individual can do with impunity but a combination cannot. Perhaps the best known example is conspiring to injure a man in his trade if done without justification. I need only refer to the series of cases in this House from *Mogul S.S. Co. v. McGregor, Gow & Co.* (12) to *Crofter Hand Woven Harris Tweed Co., Ltd. v. Veitch* (13). No one has ever attempted to define what makes an act “unlawful” so as to bring it within this class, the law seems to be haphazard depending largely on historical accident. Perhaps as good a summary as any is that which goes back to early editions of Professor Kenny’s book (now s. 451):

“... certain other acts ... which ... are not breaches of law at all, but which nevertheless are outrageously immoral or else are, in some way, extremely injurious to the public.”

One thing does, however, appear to be reasonably clear. So far as I have been able to trace, all who took part in the *Mogul S.S. Co.* series of cases (12) and who mentioned the matter, except LORD ESHER, M.R., were of opinion that to make or carry out a contract which is unenforceable by reason of immorality or otherwise is not an unlawful act in this sense.

There are two competing views. One is that conspiring to corrupt public morals is only one facet of a still more general offence, conspiracy to effect public mischief; and that, like the categories of negligence, the categories of public mischief are never closed. The other is that, whatever may have been done two or three centuries ago, we ought not now to extend the doctrine further than it has already been carried by the common law courts. Of course I do not mean that it should only be applied in circumstances precisely similar to those in some decided case. Decisions are always authority for other cases which are reasonably analogous and are not properly distinguishable. But we ought not to extend the doctrine to new fields. I agree with R. S. WRIGHT, when he says (LAW OF CRIMINAL CONSPIRACIES AND AGREEMENTS, p. 86):

“there appear to be great theoretical objections to any general rule that agreement may make punishable that which ought not to be punished in the absence of agreement.”

And I think, or at least I hope, that it is now established that the courts cannot create new offences by individuals. So far at least I have the authority of LORD GODDARD, C.J., in delivering the opinion of the court in *R. v. Newland* (14):

“The dictum in *R. v. Higgins* (15) was that all offences of a public nature, that is, all such acts or attempts as tend to the prejudice of the public are indictable, but no other member of the court stated the law in such wide terms. It is the breadth of that dictum that was so strongly criticised by SIR FITZJAMES STEPHEN in the passage in his HISTORY OF THE CRIMINAL LAW [Vol. 3, p. 359] and also by DR. STALYBRASS in 34 L.Q.R., p. 183. In effect, it would leave it to the judges to declare new crimes and enable them to hold anything which they considered prejudicial to the community to be a misdemeanour. However beneficial that might have been in days when Parliament met seldom, or at least only at long intervals, it surely is now the province of the legislature and not of the judiciary to create new criminal offences.”

Every argument against creating new offences by an individual appears to me to be equally valid against creating new offences by a combination of individuals. But there is this historical difference. The judges appear to have continued

(12) [1892] A.C. 25; 7 Asp. M.L.C. 120.

(13) [1942] 1 All E.R. 142; [1942] A.C. 435.

(14) [1953] 2 All E.R. at p. 1072; [1954] 1 Q.B. at p. 167. (15) (1801), 2 East, 5.

A to extend the law of conspiracy after they had ceased to extend offences by individuals. Again I quote from R. S. WRIGHT (LAW OF CRIMINAL CONSPIRACIES AND AGREEMENTS, p. 88):

B "In an imperfect system of criminal law the doctrine of criminal agreements for acts not criminal may be of great practical value for the punishment of persons for acts which are not, but which ought to be made punishable irrespectively of agreement."

C Even if there is still a vestigial power of this kind, it ought not, in my view, to be used unless there appears to be general agreement that the offence to which it is applied ought to be criminal if committed by an individual. Notoriously there are wide differences of opinion today how far the law ought to punish immoral acts which are not done in the face of the public. Some think that the law already goes too far, some that it does not go far enough. Parliament is the proper place, and I am firmly of opinion the only proper place, to settle that. When there is sufficient support from public opinion, Parliament does not hesitate to intervene. Where Parliament fears to tread it is not for the courts to rush in.

D Before turning to the question whether the authorities on a fair construction warrant indictment on this charge, I must notice the offence of conspiring to effect public mischief. The most recent authority is *R. v. Newland* (16). There I do not think that the court went beyond the ambit of earlier decisions. One of the early uses of this doctrine of conspiracy appears to have been to deal with various forms of cheating which no one would say ought not to be punished but which the common law had not made offences if done by an individual. Newland had conspired to obtain advantage for himself by using false and deceptive documents and devices to obtain for sale on the home market goods which manufacturers were only allowed to sell for export. LORD GODDARD, C.J., said (17):

E "It is enough to show that they [the suppliers] would not have acted as they did but for the false representations and dishonesty of the persons who obtained the goods for them."

F In my judgment, this House is in no way bound and ought not to sanction the extension of "public mischief" to any new field, and certainly not if such extension would be in any way controversial. Public mischief is the criminal counterpart of public policy, and the criminal law ought to be even more hesitant than the civil law in founding on it in some new aspect. I think that the following comments are as valid today as they were in 1824:

G "I am not much disposed to yield to arguments of public policy: I think the courts of Westminster Hall . . . have gone much further than they were warranted in going in questions of policy: they have taken on themselves, sometimes, to decide doubtful questions of policy; and they are always in danger of so doing, because courts of law look only at the particular case, and have not the means of bringing before them all those considerations which ought to enter into the judgment of those who decide on questions of policy."

(per BEST, C.J., in *Richardson v. Mellish* (18)).

I "I . . . protest . . . against arguing too strongly upon public policy;—it is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail."

(per BURROUGH, J. (19)).

It may, perhaps, be said that there is no question here of creating a new offence

(16) [1953] 2 All E.R. 1067; [1954] 1 Q.B. 158.

(17) [1953] 2 All E.R. at p. 1070; [1954] 1 Q.B. at p. 164.

(18) (1824), 2 Bing. at p. 242.

(19) (1824), 2 Bing. at p. 252.

because there is only one offence of conspiracy—agreeing or acting in concert to do an unlawful act. In a technical sense, that is true. But, in order to extend this offence to a new field, the court would have to create a new unlawful act; it would have to hold that conduct of a kind which has not hitherto been unlawful in this sense must now be held to be unlawful. It appears to me that the objections to that are just as powerful as the objections to creating a new offence. The difference is a matter of words; the essence of the matter is that a type of conduct for the punishment of which there is no previous authority now for the first time becomes punishable solely by a decision of a court. A B

I, therefore, proceed to consider the authorities on the footing that the courts cannot now create a new offence or a new kind of criminal conspiracy, or at least that, if any such power still exists, this is not a proper sphere in which to exercise it. The majority of the cases cited to us were instances of one or other of four well-established offences; offences which can be committed by an individual as well as by a combination. They are publication of an obscene libel, indecent exposure, exhibition in public of indecent things or acts, and keeping a disorderly house. I shall deal with the relevance of these in a few moments when I come to the facts of the present case. But there is a group of four cases which are more directly relevant here—*Lord Grey's Case* (20), *R. v. Delaval* (21), *R. v. Mears & Chalk* (22), and *R. v. Howell* (23). These were all cases of conspiracy to seduce a girl under twenty-one or to induce a young girl to become a prostitute. I would agree that they are good authority for it being criminal to conspire to seduce a young girl. But I would not agree that, by analogy, they must be held to be good authority for it being criminal to conspire to “seduce” a man of mature years. Indeed, I think that the judges who decided these cases would have been very surprised to learn that they had thereby decided that conspiring to seduce a man is a crime. And it must be observed that there was no public element in these cases; they were conspiracies to seduce a particular girl. So, if we are to proceed by analogy, it must be a crime today to conspire to seduce a particular man and the offence cannot be limited to a conspiracy to corrupt *public* morals. C D E

But in argument more stress was put on words which are reported to have been used by the judges than on the actual decisions, and in particular on the statement by LORD MANSFIELD (24) and others that the Court of King's Bench was *custos* or *ensor morum*. It was said that they thereby decided or recognised that any conspiracy to corrupt morals or, as the learned trial judge put it in the present case, “to lead morally astray,” was an indictable offence. I do not think so. As the reports of those days are not full reports of the judgments, we do not have the precise context, but I think it much more probable that these judges were intending to say that they then had power to create new offences, that this power extended to the moral field, and that the acts in these particular cases should be held to be punishable. It must be observed that these references to the court being censor or *custos morum* occur equally in decisions in cases of conspiracy and in cases against individuals. In the eighteenth century, courts created new offences in the field of morals both against individuals (see, for example, *R. v. Curl* (25)) and against combinations. So if, contrary to my view, the references established a general offence of conspiring to corrupt public morals, then surely they must also have established that it is a general offence for an individual to act so as to corrupt public morals or to attempt to do so. If it was established in the eighteenth century that there was a general offence of conspiring to corrupt public morals (or to lead members of the public morally astray), then, as the essence of criminal conspiracy is doing or agreeing to do an unlawful act, it must follow that for two centuries every act which has tended to lead members of the public astray morally has been an unlawful act, and the Crown's argument would apply equally to make unlawful every act which tends to lead a single F G H I

(20) (1682), 9 State Tr. 127.

(22) (1851), 4 Cox, C.C. 423.

(24) See *R. v. Delaval*, (1763), 3 Burr. at p. 1438.

(21) (1763), 3 Burr. 1434.

(23) (1864), 4 F. & F. 160.

(25) (1727), 2 Stra. 788.

A individual morally astray. In the unending controversy about the proper relationship between law and morals, no one seems to have suspected that. Hitherto I think there has been a wide measure of agreement with Professor Kenny's view that only *certain* acts which are *outrageously* immoral are unlawful in this sense.

I claim little knowledge of the history of English criminal law—any such
B knowledge that I may have is of a different system. But it seems that most crimes must have been the creation of judges of a remoter time, because Parliament played a comparatively small part and there was no reception of any foreign system. And it seems that they proceeded piecemeal, taking care, no doubt, not to move in advance of contemporary opinion, and that they did not first invent a general theory or a general offence and then apply it at once to a wide
C variety of particular cases. A somewhat similar situation arose in connexion with equally general statements by equally eminent judges that Christianity is part of the law of England. That was dealt with in this House in *Bowman v. Secular Society, Ltd.* (26), where it seems to me that more attention was paid to what the courts had in fact done than to the language that judges had used in doing it. But the best test appears to me to be to look at the views expressed by
D the authors and later editors of standard works on crime. Passages were cited to us from HAWKINS' PLEAS OF THE CROWN, EAST'S PLEAS OF THE CROWN, and BLACKSTONE'S COMMENTARIES, as well as from later standard works. None of them appears to have realised that any such general and far-reaching offence had been established. HAWKINS refers to open lewdness grossly scandalous (Vol. 1, p. 358), BLACKSTONE (Book IV, p. 64) to open and notorious lewdness,
E EAST to scandalous and open breaches of morality exhibited in the face of the people (Vol. 1, p. 3), and RUSSELL ON CRIME (11th Edn.) (Vol. 2, ch. 97) deals separately with each of the specific offences which I have already mentioned. We were referred to no passage supporting the view for which the Crown now contends and I cannot think that it is only now, after nearly two centuries, that it has been vouchsafed to us to discover the true meaning of these old cases.

F I must now deal with the particulars of the first count and the facts proved to see whether they disclose that the appellant committed some offence of more limited scope than conspiracy to corrupt public morals. It is alleged that the appellant and others conspired by means of the publication of certain advertisements to induce readers thereof to resort to prostitutes named in these advertisements for the purposes of (a) fornication, (b) taking part in "other disgusting
G and immoral acts" or (c) witnessing "other disgusting and immoral exhibitions". I shall not deal with (c) because no attempt was made to prove this. The intent alleged is twofold—(a) with intent thereby to debauch and corrupt the morals of certain of the lieges and (b) with intent thereby to raise and create in their minds inordinate and lustful desires. I find this very obscure. Which of the lieges are referred to? Is it only those persons who are induced to resort to the prostitutes
H or is it all persons who read the publication? If it means that debauching and corrupting only occur (or may occur) when a man resorts to a prostitute, that is one thing; but if it means that a man may be debauched and corrupted merely by reading the advertisements, that appears to me to raise a different and wider question and to involve a consideration of the Obscene Publications Act, 1959. I am inclined to think that these intents are stated in the wrong order, and that
I what is meant is with intent to raise inordinate and lustful desires in the minds of those who read the advertisements and then to debauch and corrupt those who are thereby induced to resort to the prostitutes. I am not at all sure whether the proposition is that an offence is committed merely by conspiring to publish matter which tends to raise in the minds of readers inordinate and lustful desires, or whether the real offence is said to be conspiring to publish matter which tends to induce men to resort to prostitutes. No authority was cited to us which goes

so far as to hold that any writing could be held to be an obscene libel merely on the ground that, although its language is in itself decent and inoffensive, it may tend to raise in the minds of its readers some lustful desire—I leave aside for the moment the word “inordinate” in the particulars. In Victorian times, very strict views were held about books or pictures that were in any way “suggestive”, but no authority was cited to us which in any way indicates that it was ever held to be an indictable offence merely to publish such matter without there being something more to bring it into the category of being obscene. A B

Section 1 of the Act of 1959 defines “obscene” by enacting that an article (which includes all matter to be read or looked at) shall be deemed to be obscene if its effect is to tend to deprave and corrupt. But I cannot find any intention to widen the old law of obscene libel, or to make it possible for a prosecutor to charge as obscene libel publication in wholly inoffensive terms of any matter which tends to raise lustful desires in the mind of a reader, whether that matter be allusion to or commendation of fornication or merely the name and address of a prostitute. But I need not pursue that matter because, as I understood counsel for the Crown, he did not argue that these advertisements were obscene libels, and that must mean that merely reading them does not tend to deprave or corrupt—if it did, they would be obscene libels by virtue of the definition in the Act, conspiracy to publish them would obviously be a crime, and the point now in controversy would never have arisen. So, any depraving and corrupting must be the result of resorting to the prostitutes and the offence, if any, must be conspiring to tempt the lieges to resort to prostitutes. Prostitution is not an offence; it is not said that the woman or any man resorting to her is guilty of any offence. The argument is that, if two or more persons (who may include the prostitute herself) combine to issue such an invitation to members of the public, they are guilty of an offence. It could not matter whether the invitation was made by words or in some other way. So both Pearce and Brooks in *Pearce v. Brooks* (27) would today be guilty of an indictable offence by reason of having acted in concert to enable Brooks to attract men for the purpose of prostitution. That seems to me to be novel doctrine. It hardly seems to accord with views expressed in the *Mogul* series of cases (28) to which I referred earlier, and I cannot believe that it is right. C D E F

But the advertisements also contain much more objectionable matter. The particulars refer to inducing readers to take part in “other disgusting and immoral acts”, and with this I think there must be coupled the reference in the indictment charged to “inordinate” desires. The evidence shows that the invitations were to resort to certain of the prostitutes for the purpose of certain forms of perversion. That I would think to be an offence for a different reason. I shall not examine the authorities, because I think that they establish that it is an indictable offence to say or do or exhibit anything in public which outrages public decency, whether or not it also tends to corrupt and deprave those who see or hear it. In my view, it is open to a jury to hold that a public invitation to indulge in sexual perversion does so outrage public decency as to be a punishable offence. If the jury in this case had been properly directed, they might well have found the appellant guilty for this reason. And the offence would be the same whether the invitation was made by an individual or by several people acting in concert. But it appears to me to be impossible to say the same with regard to ordinary prostitution. The common law has never treated the appearance of a prostitute in public as an indictable offence, however obvious her purpose might be, and an Act of Parliament has been found necessary to stop the nuisance of prostitutes parading in the public street. G H I

Finally, I must advert to the consequences of holding that this very general offence exists. It has always been thought to be of primary importance that our law, and particularly our criminal law, should be certain; that a man should be

(27) (1866), L.R. 1 Exch. 213.

(28) [1892] A.C. 25; 7 Asp. M.L.C. 120.

A able to know what conduct is and what is not criminal, particularly when heavy penalties are involved. Some suggestion was made that it does not matter if this offence is very wide; no one would ever prosecute and if they did no jury would ever convict if the breach was venial. Indeed, the suggestion goes even further; that the meaning and application of the words "deprave" and "corrupt" (the traditional words in obscene libel now enacted in the Act of 1959) or the words "debauch" and "corrupt" in this indictment ought to be entirely for the jury, so that any conduct of this kind is criminal if in the end a jury think it so. In other words, you cannot tell what is criminal except by guessing what view a jury will take, and juries' views may vary and may change with the passing of time. Normally, the meaning of words is a question of law for the court. For example, it is not left to a jury to determine the meaning of negligence; they have to consider on evidence and on their own knowledge a much more specific question—Would a reasonable man have done what this man did? I know that in obscene libel the jury has great latitude, but I think that it is an understatement to say that this has not been found wholly satisfactory. If the trial judge's charge in the present case was right, if a jury is entitled to water down the strong words "deprave", "corrupt" or "debauch" so as merely to mean lead astray morally, then it seems to me that the court has transferred to the jury the whole of its functions as censor morum, the law will be whatever any jury may happen to think it ought to be, and this branch of the law will have lost all the certainty which we rightly prize in other branches of our law.

LORD TUCKER: My Lords, with regard to the conviction of the appellant under count 2 of the indictment, I am in complete agreement with the speech of my noble and learned friend on the Woolsack. The first count charged the appellant in the following terms:

"Statement of Offence: Conspiracy to corrupt public morals. Particulars of Offence: Frederick Charles Shaw on divers days between Oct. 1, 1959, and July 23, 1960, within the jurisdiction of the Central Criminal Court, conspired with certain persons who inserted advertisements in issues of a magazine entitled 'Ladies Directory' number 7, 7 Revised, 8, 9, 10 and a supplement thereto, and with certain other persons whose names are unknown, by means of the said magazine and the said advertisements 'to induce readers thereof to resort to the said advertisers for the purposes of fornication and of taking part in or witnessing other disgusting and immoral acts and exhibitions, with intent thereby to debauch and corrupt the morals as well of youth as of divers other liege subjects of Our Lady the Queen and to raise and create in their minds inordinate and lustful desires'."

It should, I think, be stated at the outset that the words "or witnessing" in the above particulars were not relied on by the prosecution at the trial as constituting an essential ingredient in the alleged conspiracy, nor was there any evidence that the advertisements constituted an invitation to the public to resort to the addresses of the advertisers as spectators for the purpose of witnessing disgusting and immoral acts and exhibitions. The case made by the prosecution was that the advertisements constituted invitations to the male public of all ages to visit the addresses of prostitutes for the purpose of fornication and in some instances taking part in perverse practices. I shall, accordingly, treat the indictment as if the words "or witnessing" had been omitted.

Counsel for the appellant put in the forefront of his address the submission that there is no such offence known to the law as a conspiracy to corrupt public morals. Before turning to authority, I would invite your Lordships to pause to consider for a moment how far-reaching are the consequences of such a proposition if it be correct. It has for long been accepted that there are some conspiracies which are criminal although the acts agreed to be done are not per se criminal or tortious if done by individuals. Such conspiracies form a third class in

addition to the well-known and more clearly defined conspiracies to do acts which are unlawful, in the sense of criminal or tortious, or to do lawful acts by unlawful means. Assuming that the corruption of public morals by the acts of an individual may not be criminal or tortious, does it follow that a conspiracy by two or more persons to this end is not indictable? The difficulty with regard to this third class of conspiracy has always been to define its limits or give it a label which will include all its manifestations. It was referred to by VISCOUNT SIMON, L.C., in *Crofter Hand Woven Harris Tweed Co., Ltd. v. Veitch* (29) as one in which "the purpose aimed at, though not perhaps specifically illegal, was one which would undermine principles of commercial or moral conduct". The late PROFESSOR KENNY in his *OUTLINES OF CRIMINAL LAW* (11th Edn.), at p. 290, in a passage which is repeated in later editions, wrote:

"An unlawful purpose. The term 'unlawful' is here used in a sense which is unique; and, unhappily, has never yet been defined precisely. The purposes which it comprises appear to be of the following species: . . . (iv) Agreements to do certain other acts, which (unlike all those hitherto mentioned) are not breaches of law at all, but which nevertheless are outrageously immoral or else are, in some way, extremely injurious to the public."

He gives a number of examples.

An instance in modern times is to be found in *R. v. Newland* (30), where the appellants had been convicted of conspiring to effect a public mischief by obtaining and distributing on the home market for eventual retail sale decorated domestic pottery which, by orders made under the Defence (General) Regulations, manufacturers and registered exporters were permitted to supply for export only. The orders did not in terms deal with persons who obtained such goods from a manufacturer representing that they were for export and then having obtained them sold them on the domestic market. It was contended on behalf of the appellants that there was no such offence known to the law as set out in the indictment. In delivering the judgment of the Court of Criminal Appeal, LORD GODDARD, C.J., said (31):

"It is much too late to object that a conspiracy to effect a public mischief is an offence unknown to the law. There have been at least three reported cases during the present century in which that charge has been made and convictions upheld. We refer to *R. v. Brailsford* (32), *R. v. Porter* (33) and *R. v. Bassey* (34) . . . The court is well aware of the caution with which they should approach the consideration of an offence which is alleged to consist of doing acts which tend to effect public mischief as, if extended, it might enable judges to declare new offences which should be the business of the legislature. The objections to such a course were forcibly pointed out by SIR FITZJAMES STEPHEN, the most prominent institutional writer on the criminal law in the last century, in his *HISTORY OF THE CRIMINAL LAW*, Vol. 3, p. 359. We think we may say that the court should approach the subject at least with the same degree of caution as must be exercised when considering a plea in a civil action that something has been done contrary to public policy . . . No one has ever attempted to define what may or may not constitute a public mischief and we have certainly no desire to increase the number of criminal offences by adding to the category of misdemeanours, but there are two points which, in our opinion, do not make it necessary for us to consider whether there is here any attempt to create a new offence. In the first place, it is well known that there may be many acts which, if done by an individual, would not be indictable, or even actionable as a tort, and yet may become both actionable and criminal if done by a combination of

(29) [1942] 1 All E.R. at p. 146; [1942] A.C. at p. 439.

(30) [1953] 2 All E.R. 1067; [1954] 1 Q.B. 158.

(31) [1953] 2 All E.R. at p. 1071; [1954] 1 Q.B. at p. 165.

(32) [1905] 2 K.B. 730.

(33) [1910] 1 K.B. 369.

(34) (1931), 47 T.L.R. 222.

A persons as the result of a conspiracy, and for this really elementary proposition we need only refer to *Quinn v. Leathem* (35)."

My Lords, I have referred to this case as, in my opinion, the decision of the present and other similar cases does not depend on the label which is to be attached to a particular conspiracy. Can it be doubted that a conspiracy to corrupt public morals is a conspiracy to effect a public mischief? Is it to be said that a conspiracy to sell decorated domestic pottery in the home market by means of devices contrived to evade the object of Board of Trade orders is a criminal conspiracy but an agreement to do acts calculated to corrupt public morals is not? Suppose Parliament tomorrow enacts that homosexual practices between adult consenting males is no longer to be criminal, is it to be said that a conspiracy to further and encourage such practices amongst adult males could not be the subject of a criminal charge fit to be left to a jury? Similarly with regard to a conspiracy to encourage and promote lesbianism today, or incestuous sexual intercourse in the year 1907? My Lords, if these questions are to be answered in the negative, I would expect to find some clear authority during the past centuries which would justify such an answer. I know of none.

I have, I think, sufficiently indicated my view that the decision of this case does not depend on a detailed examination of the old authorities in order to ascertain whether, in every case, the act or acts in question, whether performed or proposed, constituted common law misdemeanours in themselves at the date of the decisions. If they did, then the conspiracy alleged was admittedly criminal, but, if they did not, it would, in my view, be equally criminal if the acts were of a nature to satisfy a jury that they were wrongful in the sense of being calculated to corrupt and deprave public morals. I, therefore, do not propose to refer to the cases where individuals have been convicted of the common law misdemeanour of public indecency by exposure or other indecent acts in the face of the public such as that in *R. v. Sidley* (36) in the year 1663, or other similar cases culminating in 1875 with that of *R. v. Saunders* (37), where the defendants were held to have been properly convicted on counts charging them with keeping a booth on Epsom Downs for the purpose of a disgusting and indecent exhibition to which they invited all persons within the reach of their voices. This was held to constitute a common law misdemeanour. Counsel for the appellant argued with force that such cases are distinguishable from the present and other cases where the acts, though immoral, were not acts of indecency done in the face of the public, but, as I do not consider it necessary to explore this aspect of the case, I turn, therefore, to the authorities which are more immediately relevant, viz., those in which conspiracy was charged. In *R. v. Delaval* (38) in the year 1763, the charge was that the defendants had joined in an unlawful combination and conspiracy to remove a girl, an infant of about eighteen, out of the hands of the defendant Bates (a musician) to whom she was bound an apprentice by her father (a gentleman's coachman) without the knowledge or approbation of her father and to place her in the hands of Sir Francis Delaval for the purpose of prostitution. For which purpose, she was discharged by Bates, her master, from the indentures of her apprenticeship to him, in consideration of £200 (the penalty of them) paid to him by Sir Francis; and was then bound, by the usual indentures of apprenticeship, to Sir Francis. The charge went on to set out the part played by Fraine the attorney in drawing up the indentures and the agreement between Sir Francis and Bates. Having adjourned the motion for an information against the defendants for conspiracy in order that the court might be satisfied that the girl's father was not a party to the conspiracy and being satisfied that such was not the case, LORD MANSFIELD delivered the judgment of the court. He described the conspiracy as one (39)

(35) [1901] A.C. 495.

(36) Referred to in 1 Siderfin and the English Reports as "Sir Charles Sedley's Case", (1663), 1 Sid. 168.

(37) (1875), 13 Cox, C.C. 116.

(38) (1763), 3 Burr. 1434.

(39) (1763), 3 Burr. at p. 1437.

"... to put this young girl (an apprentice to one of them), into the hands of a gentleman of rank and fortune, for the purpose of prostitution; contrary to decency and morality, and without the knowledge or approbation of her father; who prosecutes them for it, and has now cleared himself of all imputation, and appears to be an innocent and an injured man . . . Thus she has been played over, by Bates, into his hands, for this purpose. No man can avoid seeing all this; let him wink ever so much. I remember a cause in the Court of Chancery, wherein it appeared, that a man had formally assigned his wife over to another man: and LORD HARDWICKE directed a prosecution for that transaction, as being notoriously and grossly against public decency and good manners. And so is the present case. It is true that many offences of the incontinent kind fall properly under the jurisdiction of the ecclesiastical court, and are appropriated to it. But, if you except those appropriated cases, this court is the *custos morum* of the people, and has the superintendency of offences *contra bonos mores*: and upon this ground, both Sir Charles Sedley and Curl, who had been guilty of offences against good manners, were prosecuted here. *However, besides this, there is, in the present case, a conspiracy and confederacy amongst the defendants: which are clearly and indisputably within the proper jurisdiction of this court.*"

The italics are mine.

My Lords, some writers have been at pains to point out grounds on which this case might have been decided, but I suggest it is not necessary or even permissible to go outside the expressed reasons of LORD MANSFIELD. Furthermore, it is to be observed that, at that date, not only was there no crime of abduction of a girl over sixteen, not being an heiress (see HOLDSWORTH'S HISTORY OF ENGLISH LAW, Vol. 4, pp. 504 and 514), but the girl's master was willing and she was not in the custody of her father. There is no such tort as seduction in the absence of loss of services which was not, and could not have been, alleged, and there is no mention of breach of contract anywhere in the case. It is clear and compelling authority in support of the existence of the crime of conspiracy to corrupt the morals of an individual and a fortiori of the public.

In *R. v. Mears & Chalk* (40), the indictment contained three counts. The third count alleged that the accused

"did between themselves conspire, combine, confederate, and agree together wickedly, knowingly, and designedly to procure by false pretences, false representations, and other fraudulent means, the said Johanna Carroll, then being a poor child under the age of twenty-one years, to wit, of the age of fifteen years, to have illicit carnal connexion with a man, to wit, a certain man whose name is to the jurors aforesaid unknown, contrary to the form of the statute in such case made and provided, and against the peace of Our Lady the Queen, her Crown and dignity."

JERVIS, C.J., in giving judgment, said (41):

"It is unnecessary to discuss the first and second counts, and upon them we give no opinion, because we all think that the third is a good count; the court being clearly of opinion that a conspiracy to solicit prostitution, being against good morals and public decency, is, *independently of the statute*, an indictable offence."

The italics are mine.

R. v. Howell (42) was a case of conspiracy to solicit, persuade and procure an unmarried girl of the age of seventeen to become a common prostitute. A count so framed was upheld. BRAMWELL, B., said (43):

"I believe that it is not an offence at common law for a woman to be a common prostitute. But, in my opinion, that is not the criterion. There

(40) (1851), 4 Cox, C.C. 423.

(42) (1864), 4 F. & F. 160.

(41) (1851), 4 Cox, C.C. at p. 427.

(43) (1864), 4 F. & F. at p. 164.

A are many unlawful things which are not the subject of criminal proceedings of any kind . . . We have all the necessary ingredients of the offence of conspiracy . . .”

In *R. v. Berg, Britt, Carré & Lummies* (44), the second count in the indictment charged the above named and three others with conspiracy to corrupt public morals and the particulars thereof were that they on divers days therein stated

B “conspired together with other persons unknown to debauch and corrupt the minds and morals of such persons as should be induced or permitted to come to certain premises being the basement flat No. 25 Fitzroy Square in the said county and there remain tipling, whoring and behaving in an obscene and disorderly manner.”

C Berg pleaded not guilty to both counts. He was found not guilty on count 1 which charged him with aiding and abetting Britt and Carré in keeping a disorderly house, but guilty on count 2. The Court of Criminal Appeal in the present case were in error in saying that all the accused named in that count pleaded guilty. Inspection of the original indictment shows that Berg in fact pleaded not guilty to both counts. The report of the hearing before the Court of Criminal Appeal is not very satisfactory, but, as Berg had been acquitted on count 1, he must have been appealing against his conviction on count 2 and this is confirmed by the argument of his counsel (Mr. Byrne) (45). The original indictment shows that the report is inaccurate in its description of the conspiracy count. The words “disorderly house” do not in fact appear in count 2 but only in count 1. All the appeals were dismissed by a court presided over by AVORY, J., who stated

E (46) that the gist of the indictment was that the accused were lewd and immoral persons assembled for the purpose of unnatural practices. Finally, in 1960, there was the unreported case of *R. v. Dale* (47), in which the accused were convicted at the Central Criminal Court on a count in an indictment charging a conspiracy to corrupt and debauch such persons as should resort to a certain disorderly house therein named.

F It was further contended for the appellant that, in any event, the particulars in the indictment and the evidence adduced in support thereof were insufficient to support a conviction for conspiring to corrupt public morals. It was said that neither fornication nor prostitution are illegal and that, in any event, there is no precedent for holding that such conduct tends to corrupt and deprave adult males. My Lords, I think that these were matters for the decision of the jury and that

G the learned judge was right in ruling that there was a case to be left to them. There was material in this case to support the view that some of the advertisements in the magazines indicated that the advertisers were willing to take part in acts of sexual perversion. This element was, I think, conclusive against the appellant’s submission, but I am not to be taken as expressing the view that, in the absence of this feature, the case should have been withdrawn from the

H jury who must be the final arbiters in such matters, as they are on the question of obscenity. They alone can adequately reflect the changing public view on such matters through the centuries. As regards lack of precedent, apart from *R. v. Berg, Britt, Carré & Lummies* (44) in 1927 and *R. v. Dale* (47) in 1960, I would remind your Lordships of the words of PARKE, J., in *Mirehouse v. Rennell* (48):

I “The case, therefore, is in some sense new, as many others are which continually occur; but we have no right to consider it, because it is new, as one for which the law has not provided at all; and because it has not yet been decided; to decide it for ourselves, according to our own judgment of what is just and expedient. Our common law system consists in the applying

(44) (1927), 20 Cr. App. Rep. 38.

(45) (1927), 20 Cr. App. Rep. at p. 40.

(46) (1927), 20 Cr. App. Rep. at p. 42.

(47) Central Criminal Court, 1960, unreported. (48) (1833), 1 Cl. & Fin. at p. 546.

to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appears to me to be of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of law as a science."

My Lords, counsel for the Crown supported the conviction and the judgment of the Court of Criminal Appeal on count 1 of the present indictment on two alternative grounds, (i) that conduct calculated and intended to corrupt public morals is indictable as a substantive offence and consequently a conspiracy to this end is indictable as a conspiracy to commit a criminal offence, alternatively (ii) a conspiracy to corrupt morals is indictable as a conspiracy to commit a wrongful act which is calculated to cause public injury. The Court of Criminal Appeal dismissed the appeal on the ground that the case fell well within the first of these propositions. I have, I hope, sufficiently indicated that I prefer to base my decision on the second, but, in so saying, I must not be taken as rejecting the first.

A further submission by the appellant must now be mentioned. It was argued that, in any event, count 1 offended against the provisions of s. 2 (4) of the Obscene Publications Act, 1959, which reads:

"A person publishing an article shall not be proceeded against for an offence at common law consisting of the publication of any matter contained or embodied in the article where it is of the essence of the offence that the matter is obscene."

My Lords, I agree with the judgment of the Court of Criminal Appeal that the short answer to this argument is that the offence at common law alleged, namely conspiracy to corrupt public morals, did not "consist of the publication" of the magazines, it consisted of an agreement to corrupt public morals by means of the magazines which might never have been published.

Finally, it was said that the learned judge did not sufficiently direct the jury as to the meaning of the words "debauch and corrupt" in count 1, and one passage in particular in his charge to the jury was subjected to criticism in which he said:

"Well, members of the jury, no doubt you will take the view that whatever else you may have to decide in this case it is quite unnecessary for you to decide the merits or demerits of extra-marital intercourse. And, really, the meaning of debauched and corrupt is again, just as the meaning of the word induce is, essentially a matter for you. After all the arguments, I wonder really whether it means in this case and in this context much more than lead astray morally. You will have to consider it in your own minds and, as I say, you must put your own interpretation on the meaning of the words."

The words "lead astray morally" were objected to and were said to amount to a misdirection. In this and other passages later in his judgment, he makes it clear that it is for the jury to construe and apply these words to the facts proved in evidence and reach their own decision, and neither in the passage cited nor in the judgment as a whole can I find anything that amounts to misdirection.

For these reasons, I am of opinion that the appeal with regard to the conviction on count 1 also fails.

LORD MORRIS OF BORTH-Y-GEST: My Lords, I have had the privilege of reading in advance the speeches which have been delivered by my

A noble and learned friend on the Woolsack and by my noble and learned friend, LORD TUCKER, and I am in agreement with them.

The appellant was convicted not only on the two counts which are before your Lordships but also on a third count, which was one of publishing an obscene article contrary to s. 2 of the Obscene Publications Act, 1959. The article in question consisted of one issue of the "Ladies Directory". Before they could convict of that charge, the jury had to be satisfied that the appellant published the article and that it was obscene. It is provided by the Act that, for the purposes of the Act, an article is deemed to be obscene if its effect, taken as a whole, is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it. The jury must have been satisfied that the effect of the article was to tend to deprave and corrupt those who were likely to read or see it. While I concur with your Lordships in thinking that the provision contained in s. 2 (4) of the Act did not debar the prosecution from presenting and passing the charge contained in count 1, I have wondered whether they might not in this particular case have been content to put matters to the test by reference only to the other counts. It was the appellant who conceived and carried out the plan of producing the publications in question. He did so for his own gain. The conspiracy features of his conduct added little in this case to the real gravity of his actions. I join, however, with those of your Lordships who affirm that the law is not impotent to convict those who conspire to corrupt public morals. The declaration of LORD MANSFIELD (see *Jones v. Randall* (49)) that

"Whatever is contrary, bonos mores est decorum, the principles of our law prohibit, and the King's court, as the general censor and guardian of the public manners, is bound to restrain and punish"

is echoed and finds modern expression in KENNY'S OUTLINES OF CRIMINAL LAW (17th Edn.) in the statement that agreements by two or more persons may be criminal if they are agreements to do acts which are outrageously immoral or else are in some way extremely injurious to the public. There are certain manifestations of conduct which are an affront to and an attack on recognised public standards of morals and decency, and which all well-disposed persons would stigmatise and condemn as deserving of punishment. The cases afford examples of the conduct of individuals which has been punished because it outraged public decency or because its tendency was to corrupt the public morals.

It is said that there is a measure of vagueness in a charge of conspiracy to corrupt public morals, and also that there might be peril of the launching of prosecutions in order to suppress unpopular or unorthodox views. My Lords, I entertain no anxiety on those lines. Even if accepted public standards may to some extent vary from generation to generation, current standards are in the keeping of juries who can be trusted to maintain the corporate good sense of the community and to discern attacks on values that must be preserved. If there were prosecutions which were not genuinely and fairly warranted, juries would be quick to perceive this. There could be no conviction unless twelve jurors were unanimous in thinking that the accused person or persons had combined to do acts which were calculated to corrupt public morals. My Lords, as time proceeds, our criminal law is more and more being codified. Though it may be that the occasions for presenting a charge such as that in count 1 will be infrequent, I concur in the view that such a charge is contained within the armour of the law and that the jury were in the present case fully entitled to decide the case as they did.

I would dismiss the appeal.

(49) (1774). Lofft at p. 385. The quotation above exactly accords with the report; but it seems that for "est" the conjunction "et" should be read. The corresponding passage in the report in 1 Cowp. at p. 39 reads "for the law of England prohibits everything which is contra bonos mores; or it must be against principles of sound policy;".

LORD HODSON: My Lords, I am in full agreement with the speeches which have been delivered by my noble and learned friend on the Woolsack and by my noble and learned friend, LORD TUCKER, and wish only to add a few sentences on the first count. A

I am wholly satisfied that there is a common law misdemeanour of conspiracy to corrupt public morals. The judicial precedents which have been cited show conclusively to my mind that the courts have never abandoned their function as custodes morum by surrendering to the legislature the right and duty to apply established principles to new combinations of circumstances. The words of PARKE, J., in *Mirehouse v. Rennell* (50), read by my noble and learned friend, LORD TUCKER, are not out-dated and, in my opinion, are applicable to this case. I would stress that, in applying the law to the facts which now fall for consideration, I do not rest on the narrow ground that here was a conspiracy to issue a public invitation to indulge in sexual perversion which so outrages public decency as to constitute a punishable offence. It is unnecessary to dwell on the details of the publications at which your Lordships have been obliged to look. It is sufficient to say that, although there are descriptions of sexual eccentricities which to persons of normal instincts may be fairly described as perverted, these eccentricities add nothing to the substance of the charge of conspiracy to corrupt public morals. They amount in the main to the use of theatrical trappings usually associated with prostitution and irregular sexual intercourse, but are in themselves neither more nor less unlawful than prostitution itself. C D

I will not add to what has already been said about the word "unlawful", agreeing as I do that it has not to be narrowly construed as connoting the commission of a criminal offence. E

It has been contended before your Lordships that these advertisements ought to be treated as if they tended only to corrupt the morals of men and should be treated on a different footing from advertisements which would tend to corrupt the morals of women, since the law has shown anxiety to protect women from predatory males who have conspired to debauch them, whereas there is no instance of any anxiety in the converse direction. Even if there is any validity in this distinction, which in these days when much is heard of the equality of the sexes I am not disposed to admit, it has no application to the present case. The advertisements, no doubt, are primarily directed to male persons but are not so limited. They were exposed for sale and available to both sexes. They are, as a cursory examination reveals, designed to glamorise prostitution and to show by the prices charged to prostitutes for advertising their wares the profits likely to be realised from engaging in their occupation. In the ordinary use of language, it seems to me to be plain that the publication of these advertisements to both sexes may properly be held by a jury to tend to corrupt public morals. That prostitution is not a punishable offence does not involve, as I have already indicated, that it is regarded as a lawful activity. If it were lawful, such a case as *Pearce v. Brooks* (51) must have been differently decided. Even if Christianity be not part of the law of England, yet the common law has its roots in Christianity and has always regarded the institution of marriage as worthy to be supported as an essential part of the structure of the society to which we belong. I do not see any reason why a conspiracy to encourage fornication and adultery should be regarded as outside the ambit of a conspiracy to corrupt public morals. It is suggested, as I understand it, that this throws the net too wide, and in some way it is desirable to show a tenderness towards prostitution as a recognised and necessary evil. I do not accept this approach. F G H I

Since a criminal indictment is followed by the verdict of a jury, it is true that the function of *custos morum* is, in criminal cases, ultimately performed by the jury by whom on a proper direction each case will be decided. This,

A I think, is consonant with the course of the development of our law. One may take, as an example, the case of negligence where the standard of care of the reasonable man is regarded as fit to be determined by the jury. In the field of public morals, it will thus be the morality of the man in the jury box that will determine the fate of the accused but this should hardly disturb the equanimity of anyone brought up in the traditions of our common law.

B I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Gerald Black & Co.* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

C
JEFFREY (INSPECTOR OF TAXES) v. ROLLS-ROYCE, LTD.
INLAND REVENUE COMMISSIONERS v. SAME.

[COURT OF APPEAL (Holroyd Pearce, Upjohn and Donovan, L.J.J.), April 24, 25, 26, 1961.]

D *Income Tax—Income—Payment of lump sums for imparting technical knowledge—Whether income or capital receipt—Income Tax Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 10), Sch. D, Case I.*

E At the wish of the British government manufacturers of aero engines entered into an agreement with China under which they undertook to supply complete drawings and manufacturing and engineering data and information necessary to enable engines of a particular type to be manufactured by the Chinese and to provide full information from time to time with regard to improvements and modifications of its manufacture and design. There was provision for the substitution of a different type of engine. They also agreed to receive into their works trainees from China and to release competent members of their own staff to undertake employment with the Chinese. The agreement was to last for five years with an option by the Chinese to extend it for a further five years. The manufacturers received a specified royalty on engines and parts of engines manufactured by the Chinese and the agreement provided for payment to them of a lump sum of £50,000 as "consideration for the rights granted" under the agreement. This sum was described in the agreement as a capital sum. In the following six years they entered into similar agreements with governments and companies in France, the United States of America, the Argentine, Belgium, Australia and Sweden, all countries which they could not hope to penetrate for the sale of their engines by any other method. Their chairman in his annual statements made several references to the demand for licences to manufacture their engines and to the royalties resulting. They were assessed to income tax under Case I of Sch. D to the Income Tax Act, 1952, on the basis that the £50,000 was a revenue receipt. On appeal,

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I **Held:** the £50,000 was rightly brought into account in assessing the profits or gains of the manufacturers for income tax purposes, since it was one of several such sums regularly received in pursuance of a deliberate and continuous policy of making manufacturing agreements to secure royalty revenue to which the disclosing of technical knowledge was a necessary adjunct as a means rather than as an end, and it was therefore a revenue, and not a capital, receipt.

Moriarty v. Evans Medical Supplies, Ltd. ([1957] 3 All E.R. 718) distinguished.

Decision of PENNYCUICK, J. ([1960] 2 All E.R. 640) reversed.

[As to what constitutes trade receipts and income as opposed to capital for income tax purposes, see 20 HALSBURY'S LAWS (3rd Edn.) 149, para. 263; and for cases on the subject, see 28 DIGEST (Repl.) 20-38, 78-173, 50-58, 191-225.]

Cases referred to:

Butterworth v. Page, [1935] All E.R. Rep. 943; 153 L.T. 34; sub nom. *Handley Page v. Butterworth*, 19 Tax Cas. 328; 28 Digest (Repl.) 26, 111.

Edwards v. Bairstow, [1955] 3 All E.R. 48; [1956] A.C. 14; 36 Tax Cas. 207; [1955] 3 W.L.R. 410; 28 Digest (Repl.) 397, 1753.

Moriarty (Inspector of Taxes) v. Evans Medical Supplies, Ltd. *Evans Medical Supplies, Ltd. v. Moriarty (Inspector of Taxes)*, [1957] 3 All E.R. 718; 37 Tax Cas. 540; [1958] 1 W.L.R. 66; *revsg.* sub nom. *Evans Medical Supplies, Ltd. v. Moriarty*, [1957] 1 All E.R. 336; *revsg.*, [1956] 2 All E.R. 706; 28 Digest (Repl.) 26, 112.

Rustproof Metal Window Co., Ltd. v. Inland Revenue Comrs., [1947] 2 All E.R. 454; [1947] L.J.R. 1479; 177 L.T. 657; 29 Tax Cas. 243; 28 Digest (Repl.) 438, 1916.

Withers v. Nethersole, [1948] 1 All E.R. 400; [1948] L.J.R. 805; 28 Tax Cas. 501; *affg.* sub nom. *Nethersole v. Withers*, [1946] 1 All E.R. 711; 28 Digest (Repl.) 155, 600.

Appeals.

The taxpayers appealed to the Special Commissioners of Income Tax against assessments to income tax made on them under Sch. D to the Income Tax Act, 1952, in respect of their trade of manufacturers of motor cars and aero engines in the following sums: 1948-49, £1,300,000; 1949-50, £1,200,000; 1950-51, £1,800,000; 1951-52, £1,500,000; 1952-53, £2,300,000; 1953-54, £2,500,000; 1954-55, £4,800,000. The grounds of the appeal were that in computing the taxpayers' profits or gains for the relevant periods sums paid to and received by the taxpayers by virtue of certain licensing agreements had been included contrary to law, such lump sum payments being of a capital nature. The taxpayers also appealed on the same grounds against assessments to excess profits tax (1945 £66,667), the profits tax (1947-53, various sums), and excess profits levy (1952 £240,000 and 1953 £600,000). The commissioners allowed each of the four appeals. On May 27, 1960, reported [1960] 2 All E.R. 640, PENNYCUICK, J., dismissed the Crown's appeals by way of Cases Stated against that decision. The Crown appealed to the Court of Appeal.

Roy Borneman, Q.C., and *A. S. Orr* for the Crown.

Heyworth Talbot, Q.C., and *C. N. Beattie* for the taxpayers.

HOLROYD PEARCE, L.J.: The facts are fully and clearly set out in the Cases Stated. In February, 1946, the taxpayers entered into an agreement with China, the first or prototype manufacturing agreement. They did so at the wish of the British government in order that Rolls-Royce engines might be manufactured in China. By that agreement the taxpayers were to supply complete drawings and manufacturing and engineering data and information necessary to enable engines of the Derwent type to be manufactured by the Chinese and to provide full information from time to time with regard to improvements and modifications of its manufacture and design. The taxpayers also agreed to receive into their works trainees from China and to release competent members of their own staff to undertake employment by the Chinese. The agreement was to last for five years with an option to the Chinese to extend it for a further five years. There were provisions for the substitution of a different type of engine. The Chinese had to pay a specified royalty on engines and parts of engines manufactured by them. In addition they had to pay a capital sum of £50,000 as "consideration for the rights granted thereunder".

Thus the £50,000 covered all the benefits received by the agreement—the provision of technical knowledge, of plans, of a licence, and of the facilities for interchange of staff. It was not allocated to any particular benefit. Probably the major part of that sum was intended to be in respect of the transfer of technical knowledge. Nevertheless the agreement is one undivided whole and the £50,000 is consideration for all the benefits obtained thereunder.

A The words "a capital sum" do not decide the matter, being "a mere label attached . . . with an eye, no doubt, to tax considerations" (per LORD GREENE, M.R., in *Rustproof Metal Window Co., Ltd. v. Inland Revenue Comrs.* (1)). It is conceded by the Crown that, if on one occasion only the taxpayers had merely sold their technical knowledge for a lump sum, they would be selling a capital asset and the receipt of that sum would be a capital receipt. In *Evans Medical Supplies, Ltd. v. Moriarty* (2), UPJOHN, J., expressed it clearly thus:

C "The company was, in fact, parting for ever with its secret information in its methods of preparation, packing and preservation to the Burmese government; that may not in law amount to an assignment of all its rights in Burma, for the company in legal theory, though hardly in practical Burmese politics, remained at liberty to use the processes itself in Burma. Of course, it also remained at liberty to carry on its business of wholesale druggists there by selling its products, made in this country, in Burma through its usual agents. It was parting for ever, however, with part of a valuable asset, and was doing so to enable an entirely new and competing industry to be set up there. That industry, established by the skill and 'know-how' of the company, could embark on an export trade which could compete with the company's own products in other countries. In that sense the company was dissipating its asset, and it must be remembered that a secret process once communicated to another is in jeopardy; if it gets into the wrong hands, the grantor has no protection. Even if it be a necessary ingredient to support a capital payment to show some dissipation of a capital asset (which, in my judgment, it is not), that element seems to me to be present here."

E See also per ROMER, L.J., in *Butterworth v. Page* (3) and per VISCOUNT SIMON in *Withers v. Nethersole* (4).

F *Moriarty (Inspector of Taxes) v. Evans Medical Supplies, Ltd.* (5) went to the House of Lords and caused much diversity of view. For that reason, and because in that case there was only one agreement under consideration and that was in a form different from those which we are here considering, it does not provide great help in the present case.

G The China agreement does not stand alone. A few months later the taxpayers entered into a French manufacturing agreement in terms materially similar which provided for a "capital sum of £50,000". That was followed by a French variation agreement in 1950 and a further French agreement in 1953 providing for a capital sum of £100,000. Similar agreements were made in 1947 in respect of the United States of America (capital sum £50,000) with two subsequent ancillary agreements. In 1947 an agreement was made with the Argentine, but for special reasons instead of receiving a capital sum for the provision of technical knowledge and other benefits the taxpayers received payment of H £1,000,000 as the price of engines in various stages of manufacture.

I In 1948 the taxpayers made an agreement with Belgium similar to the Chinese prototype and under that a capital sum of £50,000 was payable. In 1950 the taxpayers made a similar agreement with Australia in respect of which lump sums amounting to £120,000 were payable. In 1952 a similar agreement was made with Sweden under which a capital sum of £100,000 was payable. Some of these agreements provided for the payment of a large or small technical liaison fee, which is admittedly taxable.

In 1953 the taxpayers made an agreement with Westinghouse in respect of the United States. This agreement is more complicated and differs somewhat

(1) [1947] 2 All E.R. at p. 460; 29 Tax Cas. at p. 271.

(2) [1956] 2 All E.R. at p. 715; 37 Tax Cas. at p. 552.

(3) [1935] All E.R. Rep. at p. 955; 19 Tax Cas. at p. 359.

(4) [1948] 1 All E.R. at p. 403; 28 Tax Cas. at p. 518.

(5) [1957] 3 All E.R. 718; 37 Tax Cas. 540.

from the prototype of manufacturing agreement. One clause in it provides that
“as consideration for making available and the transfer to Westinghouse
of the technical knowledge and information which [the taxpayers] already
possess as provided in cl. 4 (a), Westinghouse shall pay to [the taxpayers]
in U.S. dollars the sum equivalent to £1,000,000 sterling”

payable by instalments. In respect of all these lump sums the taxpayers under
an agreement with the British government paid one-third to them in acknow-
ledgment no doubt of the fact that the research which led to the knowledge for
which those sums were paid was partially defrayed by the government and that
without the government's consent it could not be disseminated.

Against that background the Crown argues that these oft-repeated sales of
growing technical knowledge constitute receipts of the taxpayers' trade. It is
not argued that they constitute a separate trade, but that they are a development
of their general trade in the manufacture and sale of engines.

The taxpayers contend that, if one looks at the China agreement alone, the
sum of £50,000 represents the sale price of technical knowledge including secret
processes. The taxpayers had never before sold such knowledge; they had only
sold motor cars and aeroplane engines. Therefore, it is urged that they were
selling part of their fixed assets. The mere repetition of such a transaction,
however frequent, did not without more change the nature of the transaction
nor the nature of the taxpayers' trade, and the so-called capital sums received
under the various agreements were in truth capital sums. The Special Commis-
sioners rightly, it is argued, found as a fact that the transactions subsequent to
the China agreement continued to be sales of a capital asset and that the sums
so received were capital and not trading receipts. Further the taxpayers
contend that this court cannot in any event properly disturb that finding of
fact.

The Special Commissioners, after finding the various facts set out in the
Case, expressed their conclusion on the issue before them as follows:

“Upon consideration of the evidence adduced and the arguments
addressed to us on behalf of the parties we are of opinion that the case for
the [taxpayers] succeeds and the appeal must be allowed.”

One has therefore to refer to the Case for the taxpayers to ascertain precisely
what the Special Commissioners found on the crucial issue. The material
parts of that Case are as follows:

“In the course of [their] business the [taxpayers] had acquired a vast
store of knowledge and secret information relating to [their] secret processes
of manufacture, referred to throughout the case as ‘know-how’, which
represented a fixed capital asset of the [taxpayers]’ trade, but it had never
been any part of the policy of the [taxpayers] to make inventions and
discover secret processes with a view to the earning of profits by realising
[their] rights in those inventions and processes.”

The Chinese agreement is then described. The Case continues:

“It was, however, contended for the [taxpayers] that the lump sum
paid and received under the China agreement, apart from a small amount
attributable as aforesaid to patent rights, represented a capital receipt in
respect of know-how which did not fall to be included in the profits or
gains of the [taxpayers]... It is further contended for the [taxpayers]
that if the subject-matter with which we are concerned, i.e., know-how, is
initially a fixed capital asset, then mere multiplicity of transactions in it
does not convert it into a revenue or trading asset in the absence of other
facts which suggest that there has been a conversion or that some new
trade has been set up. It is said that there has been no such change of
circumstances affecting the [taxpayers]’ know-how and therefore with regard
to the remainder of the agreements entered into by the [taxpayers] for,

A generally speaking, licensing the manufacture of aero engines and the provision of know-how in connexion therewith, the lump sums, by whatever names they are called, paid to and received by the [taxpayers] thereunder were also receipts of a capital nature."

B With all respect to the Special Commissioners, I think that there are certain aspects of the matter to which they did not give any or adequate weight. It is beside the point to consider the China agreement as if it stood alone. It did not stand alone. It has to be considered in the light of surrounding circumstances. Subsequent events may, and in my judgment do, throw light on it. Almost all the territory to which these agreements applied was found to be territory which the taxpayers could not reasonably hope to penetrate by any other methods (see as to France, para. 3 (10) of the Case; United States, para. 3 (13); Argentine, para. 3 (18); Belgium, para. 3 (20); Australia, para. 3 (24); Sweden, para. 3 (27); see also as to United States, para. 3 (28)).

C "The [taxpayers] had never refused to grant a licence to a foreign government or manufacturer on the ground that to do so and to communicate the necessary know-how would prejudice [their] interests... Possession of the [taxpayers'] know-how enabled a licensee to get into production far earlier than would otherwise have been possible. It was important from the point of view of the [taxpayers'] reputation that each licensee should have all the know-how it or he required to be able to manufacture engines to the [taxpayers'] traditionally high standard"

E (see para. 3 (30)). The agreements are for periods of five or even ten years and envisage the continuance of the arrangement after the expiry of the contract periods. There are provisions for the substitution of more modern engines on payment of a further sum (see, e.g., the schedule to the United States agreement cl. 14, para. 3 (13); Argentine, cl. 42, para. 3 (18); Belgium, cl. 13, para. 3 (20); Australia, cl. 12, para. 3 (25)).

F These facts create a strong impression that in territories where the taxpayers could not hope to sell their engines they were pursuing a wise policy of allowing local manufacture from which they would receive the benefits of advertisement, lump sums and royalties. This was not in substitution for their policy of selling their own engines in territories where they could do so, but a collateral and supplementary method of trading in territories where they could not do so.

G When one regards the chairman's annual statements, that strong impression is confirmed. In July, 1947, after the China, first French and first United States agreements, the chairman said (para. 3 (33)):

H "A considerable demand has arisen for licences to manufacture various models of our engines. This is all to the good as it reflects the appreciation of the merits of what we make but it likewise calls for expensive initial education and continuing contact with the licensee to keep him abreast of developments."

In June, 1949 (para. 3 (35)), he said:

I "The Belgian government is now amongst those who have acquired manufacturing rights, while other governments are interested in extending existing arrangements."

In 1952 (para. 3 (38)) he said:

"Our licensees Pratt and Whitney in America, the Hispano Suiza Company in France and the F.N. Company in Belgium are all now in quantity production, and we may expect a further increase in royalty receipts from these sources. Our relations with our licensees continue to be most friendly, and we look forward to a continuing association with them."

Finally, in July, 1954, he said (para. 3 (40)):

"It is also satisfactory to record a further increase in our revenue from royalties; almost all of this comes from our foreign licensees . . . Most of our foreign licensees have been very active, and the increasing volume of their production is reflected in the substantial increase in royalties which we have received. We have negotiated new licence agreements with some of our existing licensees to permit the manufacture of current types of engine."

He made further remarks as to the duty of the taxpayers to develop such a policy and concluded:

"Not only does it bring in much needed foreign currency, but it also enables the United Kingdom government to recover at least a contribution towards the substantial development expenditure which it has to invest in defence projects."

No doubt that is a reference to the one-third which the British government received on all lump sums received.

Thus it is clear that the policy of issuing licences for royalties was deliberate and continuous, and that the dissemination of technical knowledge to the licensees was a desirable or even an essential part of the issue of licences.

In each case there was no allocation of the lump sum to the disclosure of technical knowledge. That knowledge was but one of the benefits conferred by the agreements. The training of staff and interchange of employees was also of great importance. Can it be said that the mere fact that the imparting of technical knowledge was one of the considerations (and probably a major one) for the payment of the lump sums takes them out of the category of trading receipts, when the rest of the agreement is devoted to producing trading receipts? The knowledge sold in this case is not some secret of permanent value sold by an owner who is transferring or terminating his business. Such a sale would clearly be the sale of a fixed asset. The knowledge sold in this case is in the main the transient by-product of advancing engineering science. It accrues automatically from the taxpayers' business of manufacture and in a comparatively short time it is superseded and loses its value. It is ever-growing, ever-changing. It is the kind of knowledge which can easily merge its character of a fixed asset into that of a trading asset. The secret knowledge is the more transient since it becomes more quickly obsolete. That which is not secret is the valuable practical experience of years, but such knowledge partakes less of the nature of a fixed asset. It consists in the power to communicate the knowledge possessed by a well-trained, efficient and experienced staff. It could find no place in any balance sheet.

So far as part of the lump sums are paid in respect of the imparting of knowledge they are sums regularly received as an ingredient in the taxpayers' policy of making manufacturing agreements to secure royalty revenue. To such agreements the disclosing of technical knowledge is a necessary adjunct, but it is a means rather than an end.

None of these considerations is conclusive in itself but they have cumulative weight. With all respect to the learned judge who took a contrary view, I feel compelled to the conclusion that the receipt of the sums in question is part of the annual profit or gain accruing from the taxpayers' trade. I venture to think that the commissioners arrived at their conclusion by omitting all or many of the considerations to which I have referred. There is nothing to show that they had them in mind. Even if they did, the well-known observations of VISCOUNT SIMONDS and LORD RADCLIFFE in *Edwards v. Bairstow* (6) apply. We should in my judgment hold that the only reasonable conclusion on the facts found is that the sums in question are trading receipts on revenue account. I would accordingly answer no to the question asked in the Cases Stated and allow the appeals.

(6) [1955] 3 All E.R. at pp. 53, 59; 36 Tax Cas. at pp. 224, 225, 231.

UPJOHN, L.J.: I agree with the judgment that has just been delivered and only add a few words of my own as I delivered the judgment at first instance in *Evans Medical Supplies, Ltd. v. Moriarty* (7), which has been much debated before us. The question is whether the lump sum of £100,000 in the *Evans Medical* case (8) and the several lump sums in this case fall within the charge to tax under Case I of Sch. D to the Income Tax Act, 1952, i.e., whether they are revenue receipts which should be brought into account in ascertaining the annual profits or gains arising or accruing from any trade whether carried on in the United Kingdom or elsewhere.

The answer to that question necessarily depends almost entirely on the circumstances of each case, and the nature of the contract or contracts under which the lump sum or sums arise. Decisions on one set of facts form no sure guide to an entirely different set of facts. Apart from the fact that in each case the subject-matter of the transaction was in part a disposition of know-how, the two cases bear but little resemblance to one another.

There is indeed much difference even in the nature of the know-how in the two cases. In the *Evans Medical* case (8) the know-how was the knowledge which would make large scale manufacture of medical products possible in Burma. It consisted not in secret medical compositions, but in secret methods of preparation of known products and in methods of storing and packaging particularly in hot climates. It was, so to speak, a basic necessity for the introduction of a successful pharmaceutical factory in Burma, and that very same know-how would be applied in manufacture probably for a long time. **HOLROYD PEARCE, L.J.**, has pointed out the quite different transient and changing character of the know-how dealt with by the taxpayers in this case. It is more nearly akin to a trading asset. However, the fundamental difference between the two cases rests, of course, in the manner in which the taxpayers have dealt with the disposal of their knowledge and experience in the manufacture of aero engines. In the *Evans Medical* case (8) the transaction was isolated and special. In this case the only reasonable inference to be drawn from the evidence (and this is in complete contrast to the *Evans Medical* case (8)) is that as a deliberate matter of policy the taxpayers have embarked on a course of licensing others to manufacture their engines in countries where it was difficult or impossible to export engines of their own manufacture. It was all part of their trade.

Finally, the contract in the *Evans Medical* case (8) was quite different from the several contracts in this case. In the earlier case, despite much conflict of judicial opinion, it was ultimately decided that the sum of £100,000 was paid for the promises in Part I of the agreement and that the respondents were parting with a capital asset for that sum of money. In this case it is not possible to reach such a conclusion. The lump sums were paid to secure not only know-how, but also other benefits. On a proper interpretation of the agreements it is not permissible to make an allocation to know-how as in the *Evans Medical* case (8), or to draw the conclusion that the taxpayers were in substance selling a capital asset for a lump sum. That case does not really assist in the determination of this case.

In my judgment on the facts of this case only one conclusion is reasonable, viz., that these lump sums were received as revenue receipts in the ordinary course of the taxpayers' trading. I would allow these appeals.

DONOVAN, L.J.: The argument for the taxpayers is that here was a fixed capital asset. It has been sold. True it was sold in the course of the taxpayers' trade, but the proceeds were capital and not income. The Special Commissioners have so found, and their conclusion, being one of fact, with evidence to support it, ought not to be disturbed.

The expression "fixed capital asset" is a convenient one to describe such things as buildings, machinery, licences and so on which a trader uses to produce

(7) [1956] 2 All E.R. 706; 37 Tax Cas. 540.

(8) [1957] 3 All E.R. 718; 37 Tax Cas. 540.

the things he sells; but it may be misleading when applied to knowledge, skill and experience. For example, although factory premises, new this year, are not likely to become obsolete next year and to be replaced by another factory which in turn may suffer a like fate, yet this may be true of engineering skill and knowledge in the field of aero engines. The process of research and new discovery is unending. Again, to speak of "a fund of know-how possessed by the taxpayers as one of their fixed capital assets" is not an exact description of the situation. The taxpayers are served by their staff and it is in the brains and hands of their staff that knowledge, skill and experience reside. What the taxpayers can do is to make these things available to some third party if they so decide: and it is the ability to do this which is really the taxpayers' asset. Moreover, when the taxpayers do this, they do not part with the knowledge so communicated, as they would part with factory premises if sold. They simply share their knowledge with others.

If these distinctions be borne in mind, it does not matter a great deal by what name knowledge, skill and experience be called. They are clearly part of the capital equipment of a company such as the taxpayers, in much the same way as the same attributes are the capital equipment of an individual craftsman. They can be exploited in two ways. By their employment articles can be produced and sold. Alternatively or in addition, the knowledge, skill and experience can be imparted to others for reward. The great artist with his pupils is a familiar example. Similarly with a company such as the taxpayers. They can and do use their great experience, and the knowledge and skill which comes of it, to make and sell aero engines. In addition they impart these things to others for reward. Admittedly they do this in the course of their trade: and the sole question here is whether that part of the reward consisting of a lump sum is a receipt which should be included in the revenue account when computing the taxpayers' taxable profits: or whether on the other hand the receipt should properly be credited to some capital account.

Now that one can pass in review some seven years of the taxpayers' activities, I entertain no doubt that these lump sums are trading revenue. I reach this conclusion having regard to the systematic and repeated exploitation of the taxpayers' knowledge, skill and experience in this way; to the clear indications afforded by the option clauses in the various agreements, that this is a long-term policy of the taxpayers; and to the circumstances that in certain countries this was the only sure way in which the taxpayers could exploit these attributes. The case is quite different from *Moriarty v. Evans Medical Supplies, Ltd.* (9). I differ from the learned judge and from the Special Commissioners with regret, but I find myself unable to say that the commissioners' finding was reasonably open on the facts.

I should reach the same conclusion even if the large expenditure on research and experiment undertaken by the taxpayers, which contributes so much to their knowledge and skill, had not been allowed as a revenue expense when computing chargeable profits. The court was informed, however, that it has. I agree that these appeals should be allowed.

Appeals allowed. Leave to appeal to the House of Lords granted.

Solicitors: *Solicitor of Inland Revenue; Claremont, Haynes & Co.* (for the taxpayers).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

GAVAGHAN v. EDWARDS.

[COURT OF APPEAL (Ormerod, Willmer and Danckwerts, L.J.J.), April 28, 1961.]

Sale of Land—Contract—Memorandum—Material term not included in memorandum—Term orally agreed—Letter of solicitors acting for both parties stating the material term and note of confirmation by client by telephone—Whether documents sufficient memorandum—Authority of solicitor—Law of Property Act, 1925 (15 & 16 Geo. 5 c. 20), s. 40 (1).

On May 6, 1958, the vendor and the purchaser orally agreed to sell and purchase the vendor's dwelling-house. They both signed a contract, dated May 7, 1958, which was a sufficient memorandum for the purposes of the Law of Property Act, 1925, s. 40, save that it provided that "the date fixed for completion is to be agreed between the parties". The vendor and the purchaser instructed the same firm of solicitors to act for them, and later the vendor and the purchaser met and orally agreed a date for completion. On May 15, 1958, the solicitors wrote to the purchaser that the vendor had informed them that "the date for completion agreed between you and him under the contract is 'Jan. 31, 1959, or earlier by arrangement'. May we take it please that this is in order?" This letter was written by the solicitor attending to the matter and signed with the firm's name. The copy retained by the solicitors and produced in evidence bore an indorsement "16/5/58 [the purchaser] phoned and confirmed above". It was not disputed that the telephone conversation referred to took place. On the question whether the contract was enforceable against the purchaser,

Held: the contract was enforceable because the letter of May 15, 1958, was sufficient to complete the memorandum of the contract for the purposes of s. 40 of the Act of 1925, notwithstanding that it was signed only by the purchaser's solicitor, the inference from the facts, and in particular from the telephone conversation of May 16, 1958, being that the solicitor had the purchaser's authority to sign a memorandum on his behalf.

Wright v. Pepin ([1954] 2 All E.R. 52) distinguished.

Appeal dismissed.

[As to memorandum of contract for sale of land, see 34 HALSBURY'S LAWS (3rd Edn.) 207, para. 346; and for cases on the subject, see 40 DIGEST (Repl.) 31-33, 37, 161-173, 199-203.]

Cases referred to:

Forster v. Rowland, (1861), 7 H. & N. 103; 30 L.J.Ex. 396; 158 E.R. 410; 12 Digest (Repl.) 148, 943.

Rosenbaum v. Belson, [1900] 2 Ch. 267; 69 L.J.Ch. 569; 82 L.T. 658; 1 Digest 285, 165.

Smith v. Webster, (1876), 3 Ch.D. 49; 45 L.J.Ch. 528; 35 L.T. 44; 40 J.P. 805; 12 Digest (Repl.) 177, 1173.

Wright v. Pepin, [1954] 2 All E.R. 52; [1954] 1 W.L.R. 635; 3rd Digest Supp.

Appeal.

This was an appeal by the defendant from an order of His Honour JUDGE INGRESS BELL, made on Nov. 17, 1960, at Gloucester County Court. The plaintiff by his specially indorsed writ issued in Cheltenham District Registry claimed £845 for damages for breach of contract to purchase land. The defendant in his defence denied the alleged breach of contract because no date was fixed for completion, and alternatively alleged that the agreement was unenforceable inasmuch as it failed to satisfy the requirements of s. 40 (1) of the Law of Property Act, 1925. He counterclaimed for the return of the deposit of £450. The plaintiff in his reply and defence to counterclaim alleged that the contract was valid, and alternatively that the parties agreed the date for the completion and that the solicitor acting for both parties made a note of that agreement. The county court judge held that the formal contract alone was not a sufficient note

or memorandum, but with the additional note of the solicitor satisfied the requirement of s. 40 (1) of the Law of Property Act, 1925. A

The plaintiff served a respondent's notice that the judgment should be upheld on the ground that the written contract between the parties was a sufficient note or memorandum.

John Ellison for the defendant, the purchaser.

Michael Hoare for the plaintiff, the vendor. B

DANCKWERTS, L.J., gave the first judgment at the request of ORMEROD, L.J.: This is an appeal from a judgment of His Honour JUDGE INGRESS BELL sitting at Gloucester, and it relates to an alleged contract for the sale and purchase of a house. The material events began in April and May, 1958. A man called Harris introduced the vendor and purchaser to each other in April or at the beginning of May, and early in May the vendor telephoned the proposed purchaser, Edwards, and said he was now able to talk business. On May 6 the two parties met at the vendor's house and agreed a price of £4,500. This appears to have been a much better price than the vendor might have expected, because as the result of what happened subsequently the house was sold for £3,300, which is not alleged to have been an unduly low price. This may account for the unwillingness of the defendant to go through with the sale. The vendor said that he would see his solicitor and would have something ready for the purchaser to sign. However, the vendor on May 7 went to an estate agent and got a standard form which he typed out, filling in the blanks, and this form was signed by both parties over a 6d. stamp. It was what might be described as a rather detailed and complete contract or formal contract. It is dated May 7, 1958, made between the plaintiff, William Gavaghan, and the defendant, Ronald James Edwards, and cl. 2 provides that C D E

"the property is sold subject to the Law Society's Conditions of Sale, 1953, with any amendments thereof which may be effective at the date hereof (such conditions being hereinafter referred to individually by the designation 'General Conditions' together with the number thereof) so far as they are not varied by or inconsistent herewith." F

Then the price is stated, there is a provision for a deposit, and provision for vacant possession to be given on completion. Clause 6 is important. It provides, "the date fixed for completion is to be agreed between the parties" and then it provides that completion is to take place at the office of the vendor's solicitors. G

There is a cross-notice in respect of a point which was decided against the plaintiff. The learned judge held that this was not a completely binding contract because the provision, "the date fixed for completion is to be agreed between the parties", by implication eliminated the provision regarding completion which will be found in the Law Society's Conditions of Sale (which is a date seven weeks from the creation of the written agreement). It is unnecessary for us, it seems to me, to consider that point, because on the view which I have reached, at any rate, the learned judge reached a conclusion correctly in favour of the plaintiff on the other point which is before us on this appeal. H

At a meeting subsequent to that which took place on May 6, 1958, this document was signed and the vendor suggested that the purchaser should go to the vendor's solicitors. On May 8, 1958, the agreement was taken to the vendor's solicitors, Messrs. Rowberry & Co., and the solicitor in charge of the matter was a Mr. Apperley. It is fairly clear that the vendor told his solicitor on that occasion that the purchaser wished him to act for him also as well as for the vendor. On May 9, 1958, a letter was written by Mr. Apperley of Rowberry & Co. to the purchaser: I

"Dear Sir, 128B, Cheltenham Road, Gloucester. Mr. Gavaghan has passed to us the contract signed by you and him for your purchase of the

A above property. We understand that you would like us to act also for you in the matter, which we shall be pleased to do. It appears that completion is not likely to take place for some little time but we will in the meanwhile proceed with what is necessary and will get in touch with you again as soon as required."

B No answer was returned by the purchaser Edwards to the letter. On the other hand, he did not write back saying, "it is not right; I do not want you to act for me", and I think that it is a fair inference that he accepted that the instructions which had been given to the solicitor on behalf of the purchaser had been correctly given. By inference, therefore, it seems to me that from the date of the receipt of that letter, or perhaps even at an earlier date when he received instructions from the vendor, Rowberry & Co. and Mr. Apperley must be taken to have been instructed to act in regard to the purchase on behalf of the purchaser as well as the vendor. It is hardly necessary to say that I regard this situation as very unsatisfactory. In many cases it may work perfectly all right, but if anything whatever goes wrong with regard to the sale, a solicitor who is acting for both parties is almost certainly placed in a position where the interests conflict and a difficult situation is likely to arise.

D Apparently at some date which must have been just prior to the next letter, which is dated May 15, 1958, the vendor and the purchaser met and agreed on the date for completion. The date agreed must have been Jan. 31, 1959, because on May 15, 1958, the firm of Rowberry & Co., that is, Mr. Apperley, wrote another letter to the purchaser in these terms referring to the property:

E "Further to our letter of the 9th instant, Mr. Gavaghan now informs us that the date for completion agreed between you and him under the contract is 'Jan. 31, 1959, or earlier by arrangement'. May we take it please that this is in order?"

It is signed "Rowberry & Co." and a note is indorsed on the copy of this letter—the original, of course, had been sent to Mr. Edwards—"16/5/58 Mr. Edwards phoned and confirmed above". It has not been really disputed in the evidence that such a telephone conversation took place; nor has it been really disputed that there was in fact an agreement reached between the vendor and the purchaser that the date for completion should be as is stated in that letter. The real point which is taken is that a solicitor normally has no authority either to enter into a contract or to sign a memorandum on behalf of his client even though employed in regard to the completion of the sale which is in question, and, therefore, if there was no authority to sign on behalf of the vendor, there is no memorandum in accordance with s. 40 of the Law of Property Act, 1925, signed by the party to be charged or some agent on his behalf.

H It is no doubt correct (and there are cases in which it was so held) that the mere fact of the relationship of solicitor and client being constituted in regard to a particular purchase does not by implication give a solicitor any authority to make a contract or to sign a memorandum, and I may refer to *Forster v. Rowland* (1) and *Smith v. Webster* (2). But that is not a hard and fast rule which is not capable of alteration. On the facts of the case, as it seems to me, from the way in which the instructions are given to the solicitor, he may by implication be entitled to sign a memorandum which will bind his client. There are cases I where such an authority has been implied from the terms of the particular relationship created on the facts of the case. *Rosenbaum v. Belson* (3) is such a case, although the circumstances of that case are no doubt different from the present. The striking feature in this case, as it seems to me, is that there was a contract which on its terms was so complete that it needed no further implementation in any way except in regard to one single term and that was the date for completion. That was plainly on the evidence a term which in fact was agreed

(1) (1861), 7 H. & N. 103.

(2) (1876), 3 Ch.D. 49.

(3) [1900] 2 Ch. 267.

between the parties subsequently, and the only point is whether when the solicitor by way of confirmation wrote the letter of May 15, that would bind his client so as to complete a memorandum which would satisfy s. 40 of the Law of Property Act, 1925. A

There are cases where the conflict of interest between the two parties and the position, therefore, of a solicitor may be so difficult that he could not properly do something which would bind one party to the other. No doubt that was the situation in the case which was decided by HARMAN, J., with regard to an acknowledgment for the purpose of the Limitation Act, 1939, *Wright v. Pepin* (4), where the solicitor in question, acting for both parties, was held not to be able to give an acknowledgment which would prevent the statute running; but that seems to me to be a very different case from the present. Where, as in the present case, the parties have in fact agreed, there is nothing contradictory in the position of a solicitor acting for both parties which will prevent him creating an additional memorandum for the purpose of recording a final term agreed by the parties so as to bind either or both of his clients. To my mind the inference from what happened in the present case is plainly that the solicitor had such authority. He may not have had authority to make a memorandum before he wrote the letter of May 15, 1958, but the result of the conversation which took place with his client, the purchaser, when his client confirmed that the position was as stated in the letter, seems to me to have been to authorise the signing of a memorandum as a matter of confirmation apart from any difficulties, if there were any, which existed before that as to the terms of the solicitor's instructions and authority. B C D

In those circumstances the necessary memorandum for the purpose of satisfying s. 40 of the Law of Property Act, 1925, was completed by the letter of May 15, 1958, to which there is a signature by the solicitor as agent on behalf of the purchaser. It seems to me on this point that the learned county court judge reached the right conclusion and that really disposes of the case. Accordingly, the appeal should be dismissed. E

ORMEROD, L.J.: I agree and there is nothing I wish to add. F

WILLMER, L.J.: I also agree.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Devonshire & Co.*, agents for *Bretherton & Sons*, Gloucester (for the defendant, the purchaser); *Kinch & Richardson*, agents for *T. Warren-Green*, Cheltenham (for the plaintiff, the vendor).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

In the Estate of BERCOVITZ (deceased). CANNING AND ANOTHER v. ENEVER AND ANOTHER (SIEMER VAN HEMERT AND OTHERS intervening).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Phillimore, J.), April 11, 12, 13, 19, 1961.]

Will—Execution—Place of signature—Signature at top of will attested—Second signature of testator below disposition and at foot of will not attested—Whether will validly executed—Force of maxim omnia praesumuntur rite esse acta—Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 9.

A testator typed his will on a single sheet of paper. He headed it on the left-hand side with an attestation clause, and on the right-hand side of this clause he appended his signature. Under this clause and signature was a gap of two inches in which were the signatures of the two attesting witnesses. The body of the will then followed, below which the testator again placed his signature. The dispositions included gifts in favour of mistresses of the testator and an illegitimate daughter. One of the witnesses said that when they signed everything below the signatures (viz., the body of the will) was covered with blotting paper, that she did not see the testator sign at the foot of the will and that, if she had done so, she would have insisted that she and the other attesting witness should attest it. On a preliminary issue whether the will was properly attested,

Held: the will was not validly executed because the signature of the testator that was made and acknowledged by him in the presence of the witnesses was not the signature at the foot or end of the will (so that there was not compliance with s. 9* of the Wills Act, 1837), the signature attested being that beside which the witnesses signed and the probability also being that the testator's object in preparing the will in the form that he adopted (with the signature at the top of the page) was to ensure secrecy of the provisions which he would not desire the witnesses to read, which object would be consistent with the attested signature being at the top.

Phipps v. Hale ((1874), L.R. 3 P. & D. 166) considered; dictum of LINDLEY, L.J., in *Harris v. Knight* ((1890), 15 P.D. at p. 179) adopted (see p. 484, letters F to I, post).

Per CURIAM: the force of the presumption omnia praesumuntur rite esse acta varies with all the circumstances; where the document is entirely regular in form it may be very strong, but where, as here, it is irregular and unusual in form the maxim cannot apply with the same force (see p. 485, letter I, post).

[As to validity of wills and place of attestation, see 34 HALSBURY'S LAWS (2nd Edn.) 60, 61, paras. 75, 76; 62, para. 78; 63, para. 80, note (m); 64, para. 82, note (m); and for cases on the subject, see 44 DIGEST 251-253, 783, 790-802; 254, 806; 256, 257, 822-824, 831, 832, 834-836, 262, 895, 263, 913, 914, 272, 273, 1047-1051 and Supplements.

For the Wills Act, 1837, s. 9, see 26 HALSBURY'S STATUTES (2nd Edn.) 1332.]

Cases referred to:

Chamney, In the Goods of, (1849), 1 Rob. Eccl. 757; 14 L.T.O.S. 89; 163 E.R. 1204; 44 Digest 273, 1059.

Ewen v. Franklin, (1855), Dea. & Sw. 7; 26 L.T.O.S. 127; 164 E.R. 485; 44 Digest 254, 806.

Gunstan, In the Goods of, Blake v. Blake, (1882), 7 P.D. 102; 51 L.J.P. 36; 51 L.J.Ch. 377; 46 L.T. 641; 44 Digest 263, 913.

Harris v. Knight, (1890), 15 P.D. 170; 62 L.T. 507; 44 Digest 280, 1126.

Phipps v. Hale, (1874), L.R. 3 P. & D. 166; 44 Digest 273, 1052.

* Section 9, so far as material, is set out at p. 483, letter I, post.

Preliminary issues.

On May 30, 1960, COLLINGWOOD, J., ordered four preliminary issues to be tried arising out of a will dated July 23, 1940, made by Bernard Bercovitz (hereinafter called "the testator") in London. The testator was born in Berlin in 1891, of German or Polish parentage, his parents thereafter acquiring Turkish nationality. In 1920, in London, he married Johanna Jacoba Franeisea Groothuis, and, having acquired business interests in this country, he used as his agents a firm called H. & J. Skelton, Ltd. A Major Skelton of that firm had a secretary, a Miss Bathurst, who acted as the testator's secretary whilst in London. In 1931 the testator made his home in Holland and acquired a domicile of choice there until he came to London in May, 1940, five days before the Germans overran the Netherlands. He next decided to go to Canada; but on the day before he sailed, namely on July 23, 1940, he made a will. This document consisted of a single foolscap page of typewritten matter headed by an attestation clause on the right-hand side of which the testator appended his signature. Underneath this attestation clause was a blank space of some two inches and thereafter followed the body of the will naming the executors and the beneficiaries and making the dispositions. These dispositions included the gift of forty-five per cent. of the testator's estate to his widow, ten per cent. to one of his mistresses, twenty per cent. to a daughter by her, ten per cent. to another mistress and bequests to a brother and the two sisters of the testator. Immediately under these typewritten dispositions the testator again appended his signature. On July 23, 1940, the testator came to the offices of H. & J. Skelton, Ltd., and the evidence of Miss Bathurst, which was accepted by the court, showed that he had prepared the will in duplicate. Miss Bathurst said that the testator produced two documents from his bag and said that they were his will. He said that he wanted her to witness it for him and would want another witness: she thereupon fetched a Miss Hyde, who was also on the staff of H. & J. Skelton, Ltd. The testator then signed both documents at the top of each of the two sheets of paper. Then Miss Bathurst and Miss Hyde, who were both present when each signed, appended their signatures side by side below his. Miss Bathurst deposed that everything below the signatures of herself and Miss Hyde was covered by blotting paper. She said that she thought at the time that the body of the will was on a previous page. She had been employed some years previously in a solicitor's office, and had on many occasions witnessed wills. Miss Bathurst thus did not know that the body of the will followed her signature and that of Miss Hyde, nor was she aware of the testator's signature at the end of the body of the will; for had she seen it, she asserted, she would have insisted on both her and Miss Hyde attesting it. After they had signed as attesting witnesses, Miss Bathurst stated that the testator called for envelopes and sealing wax and the two documents were folded up and put in the envelopes and sealed with Major Skelton's seal, the testator writing on each envelope "the last will of Bernard Bercovitz". On the envelope containing the top copy was written the word "original". On the same day at the testator's request, Miss Bathurst deposited the top copy of the will with the City Safe Deposit and the other with R. E. Enever & Co., the testator's London solicitors. Miss Hyde stated that she remembered Miss Bathurst and herself attesting the will; but she could not remember the testator signing once, let alone twice. The evidence of one of the plaintiffs, James Canning, was that the signature of the testator on the will was the one he normally used on business documents. The evidence of Mr. Gurrin, a well known handwriting expert, was that the attestation clause and the body of the will, other than the last three lines providing for the disposal of the widow's share should she predecease the testator, were all vertically and laterally in register and must have been typed at the same time without the paper being removed from the typewriter. His evidence was that both signatures of the testator were made with the same pen and the same ink and possibly made with the same pen and ink as used by Miss Hyde. He thought that the signature

A of Miss Bathurst was made with a different pen and a different nib but that there was nothing to suggest that the two signatures of the testator were not made at the same time and there was no evidence to indicate that either was blotted.

On July 24, 1940, the testator sailed for Canada where he established himself in business, and where on Mar. 3, 1944, he re-married his wife (having divorced her in Holland in 1934). In February, 1945, he became a naturalised Canadian citizen. In April, 1947, the testator made a request by letter to Miss Bathurst to collect and give him all the documents deposited in the City Safe Deposit, including the original will, and she handed over these documents to him when he visited this country in July, 1947. The testator died in London on May 7, 1956, and no trace of the top copy of the will could be found amongst his papers either in Canada or in England; but Enever & Co. produced their duplicate, the contents of which have been described. The plaintiffs in this action, James Canning and Guy Roberge, who were Canadian business associates of the testator, believing that the will of 1940 was not valid, applied to the Canadian courts for letters of administration on the basis that the testator had died intestate. Letters were granted to them on that basis on Oct. 19, 1956, and they then proceeded to attempt to wind-up the estate in England. D The two partners of Enever & Co., Charles Richard Enever and William Baxter Enever, had entered a caveat on Nov. 14, 1956, in the Principal Probate Registry against the sealing of the said letters of administration pursuant to the provisions of the Colonial Probates Act, 1892, and on May 13, 1957, this caveat was renewed. In their statement of claim dated Feb. 21, 1958, the plaintiffs alleged, inter alia, that the will of 1940 was not duly executed and put the defendants to proof that E the provisions of the Wills Act, 1837, had been complied with. The testator's widow, Johanna Bercovitz, died on Apr. 1, 1958, and the elder of the two defendants had since died. On Apr. 11, 1960, COLLINGWOOD, J., approved a settlement of the claim by the testator's illegitimate daughter by consent, and, on May 30, 1960, as already stated, ordered four preliminary issues to be tried, namely, (i) whether the will of July 23, 1940, was validly executed; (ii) whether F this will was executed in duplicate; (iii) whether it was handed over to the testator by Miss Bathurst in 1947; and (iv) whether if the will was validly executed according to English law, it would be recognised as valid by the law of the Netherlands.

The case is reported only on the first issue, namely, whether the will of 1940 was a valid will. The defendants on this issue were the surviving partner of G Enever & Co., William Baxter Enever, and the third intervener, Barbara Flood.

John Latey, Q.C., and S. L. Newcombe for the plaintiffs.

K. B. Campbell and Viscount Stormont for the defendant and third intervener.

Cur. adv. vult.

H Apr. 19. **PHILLIMORE, J.**, read the following judgment: This action arises from the death of Bernard Bercovitz, who died at a London hotel on May 7, 1956. His estate, after payment of duty and the estimated costs of these proceedings, is likely to amount to some £300,000, of which a substantial portion is in this country. The testator was evidently a remarkable man who lived a somewhat unusual life.

I [HIS LORDSHIP then stated the facts as set out at p. 482, letter C, et seq., ante, and continued:] Section 9 of the Wills Act, 1837, so far as material, provides as follows:

"... No will shall be valid unless it shall be in writing, and ... signed at the foot or end thereof by the testator ... and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

Thus it is the testator's signature at the end of the will which is vital—it is this signature which the witnesses must attest. It does not matter if the testator, in addition to signing at the end of the will, also affixed his signature to other parts of it—thus where a will extends over several sheets of paper a testator will often sign each page for the purposes of identification. Nor does it matter where the witnesses sign provided that they are attesting the signature of the testator at the end of the will (see *In the Goods of Chamney* (1)).

In *Phipps v. Hale* (2), where a will consisted of ten sheets, the testator signed the tenth and placed his initials on the other nine; two out of the three witnesses signed their names on the first nine sheets but not on the tenth. SIR JAMES HANNEN held that the operative signature of the testator was not duly attested. In so deciding he followed a similar decision of SIR JOHN DODSON in *Ewen v. Franklin* (3).

Of course, it sometimes happens that witnesses to a signature do not actually watch the testator's pen travelling over the paper. It has been held sufficient if they see or have the opportunity of seeing the signature that they are attesting either made or acknowledged (*In the Goods of Gunstan*, *Blake v. Blake* (4)). The vital question in my judgment is whether when they attest they intend to attest the operative signature of the testator, having seen or had the opportunity to see that signature either made or acknowledged. I take that as the test from the words of SIR JAMES HANNEN in *Phipps v. Hale* (5).

In reaching a decision this court is not confined to the evidence of the attesting witnesses. Memories are often fallible after many years, and in the present case it is over twenty years since the document was attested. The practice is to apply the maxim *omnia praesumuntur rite esse acta* with more or less force according to the circumstances of each case, bearing in mind that as LOPES, L.J., said in *Harris v. Knight* (6):

“In every case of this kind the court should be influenced by a desire that the intention of the testator should not be frustrated, when the execution of the testator is sufficiently proved, and the will, on its face, complies with the requirements of the statute.”

The application of the maxim is expressed by LINDLEY, L.J. (7), in words which I should desire to adopt. He says:

“The maxim, ‘*Omnia praesumuntur rite esse acta*’, is an expression, in a short form, of a reasonable probability, and of the propriety in point of law of acting on such probability. The maxim expresses an inference which may reasonably be drawn when an intention to do some formal act is established; when the evidence is consistent with that intention having been carried into effect in a proper way; but when the actual observance of all due formalities can only be inferred as a matter of probability. The maxim is not wanted where such observance is proved, nor has it any place where such observance is disproved. The maxim only comes into operation where there is no proof one way or the other; but where it is more probable that what was intended to be done was done as it ought to have been done to render it valid; rather than that it was done in some other manner which would defeat the intention proved to exist, and would render what is proved to have been done of no effect.”

Thus, wills have been held to be duly executed in the face of the evidence of attesting witnesses to the contrary and especially but not exclusively where the document itself was entirely regular in form. The question that I have to decide is whether in all the circumstances of this particular case it is more probable that what was done was done as it ought to have been done to render the will valid.

(1) (1849), 1 Rob. Eccl. 757.

(2) (1874), L.R. 3 P. & D. 166.

(3) (1855), Dea. & Sw. 7.

(4) (1882), 7 P.D. 102.

(5) (1874), L.R. 3 P. & D. at p. 168.

(6) (1890), 15 P.D. at p. 184.

(7) (1890), 15 P.D. at p. 179.

A Counsel for the defendant (who also appeared for the third intervener) in a very able and persuasive speech asserted that this will was validly executed, and he asked me to apply the maxim—or, as it is often called, the presumption—in favour of the will.

With regard to the evidence of Miss Bathurst, he urged that I should reject it and that I should treat her evidence as uncorroborated and partisan. He referred to a number of inconsistencies in it, asserting that she was inaccurate and unreliable. He pointed out that this document was made twenty years ago, at a time of great events, and he emphasised that accurate recollection of war-time incidents is notoriously difficult.

[HIS LORDSHIP then reviewed the criticisms of Miss Bathurst's evidence, which is summarised at p. 482, letter E, ante, and continued:] With regard to the probabilities, counsel for the defendant points out that the testator was undoubtedly a clever man and had taken a lot of trouble to make this will—he prepared it in duplicate, obviously typed it himself, with an accurate attestation clause; he evidently knew that two witnesses were required; he signed himself at the end and so may well have known that that signature was important. Then, most important of all, he urges on me that he used (on Mr. Gurrin's evidence) the same pen and the same ink, and if Miss Bathurst is right, it was an ordinary office pen with a relief nib which had to be dipped in the ink. If that is right, both signatures must have been appended in the board room, not before, because the pen would not have been available, and not afterwards, because as soon as the witnesses had signed the documents were folded up and put into the envelopes. Accordingly, he urges me to find that the proper inference from the facts is that these witnesses saw or had the opportunity to see the testator's signature at the foot of the will either made or acknowledged.

I approach this question from the point of view that this man clearly wanted to make this disposition and that any court should give effect to his wishes if it is at all possible to do so. I have regretfully come to the conclusion that it is not and that I must find that this document was not validly executed. What was the object of preparing the document in this form? The contents of this will were such that this testator might well not wish to run any risk of the witnesses reading its provisions. Although it might be thought equally easy to achieve this by putting the attestation clause at the end in the ordinary way and covering the body of the will whilst the signatures were appended below it, the testator apparently thought it would be easier if the attestation clause was put at the top. I can conceive no other explanation for the form of this document other than a desire to ensure secrecy. Moreover, if a testator signs beside the attestation clause the probability is that he regards that signature as the important one. Whether in signing at the end he did so because of any knowledge of the law or simply to prevent any addition to the document must be a matter of speculation. Whatever his intention, where two witnesses sign beside a signature the overwhelming probability is that it is that signature they intend to attest. Just as in cases where witnesses have signed beside a testator's signature or initials on the first four or the first nine sheets of a will but not on the fifth or the tenth the court has held that the reasonable inference was that they were not attesting the signature made respectively on the fifth or tenth pages, so here I think the reasonable inference is that the witnesses' intention was to attest the signature by which they signed and not the signature at the foot of the will which was divided from their signatures by the whole body of the will itself.

The force of the presumption or maxim varies with all the circumstances. Where a document is entirely regular in form it may be very strong; but where, as here, it is irregular and unusual in form the maxim cannot apply with the same force. Where, as here, the natural inference must be that the witnesses intended (and intention is vital, as SIR JAMES HANNEN said in *Phipps v. Hale* (8))

to attest the signature by which they signed rather than some other signature of the testator, to apply the presumption would seem to fly in the face of the probabilities. A

Moreover, as I have said, one of the main objects of this transaction was secrecy—it was unlikely that this testator would allow any witness to observe the body of this will. I have no doubt that the body of the will was covered when the witnesses signed. It seems likely that in covering this he covered also the signature at the foot rather than that by a careful selection of a piece of paper of the appropriate width he allowed both signatures to remain visible. I am satisfied on the probabilities that he made both signatures whilst in the board room with the same pen and same ink, but I consider that it is entirely against probabilities that he allowed either witness the opportunity to see the signature he placed at the foot of the document. B C

Accordingly, on the evidence of the document itself, I think it contrary to probability that either of these witnesses saw or had the opportunity of seeing the signature of the testator at the foot of this will either made or acknowledged. Finally, I am quite satisfied that Miss Bathurst is an honest woman. I accept that she was inaccurate on a number of minor points and I think that there was some truth in the suggestion that she may have been inclined to be partisan in the sense that her inclination was to see that the widow should get full measure. At the same time, she is not a woman who would twist the truth deliberately or who would conceal the truth whatever the consequences. She had had very considerable experience in making wills, and when she told me that if she had seen the signature at the bottom she would have said at once that she and Miss Hyde must witness that signature I am satisfied that she was telling me the truth. After all, she had the testator's interests very much at heart. I am quite satisfied that when she signed she intended to witness his signature at the top of the paper and had no knowledge whatever of any signature at the foot or any intention of attesting any such signature. Accordingly I must pronounce for the plaintiffs on the first issue and find that this will was not validly executed. D E

On the second issue—the question whether the will was executed in duplicate—it is now agreed that it was made in duplicate, and accordingly on that issue I also pronounce for the plaintiffs. F

On the third issue, the simple question whether Miss Bathurst handed this will to the testator in 1947, I have no hesitation in accepting her evidence that she did so, and accordingly I find that this will was handed over to him in July of that year, and on that issue I find for the plaintiffs. G

On the fourth issue, where again the parties have agreed, it is agreed that I should pronounce for the defendants. If this will was validly executed in England it would be regarded as valid by the courts of the Netherlands.

Order accordingly.

Solicitors: *Arthur Hunt & Hunt* (for the plaintiffs); *Lovell, White and King* (for the defendant and third intervenor).

[*Reported by N. P. METCALFE, ESQ., Barrister-at-Law.*]

A YORKSHIRE INSURANCE CO., LTD. v. NISBET SHIPPING CO., LTD.

[QUEEN'S BENCH DIVISION (Diplock, J.), April 11, 12, 13, 14, 1961.]

B Insurance—Marine insurance—Subrogation—Total loss—Assured recovering damages from third party at fault of amount exceeding sum paid by insurer—Insurer not entitled to recover excess amount from assured—Valued policy—Policy value of vessel less than actual value—Marine Insurance Act, 1906 (6 Edw. 7 c. 41), s. 79 (1).

C An insurer cannot recover from an assured by means of the doctrine of subrogation (now embodied in s. 79 (1)* of the Marine Insurance Act, 1906) a greater sum than the insurer has paid (see p. 492, letter A, and p. 494, letter F, post).

Castellain v. Preston ((1883), 11 Q.B.D. 380) applied.

North of England Iron Steamship Insurance Assn. v. Armstrong ((1870), L.R. 5 Q.B. 244) explained and criticised.

D Under a valued hull policy of marine insurance the assured's vessel was insured against loss by marine risks and the policy value of the vessel was £72,000, a sum which was a little less than the actual value. As a result of a collision in 1945 with a ship owned by the Canadian government the vessel became an actual total loss and on Apr. 20, 1945, the insurers paid the assured £72,000 under the policy for the total loss of the vessel. In September, 1946, the assured, with the insurers' approval, began proceedings in Canada against the Canadian government for damages, which were quantified in Canadian dollars, for the loss of the vessel. Ultimately the Canadian government were held solely to blame for the loss and damages were awarded and paid, which having regard to devaluation of the pound in 1949 actually realised, on being transmitted to England and converted into English currency, £126,971 14s. 11d., viz., nearly £55,000 more than the £72,000 paid by the insurers for the total loss of the vessel. The assured repaid the £72,000 to the insurers but retained the excess sum of £55,000. The insurers sought to recover the excess amount from the assured relying on s. 79 (1) of the Marine Insurance Act, 1906.

G Held: the right of the insurers under s. 79 (1) to be subrogated to the assured's rights and remedies was limited to recovering from the assured the sum of £72,000 which in the circumstances of the case the insurers had overpaid.

[As to subrogation, see 22 HALSBURY'S LAWS (3rd Edn.) 160-164, paras. 309-313; and for cases on the subject, see 29 DIGEST 52-54, 156-166.]

H For the Marine Insurance Act, 1906, s. 79 (1), see 13 HALSBURY'S STATUTES (2nd Edn.) 53.]

Cases referred to:

Bank of England v. Vagliano Brothers, [1891] A.C. 107; 60 L.J.Q.B. 145; 64 L.T. 353; sub nom. *Vagliano v. Bank of England*, 55 J.P. 676; 42 Digest 779, 2094.

I *Boag v. Standard Marine Insurance Co., Ltd.*, [1937] 1 All E.R. 714; [1937] 2 K.B. 113; 106 L.J.K.B. 450; 156 L.T. 338; 19 Asp. M.L.C. 107; Digest Supp.

British & Foreign Marine Insurance Co., Ltd. v. Sanday (Samuel) & Co., [1916] 1 A.C. 650; 85 L.J.K.B. 550; 114 L.T. 521; 13 Asp. M.L.C. 289; 29 Digest 276, 2236.

Burnand v. Rodocanachi, (1882), 7 App. Cas. 333; 51 L.J.Q.B. 548; 47 L.T. 277; 4 Asp. M.L.C. 576; 29 Digest 291, 2375.

* The terms of s. 79 (1) are printed at p. 489, letter I, post.

- Castellain v. Preston*, (1883), 11 Q.B.D. 380; 52 L.J.Q.B. 366; 49 L.T. 29; A 29 Digest 52, 156.
- Celia (S.S.) v. Volturmo (S.S.)*, [1921] All E.R. Rep. 110; [1921] 2 A.C. 544; 90 L.J.P. 385; 126 L.T. 1; 17 Digest (Repl.) 173, 685.
- Glen Line, Ltd. v. A.-G.*, (1930), 36 Com. Cas. 1; Digest Supp.
- Goole & Hull Steam Towing Co., Ltd. v. Ocean Marine Insurance Co., Ltd.*, [1927] All E.R. Rep. 621; [1928] 1 K.B. 589; 97 L.J.K.B. 175; 138 B L.T. 548; 17 Asp. M.L.C. 409; 33 Com. Cas. 110; Digest Supp.
- King v. Victoria Insurance Co., Ltd.*, [1896] A.C. 250; 65 L.J.P.C. 38; 74 L.T. 206; 29 Digest 53, 159.
- Livingstone, The*, (1904), 130 Fed. Rep. 746.
- North of England Iron Steamship Insurance Assn. v. Armstrong*, (1870), L.R. 5 Q.B. 244; 39 L.J.Q.B. 81; 21 L.T. 822; 29 Digest 122, 748. C
- St. Johns, The*, (1900), 101 Fed. Rep. 469.
- Simpson v. Thomson*, (1877), 3 App. Cas. 279; 38 L.T. 1; 3 Asp. M.L.C. 567; 29 Digest 290, 2355.
- Thames & Mersey Marine Insurance Co. v. British & Chilian S.S. Co.*, [1916] 1 K.B. 30; 85 L.J.K.B. 384; 114 L.T. 34; 13 Asp. M.L.C. 221; 21 Com. Cas. 150; 29 Digest 292, 2379. D
- West of England Fire Insurance Co. v. Isaacs*, [1897] 1 Q.B. 226; 66 L.J.Q.B. 36; 75 L.T. 564; 29 Digest 306, 2534.

Action.

In this claim by insurers for money received for their use by the assured the insurers, who on the total loss of the assured's vessel had paid the full amount of their subscription to a valued policy of marine insurance on the vessel, sought to recover from the assured a sum greater than the amount they had paid under the policy which the assured had recovered from a third party as damages for the loss of the vessel. The insurers, relying on s. 79 (1) of the Marine Insurance Act, 1906, contended that on paying for the total loss of the vessel they were subrogated pro tanto to all the rights and remedies of the assured in and in respect of the vessel; alternatively, that the assured in recovering damages from the third party were acting pro tanto as agents of the insurers and/or on the instructions and/or with the agreement or approval of the insurers and were bound to account to them pro tanto for the sums recovered; and, in the further alternative, that the assured were trustees pro tanto of the sums recovered from the third party for the insurers. The assured admitted that they were bound to account to the insurers out of the sums recovered from the third party but only for the amount of the insurers' subscription to the policy. The facts are stated more fully in the judgment. E F G

A. A. Mocatta, Q.C., and *C. T. Bailhache* for the plaintiff company, the insurers.
Eustace Roskill, Q.C., and *A. J. L. Lloyd* for the defendant company, the assured. H

Cur. adv. vult.

Apr. 14. **DIPLOCK, J.**, read the following judgment: The defendant company, whom I will call the assured, were at all material times the owners of the s.s. *Blairnevis*. The plaintiff company and other insurers insured the defendant company against loss of or damage to the *Blairnevis* by marine risks for a period of twelve months from June 27, 1944, in a policy of marine insurance, in the common form of hull policy of the Institute of London Underwriters. The policy is for the sum of £36,888, of which the amount underwritten by the plaintiff company is £2,523. The *Blairnevis* is valued in the policy at £72,000. The balance of the sum of £72,000 was fully covered by other policies of marine insurance in similar terms to the said policy. I refer to the plaintiff company and the other subscribers to the said policy and the other policies collectively as the insurer. I

A On Feb. 13, 1945, during the currency of the policy, the Blairnevis was damaged in a collision with Her Majesty's Canadian ship Orkney in the Irish Sea, and later on the same day she was beached near the mouth of the River Mersey. On Feb. 15, 1945, the assured gave notice of abandonment of its interest in the Blairnevis and claimed payment for a total loss. The notice of abandonment was not accepted. The Blairnevis became an actual total loss with no salvage value and on Apr. 20, 1945, the insurer paid the assured the £72,000 for the total loss of the vessel. The plaintiff company paid the full amount of its subscription to the policy. On Sept. 19, 1946, the assured, with the approval of the insurer, commenced proceedings in Canada against the Canadian government for damages for the loss of the Blairnevis. Its claim was quantified in Canadian dollars. The proceedings, which went to the Judicial Committee of the Privy Council, were protracted and on July 25, 1955, the Privy Council restored the judgment of the Exchequer Court of Canada, of July 20, 1951, which held that H.M.C.S. Orkney was solely to blame, and set aside the judgment of the Supreme Court of Canada, who had varied the judgment of the Exchequer Court, on appeal, on an issue of limitation of liability only.

D Negotiations then took place as to quantum of damages, in the course of which it was agreed that the actual value of the Blairnevis at the time of loss was £75,514 9s. 11d. Applying the principle laid down in the House of Lords in *S.S. Celia v. S.S. Volturmo* (1) this sum was converted into dollars at the rate of exchange of 4.45 dollars to the pound, current at the date of the collision in 1945, giving a sum in Canadian dollars of 336,039.52 dollars. This sum was paid to the assured in Canada in May, 1958. But in 1949 the pound had been de-valued. E Consequently when the 336,039.52 dollars were transmitted to England in June, 1958, they were converted into pounds at the new rate of exchange and in fact realised £126,971 14s. 11d.; that is nearly £55,000 more than the £72,000 which the insurer had paid for the total loss in April, 1945, and some £51,000 more than the sterling value of the Blairnevis at the date of the loss.

F This action raises the neat point as to who is entitled to this windfall. The assured has accounted to the insurer for the sums received on the basis that it is entitled to retain all moneys in excess of the £72,000 in fact paid to the assured under the policies by the insurer. The insurer claims to be entitled to the full amount received by the assured. By agreement between the parties I can ignore for the purposes of this judgment the costs incurred in the litigation between the assured and the Canadian government. They have agreed between themselves G as to the way in which these will be dealt with, depending on the ultimate decision in this action on the question of principle involved. I therefore will deal with the matter on the basis that the assured, in 1958, received from the Canadian government, the tortfeasor responsible for the loss of the Blairnevis, the net sum of £126,971 14s. 11d., and repaid to the insurer the sum of £72,000, which was paid to the assured by the insurer for the total loss of the vessel in 1945.

H The question of principle involved can, I think, be stated thus: Where an insurer pays for a total loss of the subject-matter insured and the assured, in the exercise of his remedies in respect of that subject-matter, recovers from a third party an amount which exceeds the sum so paid by the insurer, can the insurer recover from the assured the amount of such excess?

I I turn first, as is my duty, to the Marine Insurance Act, 1906, s. 79 of which deals with the rights of the insurer on payment. Subsection (1) is in the following terms:

“Where the insurer pays for a total loss, either of the whole, or in the case of goods of any apportionable part, of the subject-matter insured, he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject-matter so paid for, and he is thereby subrogated

(1) [1921] All E.R. Rep. 110; [1921] 2 A.C. 544.

to all the rights and remedies of the assured in and in respect of that subject-matter as from the time of the casualty causing the loss."

It is to be noted that the subsection, which comes into operation only on payment for the total loss by the insurer, deals with two distinct matters: (i) the interest of the assured in the subject-matter insured; and (ii) the rights and remedies of the assured in and in respect of that subject-matter. The former the insurer is entitled although not bound to take over; if he does the whole interest of the assured in the subject-matter insured is transferred to him. To the rights and remedies of the assured in respect of the subject-matter insured, with which alone I am concerned in this case, the insurer is "subrogated . . . as from the time of the casualty causing the loss." In my view this case turns on what is meant by the word "subrogated" in this context. The doctrine of subrogation is not restricted to the law of insurance. Although often referred to as an "equity" it is not an exclusively equitable doctrine. It was applied by the common law courts in insurance cases long before the fusion of law and equity, although the powers of the common law courts might in some cases require to be supplemented by those of a court of equity in order to give full effect to the doctrine; for example, by compelling an assured to allow his name to be used by the insurer for the purpose of enforcing the assured's remedies against third parties in respect of the subject-matter of the loss.

In his classic judgment in *Castellain v. Preston* (2), BRETT, L.J., was dealing with an unvalued policy but for the purpose of analysing the principle I can at the present stage ignore the complication which arises when the policy is a valued one. BRETT, L.J. (2), based the application of the doctrine of subrogation to policies of insurance on the fundamental principle

" . . . that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified."

The expression "subrogation" in relation to a contract of marine insurance is thus no more than a convenient way of referring to those terms which are to be implied in the contract between the assured and the insurer to give business efficacy to an agreement whereby the assured in the case of a loss against which the policy has been made shall be fully indemnified, and never more than fully indemnified.

Two consequences flow from this: First, "subrogation" is concerned solely with the mutual rights and liabilities of the parties to the contract of insurance. It confers no rights and imposes no liabilities on third parties who are strangers to that contract. It vests in the insurer who has paid a loss no direct rights or remedies against anyone other than the assured. He cannot sue such parties in his own name (see *Simpson v. Thomson* (3)); he is bound by any release given by the assured to a third party (see *West of England Fire Insurance Co. v. Isaacs* (4)). The insurer's rights against the assured cannot be affected by any subsequent contract or dealings between the assured and a third party (*Boag v. Standard Marine Insurance Co., Ltd.* (5); *West of England Fire Insurance Co. v. Isaacs* (4)).

It seems to me to follow that the only terms to be implied to give business efficacy to the contract between the parties are those necessary to secure that the assured shall not recover from the insurer an amount greater than the loss which he has actually sustained. The insurer has contracted to pay to the assured the amount of his actual loss. If, before the insurer has paid under the policy, the assured recovers from some third party a sum in excess of the actual amount of the loss he can recover nothing from the insurer because he has sustained no loss, but it has never been suggested that the insurer can recover from the assured

(2) (1883), 11 Q.B.D. at p. 386. (3) (1877), 3 App. Cas. 279; 3 Asp. M.L.C. 567.

(4) [1897] 1 Q.B. 226.

(5) [1937] 1 All E.R. 714; [1937] 2 K.B. 113; 19 Asp. M.L.C. 107.

A the amount of the excess. It is difficult to see why a term should be implied in a contract of insurance which would involve a fundamentally different result merely because the insurer had already paid for the loss under the policy before the assured had recovered any sum from the third party.

B In my view the doctrine of subrogation in insurance law requires one to imply in contracts of marine insurance only such terms as are necessary to ensure that notwithstanding that the insurer has made a payment under the policy the assured shall not be entitled to retain, as against the insurer, a greater sum than what is ultimately shown to be his actual loss. As COTTON, L.J., said in *Castellain v. Preston* (6)

C "... if there is a money or any other benefit received which ought to be taken into account in diminishing the loss or in ascertaining what the real loss is against which the contract of indemnity is given, the indemnifier ought to be allowed to take advantage of it in order to calculate what the real loss is ..."

D Thus, if after payment by the insurer of a loss that loss, as a result of an act of a third party, is reduced, the insurer can recover from the assured the amount of the reduction because that is the amount which he, the insurer, has overpaid under the contract of insurance. This sum he can recover at common law, without recourse to equity, as money had and received (see BULLEN & LEAKE'S PRECEDENTS OF PLEADINGS (3rd Edn.), at p. 187). It is immaterial in what way the loss has been reduced, or whether it has been reduced after the casualty but before the actual date of payment; if the insurer has paid more than the actual loss, he can recover from the assured as money had and received the amount of the overpayment.

E It is also an implied term of the contract that if it is within the power of the assured to reduce the amount of the loss for which he had received payment from the insurer, by exercising remedies against third parties, he must do so on being indemnified by the insurer against the costs involved. Since such remedies are personal to the assured they must be exercised in his own name. As the common law provides no method by which a person can be compelled to bring legal proceedings against another, recourse was needed by the insurer before the Judicature Acts to chancery to compel the assured to allow his name to be used for legal proceedings against third parties in order to reduce the loss. But the duty of the assured to take proceedings to reduce his loss and the correlative right of the insurer to require him to do so was a contractual duty. The remedy for its breach, by compelling the assured to allow an action to be brought in his name, was an equitable remedy in aid of rights at common law, and was alternative to the common law remedy of recovering damages for breach of the duty (see *West of England Fire Insurance Co. v. Isaacs* (7)). But in the action brought in the name of the assured pursuant to the equitable remedy it is the assured who recovers judgment against the third party, and the judgment can be satisfied only by payment to him. When he receives it, the insurer can recover from him at common law, as money had and received, such sum as he has overpaid to the assured under the contract of insurance.

I In my opinion the words (in s. 79 (1) of the Marine Insurance Act, 1906)

"he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject-matter as from the time of the casualty causing the loss"

mean that he is entitled, as against the assured, to the benefit of the assured's rights and remedies against third parties to the extent which I have indicated above as constituting the rights of the insurer under those implied terms of the contract of insurance which are connoted by the expression "subrogation" in the law applicable to policies of insurance. This seems to me to be the natural

meaning of the words. If it be right, the insurer's rights under the second part of s. 79 (1) with which I am alone concerned are limited to recovering any sum which he has overpaid; he cannot recover more than he has in fact paid.

It has, however, been argued that if this meaning is to be given to the expression "subrogated" the words at the end of s. 79 (2) (which relates to partial loss)—

"in so far as the assured has been indemnified, according to this Act, by such payment for the loss (8)"

—would be unnecessary since on the view which I have expressed this is implicit in the use of the word "subrogated" (9) itself. It may well be that the effect of s. 79 (2) would be the same if those words were omitted; but it is in relation to partial loss that questions normally arise as to the quantum of the insurer's right of subrogation. It can be very rarely—the present is indeed the first recorded case—that it can arise in cases of total loss. It may well be that Parliament inserted those words in sub-s. (2) per majorem cautelam, dealing with a situation in which the problem was likely to arise. Their absence in a subsection dealing with a situation in which the problem had never arisen before 1906 and has not in fact arisen until 1961 does not seem to me to justify my construing the expression "subrogated" in a sense which in my view involves a fundamental departure from the principles of "subrogation" as applied in insurance law at the time of the passing of the Act.

Counsel for the insurer, however, relies strongly on *North of England Iron Steamship Insurance Assn. v. Armstrong* (10). This case, he contends, shows that under the law as it was in 1906 an insurer was entitled to recover from the assured an amount greater than the sum that he had paid to the assured on a total loss; and since the Marine Insurance Act, 1906, was a consolidation Act it should be construed, at least in case of ambiguity, as declaratory of the existing law (see *Bank of England v. Vagliano Brothers* (11) per LORD HERSCHELL; and *British & Foreign Marine Insurance Co., Ltd. v. Samuel Sanday & Co.* (12) per LORD WRENBURY). It is necessary, therefore, to see what *Armstrong's* case (10) did decide. In that case there was a valued policy in which the policy value of the hull was £6,000; its actual value was £9,000. The assured subsequently recovered £5,000 in respect of the loss from a third-party tortfeasor partly to blame. The assured contended that the sum of £5,000 should be apportioned between him and the insurer in the same proportions as £3,000 to £6,000; that is to say, he sought to be treated as his own insurer in respect of the difference between the real value and the policy value. This contention was rejected by the Court of Queen's Bench on the ground that the parties were estopped from alleging that the value was other than that agreed in the policy. No questions arose in that case whether the insurer was entitled to recover from the assured more than the £6,000 which he had himself paid to the assured, but there are certainly passages in the judgment of COCKBURN, C.J., and LUSH, J., which lead to the conclusion that they would have held that the insurer was so entitled. The case was decided in 1870. Valued policies were clearly regarded by the court as new-fangled devices whose use was to be deprecated; no distinction was drawn by the members of the court between the insurer's rights in the subject-matter of the insurance and his rights of subrogation to the remedies of the assured.

It was not, indeed, until LORD BLACKBURN's speech seven years later in *Simpson v. Thomson* (13) that this distinction was clearly appreciated by the

(8) Section 79 (2) in its entirety provides: "Subject to the foregoing provisions, where the insurer pays for a partial loss, he acquires no title to the subject-matter insured, or such part of it as may remain, but he is thereupon subrogated to all rights and remedies of the assured in and in respect of the subject-matter insured as from the time of the casualty causing the loss, in so far as the assured has been indemnified, according to this Act, by such payment for the loss."

(9) The word "subrogated" is used in s. 79 (2) which is printed in footnote (8) supra.

(10) (1870), L.R. 5 Q.B. 244.

(11) [1891] A.C. at p. 145.

(12) [1916] 1 A.C. at p. 672; 13 Asp. M.L.C. at p. 295.

(13) (1877), 3 Asp. Cas. 279; 3 Asp. M.L.C. 567.

A courts. The word "subrogation" is not even used in any of the judgments in *Armstrong's case* (14). *Armstrong's case* (14) was decided before *Castellain v. Preston* (15), the locus classicus of subrogation in insurance, and, in so far as its reasoning leads to the conclusion that an insurer can recover from an assured by subrogation a sum greater than he has paid, it is in my view inconsistent with the reasoning of the Court of Appeal in *Castellain v. Preston* (15). For what it

B actually decided, namely, that an insurer who pays a total loss under a valued policy can recover from the assured up to the amount of his payment notwithstanding that the real value is greater, it is an authority which has frequently been followed, but it has consistently been treated as an authority for no more than that. Thus in *Thames & Mersey Marine Insurance Co. v. British & Chilian S.S. Co.* (16), SCRUTTON, J., refers critically to that part of the reasoning of the court

C in *Armstrong's case* (14) on which counsel for the insurer relies, and points out that it was unnecessary to the decision. He treats *Armstrong's case* (14) as an authority only for the limited proposition which I have stated. In the same case, on appeal from SCRUTTON, J. (17), SWINFEN EADY, L.J., professing to apply *Armstrong's case* (14), says (18):

D "... the plaintiffs are entitled to recover from the shipowners all the sums which the shipowners received in respect of the ship up to the £45,000, the amount of the insurance."

In *Goole & Hull Steam Towing Co., Ltd. v. Ocean Marine Insurance Co., Ltd.* (19), MACKINNON, J., suggests that the reasoning of COCKBURN, C.J., in *Armstrong's case* (14) can only be right if it rests on the "cession of property to the underwriter upon payment for a total loss". Finally, in *Boag v. Standard Marine Insurance Co., Ltd.* (20), LORD WRIGHT, M.R., citing the above-mentioned judgment of SWINFEN EADY, L.J., says:

E

"Applying that here, the plaintiffs, the underwriters, are entitled to recover all the sums which the shipowners received in respect of cargo up to the £685, which is the amount of the insurance."

F Counsel for the insurer has been unable to point to any passage in any judgment other than that in *Armstrong's case* (14) itself which supports the proposition that an insurer under the doctrine of subrogation can recover from the assured any sum in excess of the payment which he has actually made, and there are many passages in the cases which are inconsistent with it. Since this case will

G no doubt go further I need not burden this judgment with more than a few examples. In *Burnand v. Rodocanachi* (21) LORD BLACKBURN, in a speech in which he commented critically on *Armstrong's case* (14), said:

H "The general rule of law (and it is obvious justice) is that where there is a contract of indemnity (it matters not whether it is a marine policy, or a policy against fire on land, or any other contract of indemnity) and a loss happens, anything which reduces or diminishes that loss reduces or diminishes the amount which the indemnifier is bound to pay; and if the indemnifier has already paid it, then, if anything which diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back."

I In *King v. Victoria Insurance Co., Ltd.* (22), LORD HOBHOUSE made it quite clear that, in their Lordships' view, under the doctrine of subrogation an insurer

(14) (1870), L.R. 5 Q.B. 244.

(15) (1883), 11 Q.B.D. 380.

(16) [1915] 2 K.B. at p. 220. (17) (1916), 13 Asp. M.L.C. 221; 21 Com. Cas. 150.

(18) (1916), 13 Asp. M.L.C. at p. 222; 21 Com. Cas. at p. 153.

(19) [1927] All E.R. Rep. at p. 625; [1928] 1 K.B. at p. 598; 17 Asp. M.L.C. at p. 412.

(20) [1937] 1 All E.R. at p. 720; [1937] 2 K.B. at p. 123; 19 Asp. M.L.C. at p. 109.

(21) (1882), 7 App. Cas. at p. 339; 4 Asp. M.L.C. at p. 578.

(22) [1896] A.C. at pp. 255, 256.

was entitled to recover from the assured only "to the extent of the payment" A
made to the assured by the insurer under the policy.

Finally, in *Glen Line, Ltd. v. A.-G.* (23) LORD ATKIN, drawing the distinction B
between the rights of abandonment and the rights of subrogation, said:

"And it is to be noted that in respect of abandonment the rights exist
on a valid abandonment, whereas in respect of subrogation they only arise
on payment; and that subrogation will only give the insurer rights up to
twenty shillings in the pound on what he has paid."

In the light of these authorities I am not satisfied that at the date of the passing
of the Marine Insurance Act, 1906, the law as to subrogation was as counsel for
the insurer—relying on the reasoning of *Armstrong's* case (24)—contends. In-
deed, I am satisfied that it was not, but was as I have stated. I am fortified in
this view by the fact that the law apparently is, and has for many years been,
the same in the United States; see *The St. Johns* (25), decided in 1900, where
BROWN, J., says:

"If the amount recoverable from the wrongdoer, after payment of the
damage-claims of third parties, were in excess of the amount paid by the
underwriters to the assured, no doubt that excess would belong to the latter;
since the insurer's right of subrogation in equity could not extend beyond
recoupment or indemnity for the actual payments to the assured."

See also *The Livingstone* (26) decided in 1904.

It follows that in my view the insurer's rights in this case were limited to
recovering from the assured the amount overpaid, that is to say, £72,000. He is
entitled to no more. The principle, I think, is a simple one. It renders irrelevant
any consideration of the particular concatenation of circumstances which
enable the assured to recover from the Canadian government a sum in sterling
in excess of the value of the ship at the time of the casualty. The fact that the
policy was a valued policy, with, as it transpired, a policy value somewhat less
than the real value is also irrelevant. The simple principle which I apply is that
the insurer cannot recover under the doctrine of subrogation now embodied in
s. 79 of the Marine Insurance Act, 1906, anything more than he has paid.

As I said at the outset, I have, by agreement of the parties, left out of con-
sideration all questions relating to the costs of the Canadian proceedings. It is
conceded for the purposes of my decision that the assured has already accounted
to the insurer, on the basis that the insurer was entitled to be repaid £72,000. It
is entitled, in my view, to no more, and the assured is accordingly entitled to
judgment.

Judgment for the defendant company, the assured.

Solicitors: *Ince & Co.* (for the plaintiff company, the insurers); *Holman,*
Fenwick & Willan (for the defendant company, the assured).

[Reported by WENDY SHOCKETT, Barrister-at-Law.]

(23) (1930), 36 Com. Cas. at pp. 13, 14.

(25) (1900), 101 Fed. Rep. at p. 474.

(24) (1870), L.R. 5 Q.B. 244.

(26) (1904), 130 Fed. Rep. 746.

Re NEWMAN AND HOWARD, LTD.

[CHANCERY DIVISION (Pennycuik, J.), May 1, 1961.]

Company—Winding-up—Compulsory winding-up—Contributory's petition—Just and equitable—Failure of company to supply accounts and information of its affairs—No allegation in petition that company would have surplus assets available for contributories in winding-up—Accounts and information produced by company as result of petition—Petition not demurrable—Costs.

Where a contributory's petition for the winding-up of a company is based on a failure on the part of the company to supply accounts and information, with the consequence that the petitioner is unable to tell whether a surplus will be available for the contributories, the general rule that prima facie a contributory is not entitled to a winding-up order unless he proves that he has a tangible interest in the assets in the liquidation is inapplicable (see p. 497, letter I, post).

Re Rica Gold Washing Co. ((1879), 11 Ch.D. 36) and *Re S. A. Hawken, Ltd.* ([1950] 2 All E.R. 408) distinguished.

The petitioner and his wife and H. and his wife were the sole shareholders and directors of a company. As a result of disagreements the petitioner and his wife resigned office as directors, leaving the affairs of the company in H.'s hands. From the date of their resignation no general meeting was held and the petitioner was unable to obtain any accounts or information from H. in regard to the company's affairs, in spite of repeated demands. On Mar. 20, 1961, the petitioner, as a contributory, presented a petition to the court for the winding-up of the company on the ground that it was just and equitable to do so. As a result of the petition H. produced accounts of and information about the company and the petitioner, therefore, no longer sought a winding-up order. On the question of costs the company contended that it should not pay the petitioner's costs, but that the petitioner should pay the company's costs, on the ground that the petition was demurrable because it did not allege that the company had, or might have, surplus assets available for contributories in the winding-up.

Held: the petition was not demurrable, for the reason stated at letter C above, and the company should pay the petitioner's costs of the petition.

[As to petitions for compulsory liquidation by fully paid shareholders, see 6 HALSBURY'S LAWS (3rd Edn.) 541, para. 1043.

As to costs of proceedings for compulsory winding-up by the court, see 6 HALSBURY'S LAWS (3rd Edn.) 554, para. 1066.

For the Companies Act, 1948, s. 222, s. 224, see 3 HALSBURY'S STATUTES (2nd Edn.) 639, 642.]

Cases referred to:

Hawken (S.A.) Ltd., Re, [1950] 2 All E.R. 408; 10 Digest (Repl.) 889, 5944.

Kaslo-Slocan Mining & Financial Corp., Ltd., Re, [1910] W.N. 13; 10 Digest (Repl.) 877, 5798.

Rica Gold Washing Co., Re, (1879), 11 Ch.D. 36; 40 L.T. 531; 10 Digest (Repl.) 876, 5796.

Petition for compulsory winding-up order.

This was a petition by Roy Newman, a shareholder and contributory in a company, Newman and Howard, Ltd., for the compulsory winding-up of the company on the ground that it was just and equitable to do so. The facts appear in the judgment.

D. S. Chetwood for the petitioner.

M. Finer for the company.

PENNYCUICK, J.: This is a petition by Roy Newman, a shareholder and contributory in a company, Newman and Howard, Ltd., that the company be wound up on the ground that it is just and equitable to do so. The petitioner and his wife owned all the issued shares in the company, but in 1959 one John Colin Howard joined the company taking up a larger number of shares than those held by the petitioner. In the upshot the petitioner and his wife came to hold 475 shares, and Mr. Howard and his wife came to hold 525 shares. Very shortly after Mr. Howard came into the company, the petitioner and his wife resigned as directors leaving the affairs of the company in the hands of Mr. Howard.

The petition sets out the circumstances in which Mr. Howard came to the company. It then says in para. 6:

"On May 15, 1959, as a result of disagreement between your petitioner and Mr. Howard your petitioner and his said wife resigned from office as directors of the company. Your petitioner had complained that Mr. Howard had not provided the £1,500 additional capital he had promised but had only provided £300 and there had also been disagreement between them in regard to the sale and purchase of motor cars on behalf of the company and in regard to the payment out of the company's moneys of bills for petrol supplied to Mr. Howard and his wife, and to avoid further quarrels your petitioner and his wife resigned as aforesaid."

Mr. Howard said that he did put up the whole of the additional capital and he repudiated any suggestion that he or his wife acted improperly in regard to either motor cars or petrol. The petitioner continues in these terms in para. 7:

"Since your petitioner's said resignation no general meeting of the company has been held and your petitioner has been unable to obtain any accounts of the company for its financial year ended on June 30, 1959, or subsequent years or any information in regard to the company's affairs. In July and August, 1960, your petitioner by his solicitors asked the company's solicitors, Messrs. Stanley A. Coleman & Hill, for a copy of the accounts for the year ended June 30, 1959, but without result. On Sept. 10, 1960, your petitioner by his solicitors gave notice under s. 132 of the Companies Act, 1948, requiring a general meeting to be convened so that an explanation could be given why the accounts were not available. On Sept. 22, 1960, the company's said solicitors replied that Mr. Howard had been ill in hospital and had not been able to supply the accountants with all the figures but stated that the accounts would be prepared straight away. On Oct. 11, 1960, the company's said solicitors, in response to a further request, stated that the accounts had been promised before the end of that month. Since then no accounts or information have been received from the company or its said solicitors in spite of further requests, nor has any general meeting been convened or held. No annual return has been made by the company under s. 124 of the Companies Act, 1948, since the return for the year to Dec. 31, 1958."

This paragraph of the petition is admittedly true. The company had not held a general meeting since May, 1959, and the petitioner had not been supplied with any accounts of the company for the financial year ending June 30, 1959, or the subsequent year; or any information in regard to the company's affairs. That is amply borne out by the correspondence. Repeated requests for accounts and information from the petitioner's solicitors were disregarded and on Mar. 20, 1961, this petition was presented. The petition has achieved its purpose of producing accounts and information from the company—in other words from Mr. Howard—and in the circumstances the petitioner no longer seeks a winding-up order.

There remains, however, the question of the costs of the petition. The petitioner claims, as is the fact, that the petition achieved its purpose, namely,

- A the obtaining of accounts and information, and that the company should pay his costs of the petition. On the other hand, the company contends that not only should it not pay the petitioner his costs, but that the petitioner should pay the company's costs. Apart from the question of demurrer which has been raised by counsel for the company, I feel no doubt that the proper order is that the company should pay the petitioner's costs of the petition. Counsel for the
- B company, however, has raised a question of demurrer which is of general importance.

The petition set out the various matters which I have read and on which it is founded, and then continued in para. 8: "In the circumstances above set forth it is just and equitable that the company should be wound up."

- C There is a well-established rule that where a contributory presents a petition he must allege and prove, at least to the extent of a *prima facie* case, that there are assets of such amount as that in the winding-up he will have a tangible interest. As to that principle, see BUCKLEY ON THE COMPANIES ACTS (13th Edn.), p. 466, and in particular *Re Rica Gold Washing Co.* (1) in the Court of Appeal where SIR GEORGE JESSEL, M.R., said this (2):

- D "That being his position, and the rule being that the petitioner must succeed upon allegations which are proved, of course the petitioner must show the court by sufficient allegation that he has a sufficient interest to entitle him to ask for the winding-up of the company."

The same rule was stated by WYNN-PARRY, J., in *Re S. A. Hawken, Ltd.* (3), who said this:

- E "It is said, in the first place, on behalf of the respondents, that the costs in question which relate only to the matters alleged in support of the relief claimed under s. 210 of the Act ought, in any event, to be disallowed, because the petition, so far as that relief is concerned, was demurrable on the face of it. The condition, on the existence of which the jurisdiction of the court depends, is that 'the facts would justify the making of a
- F winding-up order on the ground that it was just and equitable that the company should be wound-up,' i.e., that, if the petition had been presented as a contributory's petition for the winding-up of the company, the court could have made such an order: see s. 210 (2) (b). The petition, as I have said, contains an allegation that the company is insolvent and unable to pay its debts, and, therefore, it is said, it is demurrable on the face of it.
- G *Prima facie*, this would appear to be so. A contributory is not entitled to a winding-up order unless he can show that he has a tangible interest in the assets in a winding-up: see *Re Rica Gold Washing Co.* (2) per SIR GEORGE JESSEL, M.R.; and an allegation that a company has no assets and is insolvent has been held to disentitle a petitioner to such an order: see *Re Kaslo-Slocan Mining & Financial Corpn., Ltd.* (4)."

- H In the present case the petition does not contain any allegation that the company has, or may have, assets available for contributories and, therefore, it is said that the petition is demurrable.

There is no doubt that the general rule is as stated by the Court of Appeal in *Re Rica Gold Washing Co.* (1); but it seems to me that, from the very nature of the case, there must be an implied qualification to that general rule. In a case

- I where the petition is based on a failure to supply accounts and information, with the consequence that the petitioner is unable to tell whether or not there will be a surplus available for the contributories, it cannot really be the law that the petitioner is bound to make and to verify on oath the statement that the company has surplus assets when, by reason of the company's own default, he is not in a position to tell whether or not that statement is true. Nor, I think, can it really

(1) (1879), 11 Ch.D. 36.

(3) [1950] 2 All E.R. at p. 411.

(2) (1879), 11 Ch.D. at p. 43.

(4) [1910] W.N. 13.

be the law that the petitioner is bound in such a case to make some vague statement such as "the accounts may show that there will be surplus assets available for the contributories." I understand that in practice a qualification from the general rule is accepted where a petition is based on an allegation that there are matters in connexion with the company which require an investigation, and it seems to me that a comparable qualification must be implied here. The rule is simply inapplicable to a case such as the present. I conclude, therefore, that this petition is not demurrable and in the circumstances the result is that the petition will be dismissed because that is what the petitioner asks for, but the company will pay the petitioner's costs of the petition.

Order accordingly.

Solicitors: *Preston, Lane-Claypon & O'Kelly*, agents for *Southall & Co.*, Birmingham (for the petitioner); *Stanley A. Coleman & Hill*, Birmingham (for the company).

[Reported by JENIFER SANDELL, Barrister-at-Law.]

SPELLMAN v. SPELLMAN.

[COURT OF APPEAL (Ormerod, Willmer and Danckwerts, L.JJ.), April 26, 27, 1961.]

Husband and Wife—Property—Hire-purchase acquisition—Motor car being acquired by husband under hire-purchase agreement—Wife's name entered in registration book—Whether wife acquired legal interest in motor car or in hire-purchase agreement—Whether informal dealing without intention to create legal relationship.

Gift—Husband and wife—Hire-purchase acquisition—Motor car being acquired by husband on hire-purchase—Whether effectively given to wife by way of simple gift—Whether equitable assignment of benefit of hire-purchase agreement by conduct—Whether intention to create legal relationship.

The relations between a husband and wife were not happy and, with the idea that their relations might be improved, the husband discussed a proposed purchase of a motor car with his wife and they chose the colour and the car was acquired. The car was acquired under a hire-purchase agreement entered into by the husband, but the wife's name was entered in the registration book. The ownership of the car remained with the hire-purchase company, instalments under the agreement having some two years to run. The wife never drove the car, but when she saw it delivered the husband confirmed, in answer to her inquiry, that it was the car which he had bought for her. The wife had possession of the registration book. The parties' relations further deteriorated and, a few weeks after the acquisition of the car, the husband left the wife, taking the car with him. In proceedings under the Married Women's Property Act, 1882, s. 17, the husband claimed that he was entitled to the car and delivery of the registration book from the wife, who claimed that the car was a gift to her.

Held: (i) the husband was entitled to the relief which he sought for the following reasons—

(a) the car, being the subject of a hire-purchase agreement under which the husband was not the owner, could not be transferred to the wife by way of a simple gift by him; moreover, the evidence was insufficient to establish that there had been an equitable assignment of the benefit of the hire-purchase agreement, nor had there been a declaration of trust by the husband for the wife's benefit.

A (b) the dealings between the husband and wife had been informal, without intention to create legal relationship between them in relation to the car or the hire-purchase agreement.

Balfour v. Balfour ([1919] 2 K.B. 571) applied.

B (c) although the car had been entered in the registration book in the name of the wife by the husband's act, the registration book should be delivered to the husband with any necessary signatures by the wife, because the book was a document concerning the car which, under the hire-purchase agreement, the husband had the right to acquire, but over which the wife had no rights.

C (ii) a chose in action, such as the benefit of a hire-purchase agreement, was property, and questions, arising between husband and wife, as to title to it could properly be made the subject of proceedings under s. 17 of the Married Women's Property Act, 1882 (see p. 501, letter I, and p. 502, letter F, post).

Appeal dismissed.

[As to requirements for a valid gift of a chattel, see 18 HALSBURY'S LAWS (3rd Edn.) 379, para. 722; and for cases on the subject, see 25 DIGEST 506-510, 29-66.]

D Cases referred to:

Balfour v. Balfour, [1919] 2 K.B. 571; 88 L.J.K.B. 1054; 121 L.T. 346; 12 Digest (Repl.) 21, 3.

Milroy v. Lord, (1862), 4 De G.F. & J. 264; 31 L.J.Ch. 798; 7 L.T. 178; 45 E.R. 1185; 25 Digest 530, 206.

E *Turcan, Re*, (1888), 40 Ch.D. 5; 58 L.J.Ch. 101; 59 L.T. 712; 29 Digest 372, 2988.

Appeal.

F This was an appeal by the respondent wife from an order of His Honour JUDGE INGRESS BELL, dated Dec. 15, 1960, at Willesden County Court, whereby it was declared in proceedings under the Married Women's Property Act, 1882, s. 17, as amended by the Matrimonial Causes (Property and Maintenance) Act, 1958, that the applicant husband did not hold the benefit of a hire-purchase agreement dated May 19, 1960, in respect of an Austin Healey Sprite motor car on trust for the respondent wife and it was ordered that the wife deliver up to the husband the log book of the said motor car with all the necessary signatures, if any.

G *Mrs. C. M. Puxon* for the wife.

N. Taylor for the husband.

H DANCKWERTS, L.J., delivered the first judgment at the request of ORMEROD, L.J.: This is a case which has raised some interesting points and may perhaps be said to illustrate the complexities caused by modern life and the practice of obtaining property on hire-purchase. It is an appeal from a decision of His Honour JUDGE INGRESS BELL sitting at Willesden, and the subject-matter of the controversy concerns a certain motor car, an Austin Healey Sprite. The complications are very considerable. It is a dispute between husband and wife and the proceedings before us are a summons taken out under the provisions of the Married Women's Property Act, 1882, s. 17. The parties were married on Mar. 24, 1957, and there is a child of the marriage. Their relations became less happy than it was hoped they would be, and matters were in rather a serious state in the early part of 1960. There was some idea—I do not want to put it any higher than that—that the purchase of another motor car might bring the parties together perhaps in the same manner as it is often suggested that the birth of a child may effect a similar result. The idea does not appear to have been successful. The purchase of a motor car was discussed, and the evidence seems to establish that it was agreed between the husband and wife, by which phrase I do not mean to describe any legal condition, but the colour was chosen and the

car was acquired. It was delivered to the home of the parties by the agent or car dealer; the wife saw it through the window and asked whether that was the car which the husband had bought for her and he said that it was. The registration book or log book, as it is sometimes called, was put in the name of the wife and this was done by the husband for reasons which were not entirely clear, but which may possibly have had something to do with the question of insurance. The parties again fell out and the husband left his wife, taking the car with him. The wife in fact had never driven the car because apparently it had a kind of gear change with a gear lever to which she was not accustomed. She was in fact driving at the time a Ford Zephyr motor car with the operation of which she was acquainted and which for the time being suited her purpose, but the intention undoubtedly was that the wife should be taught to drive the Austin Healey in course of time. It was only a matter of some three weeks before the break up occurred and the husband went off taking the car with him.

These proceedings were begun by the husband under s. 17 of the Married Women's Property Act, 1882, and the claim as originally put by him is rather odd. It claims that the applicant, that is the husband,

"is entitled to the benefit of a hire-purchase agreement in respect of an Austin Healey car . . . and that the respondent be compelled to do all things necessary to transfer the said agreement to his name, and that it be declared forthwith that the respondent holds the said motor car on trust for the applicant and to convey to the applicant as soon as is legally possible."

That was amended, but that was the way in which it was originally put. The wife, on the other hand, claimed that the motor car was a gift from her husband to her and she denied that there was any understanding at any time that she held the motor car in trust for him. It is probable that the parties originally had no conception of the position of the motor car except that of an ordinary gift of a motor car, a chattel, from the husband to the wife. But it turned out, as I have said, that it was the subject of a hire-purchase agreement dated May 19, 1960, and that was really a fatal obstacle to the delivery of the motor car as a gift in the ordinary way. The hire-purchase agreement was in the usual form in which such things are drawn up, and the property in the motor car was in the hire-purchase company and not in the husband at all. Consequently it was impossible for him to make a delivery of what he did not own. Furthermore, there was the complication added by the provisions contained in this, as I believe in most, hire-purchase agreements in connexion with motor cars. There was an obligation to make further payments. I think about £300 had been paid altogether in respect of the motor car (including £200 as a deposit) and there were instalments to be paid which would last for a matter of two years, and then, and not until then, there was an option which could be exercised by the hirer with whom the hire-purchase agreement had been made to purchase the car by the payment of £1. There were provisions that the car should be kept in repair, that the hirer should pay the rent in respect of the premises where the car was kept, there was a provision against assignment of the hire-purchase agreement or the benefit thereof, and there was a prohibition against the hirer parting with possession. All those complications obviously made it very difficult to effect a simple gift of the car by a man to his wife. The county court judge came to the conclusion that the husband had the idea of making the gift of a car to his wife, but that it was impossible in the circumstances and no gift could be made until the husband had acquired the car by the final payment. On that view of the matter it is impossible to sustain the claim of the wife based on the theory of a gift of the car, but it appeared to me at one time that possibly there might be something in the nature of an equitable assignment of the various rights which were owned by the husband under the hire-purchase agreement. That would be a chose in action and it could be the subject of an equitable assignment which would not require to be in writing, nor, if it was

A done in an effective manner, would it require consideration, and that position has been discussed in the arguments. It is plain also that the fact that there is a prohibition in the document creating the chose in action against assignment is not necessarily fatal to such a claim: see *Re Turcan* (1). It is possible that if such an equitable assignment had been made, there could have been (as between husband and wife) an assignment of the benefit of the hire-purchase agreement with perhaps the obligation to indemnify the husband against the various liabilities which have to be carried out in order to comply with the terms of the hire-purchase agreement.

I do not think that it is necessary to consider the matter in great detail, because I have been compelled to come to the conclusion that it is impossible to spell out any equitable assignment in the circumstances of the case. It is perfectly true that no form of words is required for the purpose of making an equitable assignment as long as the intention can be fairly collected from what was said between the parties or even from a course of conduct. The facts as found by the county court judge seem to me to be insufficient to reach that conclusion. It is true that the fact that the wife's name was put in the log book is some evidence of an intention to convey the ownership of the car to the wife, but it is not, it seems to me, sufficient for the purposes of the transfer of equitable rights which would be required by an equitable assignment. The county court judge said that he thought the husband might have said: "I have bought it for her use and intend in due course to give it to her", and in the course of his judgment he said it was not a declaration of trust. As regards that point it seems to me that the conclusion of the county court judge was clearly right. If there was an intention to execute an equitable assignment or to make a gift, the matter involves a transfer, and if it is not done in a way which satisfies the law and equity, then one cannot translate what has in fact been attempted into something else, i.e., a declaration of trust by the husband in this case. *Milroy v. Lord* (2) and a long series of cases since that case have clearly established that principle. It seems to me in the first place that it is not possible to find sufficient words or evidence of intention to create the necessary equitable assignment in the present case.

Another matter which brings me to the conclusion that the wife is not entitled to relief in the present case is the principle which has been discussed in such cases as *Balfour v. Balfour* (3). The proper conclusion on all the evidence in the present case is that there was not any intention to create legal situations, but merely an informal dealing with the matter between the husband and wife which is common in daily life and which does not result in some legal transaction, but is merely a matter of convenience. Consequently it seems to me that this point is also fatal to the claim of the wife in the present case.

There are two other matters which I must mention. One is that it was contended on behalf of the husband in the present case that the question whether the wife had a right, by means of an equitable assignment, to the chose in action represented by the hire-purchase agreement is not a proper subject of proceedings under s. 17 of the Married Women's Property Act, 1882. That is entirely misconceived and one which it is difficult for the husband to sustain considering that he was responsible for the initiation of the proceedings. It is quite clear from *Re Turcan* (1), to which I have referred, that a chose in action is a species of property; and if it is a species of property, then questions as to the title to that property are properly raised by a summons under s. 17 of the Married Women's Property Act, 1882, between husband and wife. The other is a point which was taken on behalf of the wife which I really found very difficult to understand. Counsel for the wife invoked the Matrimonial Causes (Property and Maintenance) Act, 1958, and contended that the provisions of s. 7 of that Act enabled the court to direct some payment to be made to the wife in respect

(1) (1888), 40 Ch.D. 5.

(2) (1862), 4 De G.F. & J. 264.

(3) [1919] 2 K.B. 571.

of the car—I gather as compensation for not getting the car. Apart from all the other difficulties in the case, it seems to me that s. 7 of the Act of 1958 has no relevance to this case at all and it would be quite impossible to make an order that the husband should pay over moneys which had been paid as part of the purchase price of the car in the course of its acquisition in accordance with the terms of the hire-purchase agreement. It seems to me that that argument is quite impossible to sustain.

The result, then, is that the county court judge, as far as the contention of a gift was concerned, reached the right conclusion, that no trust of any sort was declared by the husband, and that the declaration that the husband does not hold the benefit of a hire-purchase agreement dated May 19, 1960, in respect of the car on trust for the wife is entirely correct.

The last matter concerns the question of registration and the log book. It was by the husband's own act that the car was put in the name of the wife. The registration book was sent to her by post or delivered by hand and she actually acquired it by finding it in the husband's wardrobe, but those are merely incidental circumstances. I felt some doubt at one time whether it was right to take away from the wife that which had been delivered to her through the act of the husband, but on the whole I have come to the conclusion that it was correct for the county court judge to direct that she should deliver up to the husband the log book with all necessary signatures (if any were needed) because it is plain on the conclusions which I have already reached that the wife has no ownership or rights in respect of the car. That being so, it would not be proper to leave the wife in possession of a document which is of no use to her except for its nuisance value, and which is part of the documents concerned with the car and should be held by the husband who has the right to acquire the car—one cannot call him the owner at present—in accordance with the terms of the hire-purchase agreement.

Accordingly, it seems to me that the appeal must be dismissed.

ORMEROD, L.J.: I am in full agreement with the views expressed by **DANCKWERTS, L.J.**, and there is nothing that I wish to add.

WILLMER, L.J.: I also agree, but in doing so I should like to make it clear that for my part I have found this a difficult case. In the end, however, I have come to the conclusion that it really falls to be decided on the ground already stated by **DANCKWERTS, L.J.**, viz., that the arrangement made by the parties falls within the principle enunciated in *Balfour v. Balfour* (4), i.e., it was not intended to create legal relationships.

I have said that I have found the case difficult; but the difficulties, I think, are largely of the wife's own making. The main difficulty to my mind, oddly enough, lies in ascertaining what is the property, the title to which, or the possession of which, is in question between the parties in this case. As to that, it has always been the husband's case that the property in question is the car. He has throughout claimed to be entitled to possession of the car. This was also the wife's case to start with; and I may perhaps be permitted to refer to the notice of appeal, which asks

“that the applicant [the husband] be ordered to deliver up possession of the said motor car to the respondent and to assign to her the benefits of the said hire-purchase agreement.”

But there has been a complete change round in the wife's case in the course of the argument. It is no longer suggested on behalf of the wife that she is entitled to possession of the motor car; so far from our being asked to make an order requiring the husband to assign to her the benefit of the hire-purchase agreement, we have now been faced with the argument that as a result of what

took place in May, 1960, there has already been an equitable assignment of the benefit of the hire-purchase agreement. That has rather complicated the appeal; for, if it be right, the property in question is not the car, but the benefit of the hire-purchase agreement.

If, when properly looked at, the property in question in this case is the car, then I think that the answer must plainly be in favour of the husband. There can be no question as to the title to the car, which for the next year or two must remain in the hire-purchase corporation. The right to possession of the car must clearly be with the husband; and it would be quite impossible for this court to make an order to the contrary, because such an order would in effect require the husband to break his contract with the hire-purchase corporation.

The same difficulty arises, I think, on the alternative suggestion put forward by counsel for the wife that the husband holds the car in some way in trust for the wife. It was when counsel for the wife started running into difficulties on this aspect of the case that DANCKWERTS, L.J., if I may respectfully say so, came to the rescue by suggesting the possibility that her case might be put on the basis that the events of May, 1960, amounted in effect to an equitable assignment of the benefit of the hire-purchase agreement. My Lord has already dealt with the difficulties of that view, and I share his difficulties. I am not persuaded that it is possible to overlook the specific provision of the agreement whereby the hirer, that is the husband, has covenanted that he will not assign or charge the goods or the benefit of the agreement. Giving all due weight to the decision in *Re Turcan* (5), to which we have been referred, it seems to me that, if we were to make a declaration such as counsel for the wife finally asked for, it would amount in effect to a declaration that the husband was in breach of his agreement, in that he had purported to assign the benefit of the agreement. Moreover, I think that there are difficulties in fitting the known facts into this conception of an equitable assignment. The principal fact relied on, viz., the promise to buy the motor car as some sort of security for the resumed cohabitation which was in contemplation, preceded the actual acquisition of the car; it certainly preceded the making of the hire-purchase agreement, and I find difficulty in conceiving of an equitable assignment of something which has not yet been called into existence.

The main reason, however, why I think the argument fails is that which I mentioned at the beginning of this judgment, viz., that fairly looked at, what took place in May, 1960, was something which was never intended to create legal relationships at all.

With regard to the alternative money claim, I only desire to say that I share the difficulty of DANCKWERTS, L.J., in understanding exactly what the argument was. It does not seem to me that s. 7 of the Matrimonial Causes (Property and Maintenance) Act, 1958, is of any relevance to the circumstances of this case.

For these reasons, therefore, in addition to those which DANCKWERTS, L.J., has already advanced, I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Willis & Willis* (for the wife); *John Morris, Wilkes & Co.* (for the husband).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

ATTORNEY-GENERAL OF THE GAMBIA *v.* N'JIE.

[PRIVY COUNCIL (Lord Radcliffe, Lord Denning and Lord Guest), March 15, 16, 20, May 3, 1961.]

Privy Council—Gambia—Counsel—Professional misconduct—Striking name off roll of court by judge—Whether exercise of judicial power—Supreme Court Ordinance (Laws of the Gambia, 1955, c. 5), s. 7.

Privy Council—Appeal—Leave to appeal—"Person aggrieved"—Attorney-General in colony responsible for bringing before judge any misconduct of barrister or solicitor of sufficient gravity to warrant disciplinary action—West African (Appeal to Privy Council) Order in Council, 1949, s. 31.

Privy Council—West Africa—Appeal to Privy Council—Application for leave to appeal to be made to court within twenty-one days from date of judgment to be appealed from—Notice to be given to opposite party of intended application—Time for giving notice—West African (Appeal to Privy Council) Order in Council, 1949, s. 5.

In June, 1958, in the course of giving judgment in a civil suit in the Gambia, the chief justice of the Gambia criticised severely certain conduct of the respondent, a member of the English Bar who was admitted to practise as a barrister and solicitor of the Supreme Court of the Gambia. As a result, the appellant, the Attorney-General of the Gambia, served a notice of motion on the respondent asking for an inquiry to be made by the chief justice into allegations of professional misconduct against the respondent and for his name to be struck off the roll of court. The motion came on for hearing before the chief justice, but, at the request of counsel representing the respondent, he agreed to recommend that someone other than himself should be appointed as a deputy judge and to exercise all the powers vested in the chief justice. The governor appointed a deputy judge of the Gambia and the hearing of the inquiry was fixed, with the apparent concurrence of the respondent. The respondent later sought by various means to get the hearing adjourned, but his objections were overruled and the inquiry was held in his absence by the deputy judge, who found eight out of the nine allegations against the respondent established and ordered that his name be struck off the roll. By s. 4 of the Gambia Supreme Court Ordinance, the Supreme Court of the Gambia, is to "consist of and shall be held by and before a judge to be appointed by the governor". By s. 7* it is lawful for the governor to appoint a deputy judge to represent the judge of the Supreme Court "in the exercise of his judicial powers" and such judge is to "exercise all the judicial powers of the judge of the Supreme Court". On appeal by the appellant to the West African Court of Appeal, that court set aside the order of the deputy judge on the ground that he had jurisdiction to represent the chief justice only "in the exercise of his judicial powers" and that the power to strike a legal practitioner off the roll was not a judicial power. By s. 5 of the West African (Appeal to Privy Council) Order in Council, 1949†, applications to the West African Court of Appeal for leave to appeal are to be made by motion or petition within twenty-one days from the date of the judgment to be appealed from, and the applicant is to give the opposite party notice of his intended application. The appellant sought leave to appeal to Her Majesty in Council, but the West African Court of Appeal refused leave on the ground that notice had not been given to the respondent within the twenty-one days. Her Majesty in Council later granted leave to appeal, on petition by the appellant under s. 31 of the West African (Appeal to Privy Council) Order in Council, 1949‡.

* Section 7 is set out at pp. 507, 508, post.

† Section 5 is printed at p. 511, letter F, post.

‡ The terms of s. 31 are printed at p. 510, letter G, post.

whereby nothing is to interfere with the right of Her Majesty in Council on the petition of "any person aggrieved" by any judgment of the court to admit his appeal therefrom. Liberty was expressly reserved to the respondent to raise on the appeal the preliminary point that no appeal lay at the instance of the appellant, on the ground that he had no *locus standi* because he was not a "person aggrieved."

Held: (i) the appellant was a "person aggrieved" for those were words of wide import and included a person who had a genuine grievance in that an order had been made which prejudicially affected his interest; in the present case, the appellant represented the Crown as the guardian of the public interest and he had a sufficient interest, when a court reversed (on a ground touching the public interest) a decision that a barrister or solicitor had been guilty of professional misconduct (as distinct from a decision of acquittal), to constitute him a person aggrieved within s. 31 of the Order in Council of 1949 (see p. 511, letters A to D, post).

Dictum of JAMES, L.J., in *Re Sidebotham, Ex p. Sidebotham* ((1880), 14 Ch.D. at p. 465) explained.

(ii) although judges exercising jurisdiction to suspend a legal practitioner from practising or to strike his name off a court roll do not sit as a court of law but are acting as a disciplinary authority, yet in the context of s. 7 of the Gambia Supreme Court Ordinance the judge exercised judicial powers when he was exercising disciplinary powers that were properly appurtenant to the office of judge (see p. 509, letter E, and p. 510, letter C, post); accordingly, the deputy judge had power to make the order striking the respondent's name off the roll of court (see p. 510, letter E, post).

(iii) on the true construction of s. 5 of the West African (Appeal to Privy Council) Order in Council, 1949, its requirements were that the notice of the motion or petition must be lodged with the court within twenty-one days from the date of the judgment appealed from, and that a copy must be served on the opposite party as soon as possible and in any case a reasonable time before the date of the hearing (see p. 511, letter I, post).

Appeals allowed.

[**Editorial Note.** Many cases have been decided on the meaning of the words "person aggrieved" in the contexts of divers enactments; a number of these is gathered in 25 HALSBURY'S LAWS (3rd Edn.) 293, note (h).

As to leave to appeal to the Judicial Committee, see 9 HALSBURY'S LAWS (3rd Edn.) 379-381, paras. 885, 886.

As to the disciplinary jurisdiction over barristers and solicitors, see 3 HALSBURY'S LAWS (3rd Edn.) 5, para. 5, and 31 HALSBURY'S LAWS (2nd Edn.) 295, para. 316.]

Cases referred to:

Anandalwan v. Judges of the High Court at Madras, (1930), L.R. 58 Ind. App. 156 n.

Antigua Justices, Re, (1830), 1 Knapp, 267; 12 E.R. 321; 3 Digest (Repl.) 360, 106.

Har Prasad Singh v. Judges of Allahabad High Court, (1931), L.R. 58 Ind. App. 152.

Macauley v. Sierra Leone Supreme Court Judges, [1928] A.C. 344; 97 L.J.P.C. 60; 139 L.T. 314; 42 Digest 402, 4558.

Myers v. Elman, [1939] 4 All E.R. 484; [1940] A.C. 282; 109 L.J.K.B. 105; 162 L.T. 113; 2nd Digest Supp.

R. v. Southerton, (1805), 6 East, 126; 102 E.R. 1235; 42 Digest 398, 4480.

Reed, Bowen & Co., Re, Ex p. Official Receiver, (1887), 19 Q.B.D. 174; 56 L.J.Q.B. 447; 56 L.T. 876; 4 Digest (Repl.) 21, 1806.

Shell Co. of Australia, Ltd. v. Federal Comr. of Taxation, [1930] All E.R. Rep. 671; [1931] A.C. 275; 100 L.J.P.C. 55; 144 L.T. 421; Digest Supp.

Sidebotham, Re, Ex p. Sidebotham, (1880), 14 Ch.D. 458; 49 L.J.Bey. 41; A 42 L.T. 783; 4 Digest (Repl.) 250, 2267.

Smith v. Sierra Leone Justices, (1848), 7 Moo. P.C.C. 174; 13 E.R. 846; 3 Digest (Repl.) 362, 65.

Appeals.

Appeals by special leave by the Attorney-General of the Gambia against (i) a judgment of the West African Court of Appeal (BAIRAMIAN, Ag. P., HURLEY, Ag. J.A., and AMES, Ag. J.A.), dated June 5, 1959, setting aside an order of a deputy judge of the Supreme Court of the Gambia (ABBOTT, D.J.), dated Sept. 22, 1958, directing the removal of the name of the respondent Pierre Sarr N'Jie from the Roll of Barristers and Solicitors of the Supreme Court of the Gambia, and (ii) a judgment of the West African Court of Appeal (BAIRAMIAN, Ag. P., BENKA-COKER and MARKE, JJ.), dated July 6, 1959, refusing an application by the appellant for leave to appeal to Her Majesty in Council against the judgment of June 5, 1959. The facts are set out in the judgment of the Board.

J. G. Le Quesne for the appellant.

E. F. N. Gratiaen, Q.C. (Ceylon), and *W. Jayawardena* for the respondent.

LORD DENNING: The respondent is a member of the English Bar who was admitted a few years ago to practise as a barrister and solicitor of the Supreme Court of the Gambia. On Sept. 22, 1958, the deputy judge (ABBOTT, D.J.) made an order striking his name off the roll of that court and directing that it be reported to the Masters of the Bench of his Inn. On June 5, 1959, the West African Court of Appeal (BAIRAMIAN, Ag. P., HURLEY, Ag. J.A., and AMES, Ag. J.A.) set aside the order on the ground that the deputy judge had no jurisdiction in the matter. The appellant, the Attorney-General of the Gambia, sought leave to appeal to Her Majesty in Council but on July 6, 1959, the West African Court of Appeal (BAIRAMIAN, Ag. P., BENKA-COKER and MARKE, JJ.) refused him leave to appeal on the ground that notice had not been given in due time to the respondent. Thereupon the appellant made a petition to Her Majesty for special leave to appeal from the judgments of the West African Court of Appeal, both of June 5, 1959, and July 6, 1959. This petition was granted, but liberty was expressly reserved to the respondent to raise the preliminary point that no appeal lies at the instance of the Attorney-General. Their Lordships rejected this preliminary point and their reasons will appear later in this judgment.

The history starts with a civil suit tried in 1958 in the Supreme Court of the Gambia before the chief justice of the Gambia (WISEHAM, C.J.). On June 27, 1958, in the course of giving judgment, WISEHAM, C.J., criticised severely certain conduct of the respondent which had come to his notice during the trial, and he sent a copy of his judgment to the appellant. On July 16, 1958, the appellant served a notice of motion on the respondent asking for an inquiry to be made by the chief justice into allegations of professional misconduct against the respondent and for his name to be struck off the roll of court. The allegations were set out in an affidavit, and were to the effect that he had received several sums of money on behalf of others, to wit, £350, £200, £150, £50, £203 9s., £1,360, and £200, and had utilised them for his own purposes; and, further, that he had, with intent to deceive, been guilty of false representation and concealment. On July 19, 1958, the motion came on for hearing before WISEHAM, C.J. The respondent was then represented by his brother, Mr. S. A. N'Jie. He consented to an inquiry being held, but asked that it should be held by someone other than WISEHAM, C.J. The chief justice said that, in view of his findings in the civil suit, this was reasonable. He said that he would recommend that someone other than himself should be appointed as a deputy judge to hold the inquiry and to exercise all the powers vested in the chief justice. Mr. S. A. N'Jie asked for time until November, but this the chief justice refused to grant. A day

or two later the respondent left the Gambia for England, and on July 25, 1958, he wrote from London to the appellant asking the date of the inquiry. He said: "I should like it held as early as possible, say, first week of September next". Steps were duly taken to appoint a deputy judge to hold the inquiry instead of the chief justice. The governor appointed ABBOTT, J. (at that time a justice of the Federal Supreme Court of Nigeria), to be a deputy judge of the Gambia. The hearing was fixed for Sept. 15, 1958, at Bathurst in the Gambia. Notice was given to the respondent, who wrote on Aug. 17, 1958:

"I have noted that the hearing of the matter before the court will take place (at Bathurst) on Sept. 15, 1958, and I shall be present, God being willing."

Notwithstanding this apparent concurrence in the date of Sept. 15, 1958, the respondent afterwards sought by various means to get the hearing adjourned. At one time he objected to a hearing during the vacation. At another time he said that it was impossible for him to attend. Eventually he said that he was ill and that a medical certificate was available, but none ever came. All his objections were overruled; and ABBOTT, D.J., held the inquiry on Sept. 15, 16, 17 and 18, 1958. The Attorney-General appeared but the respondent did not appear nor was he represented, save for a fleeting moment when his brother, Mr. E. D. N'Jie, asked for an adjournment and, on its being refused, withdrew. Their Lordships see no reason to suppose that ABBOTT, D.J., was wrong in refusing to grant an adjournment. It was a matter for his discretion, and there is no ground for saying that he exercised his discretion improperly. If the respondent had any defence on the merits, he ought to have returned to the Gambia to put it forward; and no good reason was shown for his not doing so. On Sept. 22, 1958, ABBOTT, D.J., gave his decision. He found that eight out of the nine allegations against the respondent had been established. He summarised his conclusions in these words:

"Of the respondent's behaviour as disclosed by the documentary and oral evidence before me I find it difficult to speak with anything approaching moderation. He is undoubtedly guilty of the most disgraceful professional misconduct that I have come across in thirty-five years' legal experience. He is totally unfitted, in my view, to be entrusted with the interests and affairs of any member of the public, still less with any money belonging to anyone else, and he is a disgrace to the profession to which he belongs."

ABBOTT, D.J., ordered that his name be struck off the Roll of Barristers and Solicitors of the Supreme Court of the Gambia and directed that the making of the order be reported by the appellant to the Master of the Bench of the Inn of Court by which he was called to the Bar. On June 5, 1959, the West African Court of Appeal set aside this order on the ground that a deputy judge has only jurisdiction to represent the chief justice "in the exercise of his judicial powers"; and they held that the power to strike a legal practitioner off the roll is not a judicial power.

In order to consider the validity of this decision, their Lordships must draw attention to the fact that there is only one judge of the Supreme Court of the Gambia; for, by s. 4 of the Supreme Court Ordinance, it is provided that: "The Supreme Court shall consist of and shall be held by and before a judge to be appointed by the governor . . ." This single judge is the chief justice. There is provision for an acting judge to be appointed to act if the chief justice is ill or absent from duty, but that was not the case here. There is also provision for a deputy judge to be appointed, and that is what was done. ABBOTT, J., was appointed a deputy judge under s. 7 of the Supreme Court Ordinance, which provides that:

"(1) Notwithstanding anything in this ordinance contained, it shall be lawful for the governor to appoint a deputy judge to represent the

judge of the Supreme Court of the Colony of the Gambia *in the exercise of his judicial powers*, although he be present in the Colony or the Protectorate. A

"(2) Such deputy judge *shall exercise all the judicial powers* of the judge of the Supreme Court, and all acts done by such deputy judge, in the execution of his powers, shall be as valid and effectual, to all intents and purposes, as if they had been done by the judge of the Supreme Court, and all judgment orders or decrees made by such deputy judge shall be subject to the same right of appeal in all respects as if they had been made by the judge of the Supreme Court. B

"(3) The judge of the Supreme Court may direct at what time and place such deputy judge shall sit, and what causes shall be heard before him, and generally make such arrangements as to him shall seem proper for the division and despatch of the business of the Supreme Court." C

It is quite apparent from that section that the deputy judge can only represent the chief justice in the exercise of his judicial powers. He cannot represent the chief justice in the exercise of his administrative powers. Some of the powers of the chief justice are clearly judicial powers, as when he sits in court to decide civil or criminal cases. Other are equally clearly administrative powers, as when he directs the times at which the offices of the courts shall be open, or appoints notaries public, or makes rules of court. Into which of these categories are we to place the power of the chief justice to suspend legal practitioners or to strike them off the roll of court? Is this a judicial power? or an administrative power? This necessitates an analysis of the nature of the power. D

By the common law of England, the judges have the right to determine who shall be admitted to practise as barristers and solicitors; and, as incidental thereto, the judges have the right to suspend or prohibit from practice. In England, this power has for a very long time been delegated, so far as barristers are concerned, to the Inns of Court; and, for a much shorter time, so far as solicitors are concerned, to the Law Society. In the colonies, the judges have retained the power in their own hands, at any rate, in those colonies where the profession is "fused". The principle on which this rests was well stated by LORD WYNFORD in 1830 in *Re Antigua Justices* (1): E

"In the colonies there are no Inns of Court, but it is essential for the due administration of justice that some persons should have authority to determine, who are fit persons to practise as advocates and attornies there. Now advocates and attornies have always been admitted in the Colonial courts by the judges, and the judges only. The power of suspending from practice must, we think, be incidental to that of admitting to practise, as is the case in England with regard to attornies. In Antigua the characters of advocates and attornies are given to one person; the court therefore that confers both characters may for just cause take both away." F

In the Gambia, these powers of the judges have been embodied in Rules of the Supreme Court, 1928. Order 9, r. 2, says that the judge (there is only one) may, in his discretion, approve, admit and enrol to practise as a barrister and solicitor of the court (*inter alios*) any person who is entitled to practise as a barrister in England and who produces testimonials of good character. Schedule 1, Ord. 9, r. 7, says that H

"The judge shall have power, for reasonable cause, to suspend any barrister or solicitor from practising within the jurisdiction of the court for any specified period, or order his name to be struck off the roll of court." I

Their Lordships notice that a majority of the West African Court of Appeal (BAIRAMIAN, Ag. P., and AMES, Ag. J.A., with HURLEY, Ag. J.A., dissenting) thought that Ord. 9, r. 7, was *ultra vires*. But it seems to their Lordships

A that it is simply a restatement of the inherent power of the judge at common law and *intra vires*. And this was conceded by counsel for the respondent before their Lordships.

B When the judges exercise this power to suspend or expel, they do not decide a suit between parties. There is no prosecutor as in a criminal case, nor any plaintiff as in a civil suit. The judges usually act on their own initiative, *ex mero motu*, on information which has come to their notice, or to the notice of one or other of them in the course of their duties; as in *R. v. Southerton* (2) and *Har Prasad Singh v. Judges of Allahabad High Court* (3). But sometimes they have acted on the complaint of the Attorney-General of the colony, as in *Re Antigua Justices* (4) and *Macauley v. Sierra Leone Supreme Court Judges* (5) (see the printed book): or even on the complaint of a third person, as in *Anandalan v. Judges of the High Court at Madras* (6) (see the printed Record of the Proceedings, pp. 1 and 284). Whoever makes the complaint, the judges are, of course, under a duty to act judicially; see *Har Prasad Singh v. Judges of Allahabad High Court* (7).

D When a legal practitioner is suspended or struck off by the judges of a colony, he has always been at liberty to petition Her Majesty in Council to restore him. But he should give notice of his application to the judges so as to enable them to justify their order; see *Smith v. Sierra Leone Justices* (8) by LORD BROUGHAM; and in all the cases since 1848 the judges themselves have been made respondents to the appeal; see, for instance, *Har Prasad Singh v. Judges of Allahabad High Court* (9): though in one of the cases the Attorney-General was also made a respondent: *Macauley's case* (5). This fact—that the judges are themselves always made respondents to the petition to Her Majesty—is an implicit recognition that, when exercising this jurisdiction, they do not sit as a court of law but as a disciplinary authority. And it has been expressly decided in West Africa that the judges in this regard do not sit as a court. In *Macauley's case* (5), the chief justice of Sierra Leone struck Mr. Macauley off the roll of court. Mr. Macauley sought to appeal to the Full Court under a provision which gave an appeal from a decision of the “Supreme Court” to the Full Court. It was held by PETRIDES and SAWREY-COOKSON, J.J., with ALTKIN, J., dissenting, that no appeal lay to the Full Court because the order of the chief justice striking him off was not a decision of the “Supreme Court”, and that Mr. Macauley's only remedy was to go to the Privy Council for special leave. (The judgment is contained in the printed Record in *Macauley's case*, pp. 30 to 33 and 44 to 49.) G The legislature seems to have had its attention drawn to this decision, for it soon afterwards made special provision for an appeal. When setting up the West African Court of Appeal, it made provision for appeals to it from the decisions of the “Supreme Court” in civil and criminal cases, and then went on (10) by a special s. 14 to provide that

H “An appeal shall lie to the Court of Appeal from any order of the judge suspending a barrister or solicitor of the Supreme Court from practice or striking his name off the roll, and for the purposes of any such appeal any such order shall be deemed to be an order of the Supreme Court.”

I That section is still in force. It was the very section under which the respondent appealed to the Court of Appeal. And it shows clearly enough that the legislature did not regard the decision of the judge in such a case as a decision of the Supreme Court but as a decision of the judge as a disciplinary authority.

It was on this account—that the judge, when exercising disciplinary powers, does not sit as a court—that the West African Court of Appeal concluded that

(2) (1805), 6 East, at p. 143. (3) (1931), L.R. 58 Ind. App. at p. 154.
 (4) (1830), 1 Knapp, 267. (5) [1928] A.C. 344.
 (6) (1930), L.R. 58 Ind. App. 156 n. (7) (1931), L.R. 58 Ind. App. at p. 156.
 (8) (1848), 7 Moo. P.C.C. at p. 175. (9) (1931), L.R. 58 Ind. App. 152.
 (10) In the West African Court of Appeal Ordinance (Laws of the Gambia, 1955, c. 6).

it was not part of his "judicial powers" within s. 7 of the Supreme Court Ordinance, and it was, therefore, not within the competence of a deputy judge. BAIRAMIAN, Ag. P., said: "A deputy judge cannot in my opinion deal with any matter which is not a proceeding in the court"; and AMES, Ag. J.A., said:

"by 'judicial powers' is meant powers which he exercises when constituting the Supreme Court under s. 4, to the exclusion of any other of his powers."

Their Lordships recognise that, in some contexts, the words "judicial powers" do signify the powers of a court which sits to decide controversies between parties; as, for instance, in the phrase "The judicial power of the Commonwealth"; see *Shell Co. of Australia, Ltd. v. Federal Comr. of Taxation* (11). But in this ordinance the phrase is "the judicial powers of the judge". And it appears to their Lordships that, in this context, a judge exercises judicial powers, not only when he is deciding suits between parties, but also when he exercises disciplinary powers which are properly appurtenant to the office of a judge. Suppose, for instance, that a judge, finding that a legal practitioner had been guilty of professional misconduct in the course of a case, orders him to pay the costs, as he has undoubtedly power to do (see *Myers v. Elman* (12), by LORD WRIGHT). That would be an exercise of the judicial powers of the judge just as much as if he committed him for contempt of court. Yet there is no difference in quality between the power to order him to pay costs and the power to suspend him or strike him off. And suppose that the judges of a colony do suspend a practitioner or strike him off. It is undoubtedly open to the practitioner to appeal to Her Majesty in Council; and this necessarily imports that it is the exercise by the judges of a judicial power. For there is no right of appeal to their Lordships' Board from the exercise of an administrative power. Their Lordships are, therefore, of opinion that the power of a judge to suspend or strike off a legal practitioner is a judicial power of the judge which it is competent for a deputy judge to exercise.

Their Lordships will now revert to the preliminary point; for the foregoing discussion is pertinent to it. The preliminary objection raised by counsel for the respondent was simply this: The Attorney-General has no locus standi to petition for special leave to appeal, because he is not a "person aggrieved". Section 31 of the West African (Appeal to Privy Council) Order in Council, 1949 (under which the appellant made his petition), says that:

"Nothing in this order contained shall be deemed to interfere with the right of His Majesty upon the humble petition of *any person aggrieved* by any judgment of the court, to admit his appeal therefrom upon such conditions as His Majesty in Council shall think fit to impose."

In support of this preliminary objection, counsel referred to the judgment of JAMES, L.J., in *Re Sidebotham, Ex p. Sidebotham* (13), where he said:

"A 'person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something."

If this definition were to be regarded as exhaustive, it would mean that the only person who could be aggrieved would be a person who was a party to a lis, a controversy inter partes, and had had a decision given against him. The Attorney-General does not come within this definition, because, as their Lordships have already pointed out, in these disciplinary proceedings there is no suit between parties, but only action taken by the judge, ex mero motu or at the instance of the Attorney-General or someone else, against a delinquent practitioner.

(11) [1930] All E.R. Rep. at p. 679; [1931] A.C. at p. 295.

(12) [1939] 4 All E.R. at p. 508; [1940] A.C. at p. 318.

(13) (1880), 14 Ch.D. at p. 465.

A But the definition of JAMES, L.J., is not to be regarded as exhaustive. LORD
 ESHER, M.R., pointed that out in *Re Reed, Bowen & Co., Ex p. Official Receiver* (14).
 The words "person aggrieved" are of wide import and should not be subjected
 to a restrictive interpretation. They do not include, of course, a mere busybody
 who is interfering in things which do not concern him; but they do include
 B a person who has a genuine grievance because an order has been made which
 prejudicially affects his interests. Has the appellant a sufficient interest for this
 purpose? Their Lordships think that he has. The Attorney-General in a colony
 represents the Crown as the guardian of the public interest. It is his duty to
 bring before the judge any misconduct of a barrister or solicitor which is of suffi-
 cient gravity to warrant disciplinary action. True it is that, if the judge acquits
 the practitioner of misconduct, no appeal is open to the Attorney-General. He
 C has done his duty and is not aggrieved. But if the judge finds the practitioner
 guilty of professional misconduct, and a Court of Appeal reverses the decision
 on a ground which goes to the jurisdiction of the judge or is otherwise a point in
 which the public interest is concerned, the Attorney-General is a "person
 aggrieved" by the decision and can properly petition Her Majesty for special
 leave to appeal. It was for these reasons that their Lordships rejected the
 D preliminary objection and held that the appellant was a "person aggrieved"
 by the decision of the West African Court of Appeal.

There is one last point to consider. It relates to the order made on July 6,
 1959, by the West African Court of Appeal when they refused the appellant
 leave to appeal to Her Majesty in Council. The point arises on s. 5 of the West
 African (Appeal to Privy Council) Order in Council, 1949, which says that:

E "Applications to the court for leave to appeal shall be made by motion
 or petition within twenty-one days from the date of the judgment to be
 appealed from, and the applicant shall give the opposite party notice of his
 intended application."

F In the present case, the decision of the West African Court of Appeal (by which
 they set aside the order of the deputy judge) was given on June 5, 1959. The
 appellant sought leave from that court to appeal to Her Majesty in Council.
 He lodged his notice of motion within twenty-one days, namely, on June 23,
 1959, but he did not serve it on the respondent within twenty-one days, because
 the respondent was not in the Gambia but in England. On July 6, 1959, the
 West African Court of Appeal refused the appellant's application. They said:

G "This court cannot, in face of s. 5 of the Order in Council, entertain an
 application for leave to appeal unless the notice to the opposite party of the
 intended application is given before the twenty-one days have expired."

This ruling is of no practical significance in the present case because their Lord-
 ships afterwards gave special leave to appeal; but, as the ruling is said to affect
 H many colonies with similar Orders in Council, their Lordships gave special leave
 to appeal from it. Their Lordships think that, if s. 5 is construed literally, it
 does seem to lead to the result reached by the West African Court of Appeal;
 for an application remains an "intended application" until it is heard in court.
 But this would mean that the application itself would have to be heard within
 twenty-one days. That cannot have been intended. No court could bind itself to
 I give a date for the hearing within that time. All that was intended was that
 notice should be lodged with the court within twenty-one days; and a copy
 served on the opposite party as soon as possible and in any case a reasonable
 time before the date of the hearing. This result is reached by reading the section
 in this way:

"Applications for leave to appeal shall be made by motion or petition
 (notice of which shall be lodged with the court within twenty-one days from

the date of the judgment to be appealed from), and the applicant shall give the opposite party notice of his intended application." A

Their Lordships think the section should be so read.

Their Lordships will humbly advise Her Majesty that the appeals should be allowed and the order of the deputy judge of the Gambia restored. They make no order as to costs.

Appeals allowed. B

Solicitors: *Charles Russell & Co.* (for the appellant); *A. L. Bryden & Williams* (for the respondent).

[Reported by G. A. KIDNER, ESQ., *Barrister-at-Law.*]

PRACTICE DIRECTION.

PATENTS APPEAL TRIBUNAL. D

Patent—Practice and procedure—Appeal tribunal—Dates of sitting.

With effect from the Michaelmas Term, 1961, the Patents Appeal Tribunal will sit for the hearing of patent appeals as follows:—

- (a) *In the case of a term of nine or more weeks' duration:*
For the first, fifth and ninth weeks of the term. E
- (b) *In the case of a term of less than nine weeks' duration:*
For the first and fifth weeks of the term.

The "first week" of each term shall normally be interpreted as commencing on the Monday of the first *complete* week and terminating on the Friday of the same week. The tribunal will thus sit for the hearing of patent appeals between F
October, 1961, and July, 1962, as follows:—

1961

Monday, Oct. 9, to Friday, Oct. 13
Monday, Nov. 6, to Friday, Nov. 10
Monday, Dec. 4, to Friday, Dec. 8

1962

Monday, Jan. 15, to Friday, Jan. 19
Monday, Feb. 12, to Friday, Feb. 16
Monday, Mar. 12, to Friday, Mar. 16
Monday, May 7, to Friday, May 11
Monday, June 4, to Friday, June 8
Monday, June 25, to Friday, June 29
Monday, July 23, to Friday, July 27. H

Those appeals in which the only parties to address the tribunal are the patentee (or his counsel or agent) and the Comptroller-General of Patents, Designs and Trade Marks (i.e., applications in respect of which no notice of opposition has been filed) will appear at the head of the list of appeals for hearing each sitting.
May 16, 1961.

G. H. LLOYD-JACOB, J.

Re ST. PETER THE GREAT, CHICHESTER.

[CHICHESTER CONSISTORY COURT (Chancellor Buckle), March 20, April 13, 1961.]

Burial—Burial ground—Disused—“ Buildings upon any disused burial ground ”
—Electricity sub-station—“ Structure ” but not building—Disused Burial
Grounds Act, 1884 (47 & 48 Vict. c. 72), s. 3—Open Spaces Act, 1887 (50 &
51 Vict. c. 32), s. 4.

Ecclesiastical Law—Faculty—Jurisdiction—Consecrated ground—Use for secular
purposes—Burial ground—Electricity sub-station.

In order to maintain the supply of electricity in part of the city of C. the electricity board found it necessary to erect a new sub-station. The most convenient site was in a churchyard which was a disused burial ground. The proposed sub-station would consist of a low voltage feeder pillar, being a rectangular-shaped “ cupboard ” with doors and standing four feet three inches high; a transformer constructed mainly of tubes and standing six feet four inches high; and high voltage switch gear. The site in the churchyard which this equipment would occupy measured approximately twenty feet by thirteen feet. The equipment would be fixed to concrete rafts and the ground would be excavated to a depth of two feet; and cables would be laid from the site to the roadway at a depth no greater than two feet and on a line avoiding any graves. If this equipment constituted a building or buildings its erection would be prohibited by the Disused Burial Grounds Act, 1884, s. 3. The vicar and churchwardens petitioned for a faculty to authorise the use of the churchyard for the sub-station.

Held: the faculty would be granted since—

(i) there was jurisdiction to grant a faculty in such a case, unless the proposed erection was forbidden by s. 3* of the Disused Burial Grounds Act, 1884, and, the court being satisfied that the erection of the sub-station would benefit the parish and the public generally and was not inconsistent with the effects of consecration, the jurisdiction to grant a faculty would be exercised if the erection were not prohibited by s. 3.

Observations of DR. TRISTRAM in *Re St. Nicholas Cole Abbey, Re St. Benet Fink, Churchyard* ([1893] P. at p. 65), of the Dean of the Arches in *Re St. Mark's Church, Lincoln* ([1956] 2 All E.R. at p. 581), and of Chancellor ELLISON in *Re St. Swithin's Parish, Norwich* ([1959] 3 All E.R. at p. 303) applied.

(ii) although the equipment in the present case constituted a structure, it did not, taken either singly or together, constitute a building or buildings for the purpose of s. 3 of the Act of 1884, and the erection of the proposed sub-station was not, therefore, prohibited by that Act.

Re St. Nicholas Acons (Rector and Churchwardens) v. London County Council ([1928] All E.R. Rep. 240) and *Re St. Mark's Church, Lincoln* ([1956] 2 All E.R. 579) distinguished.

[As to building on disused burial grounds and what constitutes “ building ”, see 4 HALSBURY'S LAWS (3rd Edn.) 89, para. 253, note (b); and for cases on the subject, see 7 DIGEST 552, 553, 299-300.]

As to use of consecrated ground for secular purposes, see 13 HALSBURY'S LAWS (3rd Edn.) 396, para. 886, notes (k) (l) (m); and for cases on the subject, see 7 DIGEST 534, 535, 144-150.

For the Disused Burial Grounds Act, 1884, s. 2, s. 3, and for the Open Spaces Act, 1887, s. 4, see 2 HALSBURY'S STATUTES (2nd Edn.) 792, 793.]

Cases referred to:

Bideford Parish, Re, Ex p. Bideford (Rector, etc.), [1900] P. 314; 64 J.P. 743;
 7 Digest 556, 330.

* The relevant terms of s. 3, and the amendment, are printed at p. 518, letters A to D, post.

- Butt v. Jones*, (1829), 2 Hag. Ecc. 417; 162 E.R. 909; 19 Digest 361, 1791. A
- Campbell v. Paddington (Parishioners and Inhabitants)*, (1852), 2 Rob. Ecol. 558; 19 L.T.O.S. 276; 163 E.R. 1413; 19 Digest 358, 1752.
- Cardiff Rating Authority and Cardiff Assessment Committee v. Guest Keen Baldwin's Iron & Steel Co., Ltd.*, [1949] 1 All E.R. 27; [1949] 1 K.B. 385; [1949] L.J.R. 713; 113 J.P. 78; 38 Digest (Repl.) 630, 955.
- Harris v. De Pinna*, (1886), 33 Ch.D. 238; 56 L.J.Ch. 344; 54 L.T. 770; B 50 J.P. 486; 19 Digest 127, 850.
- Moir v. Williams*, [1892] 1 Q.B. 264; 61 L.J.M.C. 33; 66 L.T. 215; 56 J.P. 197; 34 Digest 583, 46.
- R. v. Twiss*, (1869), L.R. 4 Q.B. 407; 10 B. & S. 298; 38 L.J.Q.B. 228; 20 L.T. 522; 33 J.P. 516; 19 Digest 324, 1294.
- St. Bene't, Sherehog (Rector and Churchwardens) v. St. Bene't, Sherehog (Parishioners)*, *St. Nicholas, Acons (Rector and Churchwardens) v. St. Nicholas, Acons, (Parishioners)*, (1892), Trist. 274; sub nom. *Re St. Benet, Sherehog, Re St. Nicholas, Acons*, [1893] P. 66, n.; 19 Digest 476, 3336. C
- St. Gabriel, Fenchurch Street (Rector, etc.) v. City of London Real Property Co.*, [1896] P. 95; 7 Digest 557, 337. D
- St. Mark's Church, Lincoln, Re*, [1956] 2 All E.R. 579; [1956] P. 336; 3rd Digest Supp.
- St. Nicholas Acons (Rector and Churchwardens) v. London County Council*, [1928] All E.R. Rep. 240; [1928] A.C. 469; 97 L.J.P.C. 113; 139 L.T. 530; 92 J.P. 185; Digest Supp.
- St. Nicholas Cole Abbey, Re, St. Benet Fink, Churchyard, Re*, [1893] P. 58; E 7 Digest 554, 309.
- St. Swithin's Parish, Norwich, Re*, [1959] 3 All E.R. 301; [1960] P. 77; [1959] 3 W.L.R. 989; 3rd Digest Supp.
- South Wales Aluminium Co., Ltd. v. Neath Assessment Area Assessment Committee*, [1943] 2 All E.R. 587; 108 J.P. 45; 2nd Digest Supp. F

Petition for a faculty.

In this case the vicar and churchwardens of St. Peter the Great, Chichester, sought a faculty authorising the Southern Electricity Board to use part of the churchyard of the church of All Saints, Chichester (the former parish of which had been united with the parish of St. Peter the Great some years previously) for the purpose of a new electricity sub-station to serve the needs of consumers in part of the central area of the city. The facts appear in the judgment. G

E. G. Nugee for the petitioners.

Cur. adv. vult.

Apr. 13. **THE CHANCELLOR** read the following judgment: By the original petition, which is dated Nov. 24, 1960, the court was asked to authorise the grant of a lease of the churchyard of the church of All Saints, Chichester, to the Southern Electricity Board for ninety-nine years, but at the hearing the petitioners asked only for a licence for a fixed term of years, fifty being suggested, and then until further order. A map of the central area has been produced in evidence. It appears that within the area edged red thereon, which may be described as the area of benefit, comprising one of the main shopping and business areas of the city, and wholly situated in the parish of St. Peter the Great, there are at present about two hundred consumers of electricity, including shops. At the present time the area is served by one sub-station to the north with the incongruous and rather ominous name of Crooked S., and another on the south-west called Southgate. The first of these is already overloaded to the extent of one-third beyond its proper capacity, and the other is nearly up to capacity. There is thus already a liability to breakdown, and the board is experiencing difficulty in fulfilling its statutory obligation to keep up a constant voltage. Further, in H I

A anticipating the future needs of the area, the board calculates that the load within the area will double within five to seven years from now. For these reasons, it is deemed essential that a site for a new sub-station be found in the area with a view to easing the load on the existing ones, and as a complement to them.

B Of the few possible sites which are shown on the map to which I have referred, it was proved to my satisfaction that the churchyard site was the most convenient. Indeed, it seems that the petitioners were the only persons prepared to negotiate with the board on a voluntary basis, and the board is understandably loath to use its powers of compulsory acquisition unless there is no feasible alternative. The need for a new sub-station has been amply shown. What that will consist of I will deal with in a moment; but, before doing so, it will be
C convenient to consider the position regarding the churchyard.

D The former parish of All Saints has become united with the parish of St. Peter the Great. The church of All Saints is still used, but the churchyard is not. The last burial took place in or about 1870. Although there is apparently no record that the churchyard has been closed formally by Order in Council, it was conceded on behalf of the petitioners that it was a disused burial ground, and their case was presented and argued on that basis. The churchyard (which is a small one) has at present what was described in evidence as a poor fence surmounted by a hedge on its short frontage to West Pallant, and the small entrance gate is kept locked. It is in practice only open to the local authority who from time to time do what maintenance is necessary, presumably on a voluntary basis.

E The equipment of which the sub-station would consist comprises, first, a low voltage feeder pillar approximately four feet three inches in height which houses low voltage outgoing cables and the fuses controlling them; secondly, a 750 kVA transformer approximately six feet four inches high; and thirdly, high voltage switch gear, four switches being proposed at first, rising* possibly to a maximum number of eight. Photographs of this equipment were produced at
F the hearing, and from these it appears that all the items are made of metal, the pillar being a rectangular-shaped container or receptacle in the nature of a cupboard with doors, apparently opened by some form of key. The transformer is a bulkier piece of machinery mainly constructed of tubes, and the switch gear consisting in each case of a metal box with a switch lever affixed, and padlocked in position. These items of equipment would occupy a site in the north-west
G corner of the churchyard measuring nineteen feet six inches on the west side, eleven feet on the north, and thirteen feet on the south, the east boundary being of an irregular shape in order to avoid interference with two brick memorials. The equipment would be fixed in each case to concrete rafts. The ground would require to be excavated to a depth of two feet and filled in with hard core, and high and low voltage cables would run from the site to the roadway at a depth
H not greater than two feet on a line avoiding any graves. The works would involve the removal of a few small trees and three gravestones; but, as the depth of the excavation will be two feet only, no remains are likely to be disturbed.

Evidence in favour of the proposals was given by the vicar of St. Peter's, and by the district engineer of the Southern Electricity Board, who also told me that the equipment would stand in the open uncovered in any way, and was quite safe. The board would like to remove the fence and hedge and substitute a six foot double gate, and would fill in the rest of the frontage with a wall to match the stonework of the church, or a fence, as the parochial church council should prefer. The whole of the cost would, of course, be borne by the board, who would also make a yearly payment to the council of £10 a year. The equipment would be inspected once a month in summer and weekly in the winter. The hum of the machinery in action would not be audible in the church.

I The petition is supported by a resolution of the parochial church council at a

meeting held on Sept. 7, 1960, passed by a majority of twenty-five to two, the terms of the resolution being:

"That general approval be given to the allocation of land for the erection of the sub-station, and that Messrs. Thomas Eggar & Sons, solicitors, be requested to safeguard the rights of the council in the matter of any payment, it being understood that no expense was to fall upon the council in connexion with the establishment of the sub-station."

When citation issued, two persons, having a locus standi as parishioners, entered an appearance in opposition, one of them, I understand, being one of the two members of the council who voted against the resolution. They took no further part in the proceedings, but I was told that their ground of objection was one of general principle that a burial ground should be kept as such, and not put to other purposes. In so far as these proposals involve a matter of discretion, I have borne this in mind in reaching a conclusion. Those, then, are the facts.

On the question of jurisdiction, assuming that I were minded to exercise discretion in favour of the petitioners, counsel submitted on their behalf that there were two questions to consider: (i) Has the court jurisdiction to grant a faculty for the use of consecrated ground for secular purposes? (ii) Is the sub-station a "building" within the meaning of s. 3 of the Disused Burial Grounds Act, 1884, as amended by s. 4 of the Open Spaces Act, 1887, the first of these Acts being, according to its title: "An Act for preventing the erection of buildings on disused burial grounds"?

The first of these questions can be answered quite shortly. Counsel referred me (among other cases) to *Re St. Nicholas Cole Abbey*, *Re St. Benet Fink, Churchyard* (1), *Re St. Mark's Church, Lincoln* (2) and *Re St. Swithin's Parish, Norwich* (3). The earlier cases, which involve underground transformer chambers, were, of course, overruled by the Judicial Committee in *St. Nicholas Acons (Rector and Churchwardens) v. London County Council* (4), on the ground that the works authorised were "buildings" and forbidden by the Act of 1884 as amended, but the general principles as to jurisdiction (assuming for the moment that no building is involved) still stand. DR. TRISTRAM, in the first cited case, said this (5):

"The refusal to grant the faculties asked for will deprive the streets and houses and offices in the areas mentioned of the advantage of being lighted by electric light, and the question before the court is whether it has a discretionary jurisdiction in the matter, and, if it has, whether it would be a proper exercise of it to grant the faculties prayed. It has already granted two faculties to this company, giving it the use for twenty-one years of portions of two churchyards in the city for the construction of entrances and subways to transformer chambers, constructed by permission of the Commissioners of Sewers under narrow streets, in the cases of *Re St. Benet, Sherehog* and *St. Nicholas Acons* (6). This case does not come within the class of cases referred to in *R. v. Twiss* (7). The rule applicable to this and kindred cases is thus laid down by SIR JOHN NICHOLL: 'Faculties are to be granted at the discretion of the ordinary, but it must be a sound discretion, having a due regard to times and circumstances, and to the rights and interests of all parties concerned: if an unsound discretion be exercised, a party may appeal to a superior tribunal': *Butt v. Jones* (8). The court is of opinion that it would not be exceeding its jurisdiction in granting the faculties prayed, and that under the exceptional circumstances of these two cases it will be exercising a sound discretion in granting them. It, therefore, decrees the faculties as prayed."

(1) [1893] P. 58.

(2) [1956] 2 All E.R. 579; [1956] P. 336.

(3) [1959] 3 All E.R. 301; [1960] P. 77.

(4) [1928] All E.R. Rep. 240; [1928] A.C. 469.

(5) [1893] P. at p. 65.

(6) [1893] P. 66 n.

(7). (1869), L.R. 4 Q.B. 407.

(8) (1829), 2 Hag. Ecc. at p. 424.

DR. TRISTRAM then went on (9) to make provision respecting the removal of the bodies buried in the vaults.

In *Re St. Mark's Church, Lincoln* (10), the Dean of the Arches (11), having stated that the Lincolnshire Road Car Co., Ltd. had found a need to establish a comprehensive omnibus station to accommodate its services, but that an oblong projection of the churchyard constituted an obstacle, and that a faculty was desired authorising inter alia the use of the projection as a footpath, goes on to say (12):

"Although the company's project is a unified scheme in that they would be unlikely to leave part of the station uncovered, the issue before me appears to me, as it appears to the learned chancellor, to fall into two parts. Can and if so should this area of consecrated ground be used as part of an omnibus station? If so, is the proposed roofing permissible? As to the first of these issues I see no reason to differ from the learned chancellor. Until the decision of this court in *Re Bideford Parish, Ex p. Bideford (Rector, etc.)* (13) there was considerable doubt and some apparent conflict of authority whether it could be permitted that land once consecrated to a sacred use should be used for a secular purpose. That case is clear authority that when the purpose for which the ground was originally consecrated can no longer be lawfully carried out the use of it for a secular purpose may be authorised though the ownership of the land remains unaffected. *Re Bideford Parish* (13) was a case in which the wall of a churchyard was moved, part of the area of the churchyard being thrown into the highway. But the earlier case of *St. Gabriel, Fenchurch Street (Rector, etc.) v. City of London Real Property Co. (14)* shows that the principle is not limited to the widening of a highway . . ."

Lastly, in *Re St. Swithin's Parish, Norwich* (15), where a faculty was sought to enable the rector, in whom the freehold of the church was vested, to grant to a bank an option to take a lease of it, Chancellor ELLISON, having stated that if it were a case where he had jurisdiction, he would have exercised it, and having referred to *R. v. Twiss* (16), went on to say (17):

"In that case the writ of prohibition was in fact refused and those remarks were obiter. Both before that case, for example in *Campbell v. Paddington (Parishioners and Inhabitants)* (18) and subsequently, the courts have granted faculties for secular and ecclesiastical purposes combined, provided that the secular purpose is not one of such nature as to be wholly inconsistent with the sacredness of consecration."

The submission of the petitioners on this part of the case was that I have jurisdiction to grant a faculty of this nature if I am satisfied that the benefit to the parish and the public generally is sufficiently established, and, I should add, the purpose for which the faculty is desired is not inconsistent with the effects of consecration. I accept this, and on the evidence adduced at the hearing I have no doubt that the benefit to the persons living and working in the area, parishioners and non-parishioners, outweighs the ground of objection in the mind of those who originally appeared in opposition. Consequently I would grant this faculty unless the Acts of 1884 and 1887 previously referred to prevent me from so doing.

The Disused Burial Grounds Act, 1884, entitled as I have stated: "An Act for preventing the erection of buildings on disused burial grounds" and containing recitals which, in my judgment, afford no assistance to its construction, contains the following relevant provisions:

(9) [1893] P. at p. 68.

(10) [1956] 2 All E.R. 579; [1956] P. 336.

(11) H. U. WILLINK, Esq., Q.C.

(12) [1956] 2 All E.R. at p. 581; [1956] P. at p. 341.

(13) [1900] P. 314.

(14) [1896] P. 95.

(15) [1959] 3 All E.R. 301; [1960] P. 77.

(16) (1869), L.R. 4 Q.B. 407.

(17) [1959] 3 All E.R. at p. 303; [1960] P. at p. 80.

(18) (1852), 2 Rob. Eccl. 558.

"2. Interpretation.—In this Act a 'disused burial ground' shall mean a burial ground in respect of which an Order in Council has been made for the discontinuance of burials therein in pursuance of the provisions of the said recited Acts [the Burial Acts of 1852 and 1853].

"3. No buildings to be erected upon disused burial grounds except for enlargement etc.—It shall not be lawful to erect any buildings upon any disused burial ground, except for the purpose of enlarging a church, chapel, meeting house, or other places of worship."

These provisions were amended by s. 4 of the Open Spaces Act, 1887, which reads as follows:

"Amendment of 47 & 48 Vict., c. 72.—In the Disused Burial Grounds Act, 1884 . . . the expression 'burial ground' shall have the same meaning as in the Metropolitan Open Spaces Act, 1881, as amended by this Act, and the expression 'disused burial ground' shall mean any burial ground which is no longer used for interments, whether or not such ground shall have been partially or wholly closed for burials under the provisions of any statute or Order in Council, and the expression 'building' shall include any temporary or movable building."

It is accepted that All Saints churchyard is a disused burial ground within the meaning of these enactments.

In considering this part of the case, two decisions immediately come to mind, namely, the *St. Nicholas Acons* case (19) and *Re St. Mark's Church, Lincoln* (20), to both of which I have already referred, and in which the works proposed were held to be buildings as above defined, and therefore prohibited. In my judgment, however, both these cases are distinguishable from the present. As regards the *St. Nicholas Acons* case (19) it is sufficient to read the description of the transformer chamber given by LORD HAILSHAM, L.C. In describing it, he said (21):

"The transformer chamber which it is proposed to place in the churchyard is described in the judgment of the learned chancellor (22) as: 'A brick-built structure with a roof of asphalt supported by wrought steel girders and by reinforced concrete. That roof is under the surface of the churchyard and the only parts of the transformer chamber which will, so to speak, emerge in the churchyard are two ventilators, which, I think, are something like nine inches above the surface of the churchyard, and they will be practically concealed from sight by certain beds of flowers which the company undertake to place there. So far as noise is concerned, there will be no noise connected with the machines which are used in the transformer chamber. They are, in fact, as I understand, motionless machines.'"

Clearly this was a building in the ordinary sense of the word, being a brick structure with a roof supported by girders emplaced in concrete, the only distinguishing feature from most other transformer stations being that it was built in or under the ground, and not on it. LORD HAILSHAM (23) said:

"The first question which has to be considered is whether the proposed transformer chamber is a building. Having regard to the nature of the structure as described above, their Lordships can entertain no doubt that that question must be answered in the affirmative, and, indeed, this was not seriously contested on behalf of the appellants. But the appellants' counsel contended that, even if the chamber were a building, it would not be a 'building erected upon' the churchyard. It was argued that this expression must be limited to buildings raised substantially above the ground level and interfering with the use of the churchyard for the purposes

(19) [1928] All E.R. Rep. 240; [1928] A.C. 469.

(20) [1956] 2 All E.R. 579; [1956] P. 336.

(21) [1928] All E.R. Rep. at p. 242; [1928] A.C. at p. 472.

(22) F. H. L. ERRINGTON, Esq., [1928] P. at p. 104.

(23) [1928] All E.R. Rep. at p. 242; [1928] A.C. at p. 473.

A of an open space. In their Lordships' view the language of the statute cannot be so limited. The erection of the building is commenced as soon as the foundation has been excavated, and a building is erected upon the site upon which it is built none the less because no part of it is raised above the ground level as existing at the date of its erection."

B In *Re St. Mark's Church, Lincoln* (24) the bus station was to be erected almost wholly outside the churchyard, and on the company's own land, but by the use of modern engineering methods it would have been possible to design part of the roof in such a way that it would overhang the churchyard wall, but be supported entirely from the company's land so that no part of the building was in contact with the churchyard wall or with the ground. Again it was argued that "on" or "upon" connoted in their usual meaning contact with the ground; but as the Dean of the Arches said (25):

C "It would be artificial to rely on the fact that the words 'on' and 'upon' usually imply contact; the clear intention of the Act [of 1884] is to prohibit all building in churchyards other than such building as is expressly permitted. Moreover I agree with the learned chancellor (26) that it is not possible or in accord with common sense to isolate one portion of the roof on the western side of the proposed building. The proposed building would appear to be and would in fact be a building erected partly upon the company's land and partly upon consecrated land, and it is clear to me that there is no jurisdiction in this court to permit the use of a disused burial ground for the accommodation of such a building."

E The effect of these two decisions appears to be (i) that all building is prohibited whether in, under, on or above a churchyard and (ii) that the fact that that part of a building which overhangs consecrated ground is not in actual physical contact with it does not affect the character of the whole erection as a building. In both cases the works in the churchyards were clearly buildings (in the first by their own nature and in the second as part of a larger building) and therefore prohibited. In neither case, however, was the term "building" defined and the works now proposed bear no resemblance to the works then in issue.

F No other case was brought to my notice, nor am I aware of one precisely in point or sufficiently closely analogous to the present one which affords guidance to me. In view of the perhaps surprising lack of authority, I must regard the case as one of first impression. Furthermore, I derive no assistance from the relevant sections themselves. These simply prohibit buildings, including temporary or movable buildings, with limited exceptions, but give no guide as to the limits of the expression. I do not feel that I ought to endeavour to impute an intention to the legislature not apparent on the face of the statute, including its long title. And I accept counsel's submission that I must interpret the word "building" in its ordinary sense. I am strengthened in that view because it appears to have been the view taken by the Dean of the Arches in the last-mentioned case (27).

H Counsel suggested that there were three tests of what constituted a "building", that is to say: (i) Would the ordinary man think this was a building? (ii) Has the relevant structure four walls and a roof? (iii) Can one say that the structure is built? Regarding the first of these tests, I was referred to the judgment of CHITTY, J., in *Harris v. De Pinna* (28), a case involving questions of light under s. 3 of the Prescription Act, 1832. It is, therefore, a special type of case, and I derive assistance only from the learned judge's general observations. Thus, having discussed the structure, he puts one test which, though naturally

(24) [1956] 2 All E.R. 579; [1956] P. 336.

(25) [1956] 2 All E.R. at p. 582; [1956] P. at p. 344.

(26) K. M. MACMORRAN, Esq., Q.C.

(27) [1956] 2 All E.R. at pp. 581, 582; [1956] P. at pp. 342, 343.

(28) (1886), 33 Ch.D. 238.

phrased in relation to the structure which he was then considering, I regard as of A
general application. The learned judge says (29):

"The proposition I am about to put again is not a decisive one, but I will
put it. Would an ordinary man, with a reasonable knowledge of the English
language, passing this structure speak of it as a building? I agree that it is
only putting it in a somewhat different form. The question in substance is one
of fact, and viewing it as a whole, and having regard particularly to the B
model, and by no means disregarding the photographs which I have seen,
I have come to the conclusion that this is a structure, but not a building
within s. 3 of the Prescription Act."

Similarly in the present case, having seen the photographs which were produced
in evidence, I take the view that a reasonable man passing them would take the C
view that they were structures, but not buildings in the ordinary sense of the
word.

So far as the second question is concerned, it answers itself in the present case.
The authority cited to me was *Moir v. Williams* (30). Again this is a very
special case, this time under the Metropolitan Building Act, 1855, but the test
posed by LORD ESHER, M.R. (31), seems to me to be of general application. D
The case involved fees payable to a district surveyor which were regulated by
Part 1 of Sch. 2 to the Act which provides, in the case of new buildings, for a fee
in respect of "every building not exceeding four hundred square feet in area,
and not more than two stories in height", and additional fees for each additional
storey and additional area of one hundred square feet. LORD ESHER said this (31):

"If the words 'new building' are taken by themselves without reference E
to the other part of the Act, they would be taken to apply to what is ordinarily
called a building. Such an ordinary building is an inclosure of brick or stone-
work covered in by a roof, and if the schedule were taken alone it is to such
an area that it would apply."

I emphasise, of course, that this is a very special case, but in my view those F
words can properly be relied on—

"what is ordinarily called a building . . . is an inclosure of brick or stone-
work covered in by a roof . . ."

The reference to brick and stonework may need some qualification seventy
years after that decision, but in my judgment this is a valid test, and I regard the
reference to covering in by a roof as most important. On this test, also, then, G
the petitioners satisfy me.

Lastly, taking counsel's third test, can one say that the structure is built?
Counsel referred me to the decision of ATKINSON, J., under the Rating and
Valuation Act, 1925, in *South Wales Aluminium Co., Ltd. v. Neath Assessment*
Area Assessment Committee (32). The headnote reads as follows:

"The plaintiff company manufactured metallic aluminium by an electro- H
lytic process which required direct current. In order to convert the alter-
nating current supplied from the mains, the plaintiffs passed the current
through a transformer system to a distribution board, and from thence to
three motor generators equipped with three dynamos which produced the
direct current which was passed to cells composed of plates and fittings
assembled together. The plaintiffs contended (i) that the motor generators I
were not machinery used for the 'primary transformation of power' within
the meaning of the Rating and Valuation Act, 1925, Sch. 3, class 1 (a);
(ii) that the cells were not in the nature of a 'building or structure' within
the meaning of class 4; and (iii) that, therefore, the specified machines and
plant were not rateable:—Held: on a true construction of the Act the

(29) (1886), 33 Ch.D. at p. 249.

(31) [1892] 1 Q.B. at p. 270.

(30) [1892] 1 Q.B. 264.

(32) [1943] 2 All E.R. 587.

A motor generators were not used for the 'primary transformation of power', nor were the cells in the nature of 'buildings or structures'."

And the plaintiffs' submission was upheld. It is with reference to the second leg of this decision that I was referred to it. The editorial note, with which I concur, states (33):

B "Statutes and statutory orders must at times contain technical terms and the meaning to be applied to such technical terms must be that applied to them by men accustomed to use such terms in the industry which is being dealt with. The construction of the rating order here in question is, therefore, largely subject to the expert evidence of technical persons, but the meaning of the term 'structure' is based upon more general considerations."

C Possibly "structure or building" would be more accurate. ATKINSON, J., when dealing with the electrolytic cells, stated (34) that the facts found about them were that they were "substantial, rectangular receptacles measuring sixteen feet by eleven feet". He then proceeds to describe the cells and their operation, noting that they were not fixed to the ground but in each case rested on four pillars on a concrete base to keep them firmly in position, and says (34):

D "The question is whether these big receptacles, as I have described them, are in the nature of 'a building or structure'. I do not think it is denied that the word 'structure' must be construed as in the nature of a building. There has been an argument as to whether this is a question of fact or a question of law. I think it is obvious it is mixed, but it is only a question of law, I imagine, to this extent. It is a question of law to determine what is meant by the word 'structure'. Then, in the main, it must be a question of fact whether any particular plant or erection, to use a neutral expression, is within it or not. That must be, in the main, a question of fact, although in certain cases it may be mixed law and fact. There is nothing to suggest here that the word 'structure' is not to be used in its ordinary sense. As used in its ordinary sense I suppose it means something which is constructed in the way of being built up as is a building; it is in the nature of a building. It seems to me it is not in the nature of a building, or a structure analogous to a building, unless it is something which you can say quite fairly has been built up. I do not think that is the only guide or the only test, but, roughly, I think that must be the main guide: how has it got there? Is it something which you can fairly say has been built up? I do not think it depends at all on whether it is fixed to the ground. That may be a relevant consideration."

The decision is subject to a qualification made by DENNING, L.J., in the later case of *Cardiff Rating Authority and Cardiff Assessment Committee v. Guest Keen*

H *Baldwin's Iron & Steel Co., Ltd.* (35). The learned lord justice said (36):

I "I must say a word as to *South Wales Aluminium Co., Ltd. v. Neath Assessment Area Assessment Committee* (37). If that decision turned on the question whether the cell was in the nature of a building, I cannot agree with it. The order requires the thing in question to be 'in the nature of a structure', and a structure is often not a building. A crane gantry or a turntable is a structure, but not a building. Again, if the decision turns on the fact that the cell was a receptacle, I cannot agree with it. A vat is a receptacle, but it may also be a structure."

(33) [1943] 2 All E.R. at p. 588.

(34) [1943] 2 All E.R. at p. 592.

(35) [1949] 1 All E.R. 27; [1949] 1 K.B. 385.

(36) [1949] 1 All E.R. at p. 31; [1949] 1 K.B. at p. 397.

(37) [1943] 2 All E.R. 587.

That may be some qualification of the decision of ATKINSON, J., but I do not think that it affects the question that is here in issue. Even with this qualification I think that the petitioners are entitled to say on these authorities that, in the absence of a context indicating some other meaning, a building is something you can fairly say has been built up. The equipment in this case has been constructed; it has not been built up. Each item may be a structure, but neither singly nor together do they constitute a building or buildings.

In my judgment, therefore, these are structures, but not buildings, and I see nothing in the Acts of 1884 or 1887 which requires me to construe "building" as equivalent to "structure". Consequently I have come to the conclusion that I have jurisdiction in the present case to grant a faculty as now prayed, and as I have indicated earlier in this judgment I propose to exercise it in favour of the petitioners. Counsel referred me again to *Re St. Nicholas Cole Abbey* (38) where the minute of the decree in that case is set out (39), and I understand that the petitioners will be content to accept a decree in the terms there indicated, or something on those lines, for a period of fifty years, and then until further order. The only other point which I think it necessary to mention is that that particular minute of the decree does not refer to human remains. Although it is apparently doubtful whether any such remains will be disturbed in this case, I think that the faculty should provide that if any remains are uncovered, they should be reverently re-interred in the churchyard under the supervision of the incumbent. With that qualification, the faculty will issue in terms substantially similar to those in *Re St. Nicholas Cole Abbey* (39).

I think that all I have to do finally is to express my thanks to Mr. Nugee for having taken me so carefully through this complicated case, for his clear presentation of it, and for the great assistance which he rendered to me at the hearing, and I am very much obliged to him.

Order accordingly.

Solicitors: *F. W. W. Kempton*, Maidenhead (for the petitioners).

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

RIDGE v. BALDWIN AND OTHERS.

[QUEEN'S BENCH DIVISION (Streatfeild, J.), April 11, 12, 13, 14, 17, 18, 19, 1961.]

Police—County borough police force—Chief constable—Summary dismissal by watch committee—Validity—Whether quasi-judicial decision—Officer accused of criminal offences—Acquitted of offences, but conduct severely criticised by trial judge—Appeal against decision of watch committee dismissed by Home Secretary—Waiver of right to proceed by action—Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 191 (4)—Police Act, 1919 (9 & 10 Geo. 5 c. 46)—Police (Appeals) Act, 1927 (17 & 18 Geo. 5 c. 19), s. 2 (3).

In 1956 the plaintiff, an officer of a county borough police force, was appointed chief constable of the county borough. His appointment was expressed to be subject "to the Police Acts and regulations". In October, 1957, he was suspended from duty after being arrested, together with two other officers of the same police force, on charges, which were subsequently the subjects of two indictments, one for criminal conspiracy to corrupt the course of justice and the other for corruption. The trial of the first indictment took place early in 1958. The other two police officers were found guilty. The plaintiff was acquitted and, in consequence, the prosecution offered no evidence against him on the second indictment, which came before the court on Mar. 6, 1958. Although the plaintiff was acquitted, his own evidence and the observations of the trial judge when passing sentence on the other two police officers at the trial of the first indictment showed that the plaintiff had failed in professional and moral leadership. On Mar. 7 the watch committee held a meeting at which, after considering matters relating to the plaintiff, they came to the conclusion that he had been negligent in the discharge of his duty and was unfit for that duty, and they dismissed him forthwith, under s. 191 (4)* of the Municipal Corporations Act, 1882, from his office as chief constable. The plaintiff was not present at that meeting and had not been given notice of any specific charges against him. He appealed, under the Police (Appeals) Act, 1927, to the Home Secretary against the dismissal, but his appeal was dismissed. In an action against the watch committee the plaintiff claimed that his purported dismissal was ultra vires and void, because the watch committee had not complied with the requirements of the relevant Police (Discipline) Regulations†, made under the Police Act, 1919, which (he contended), in effect, repealed s. 191 (4) of the Act of 1882.

Held: (i) the dismissal of the plaintiff by the watch committee was not a nullity nor ultra vires for the following reasons—

(a) the express provision that the plaintiff's appointment should be subject to the "Police Acts and regulations" did not exclude Part 9 (including s. 191) of the Municipal Corporations Act, 1882, which was a police Act within this description in its context (see p. 530, letter B, post).

(b) the power of dismissal of a chief constable under s. 191 (4) of the Municipal Corporations Act, 1882, survived alongside the disciplinary code established by virtue of the Police Act, 1919, particularly as unfitness for office, which was a ground of dismissal under s. 191 (4), was not an offence under the disciplinary code, although conduct which showed unfitness might also constitute an offence against the disciplinary code (see p. 534, letters C and D, post).

Cooper v. Wilson ([1937] 2 All E.R. 726) applied.

Walkwork v. Fielding ([1922] All E.R. Rep. 298) considered.

(c) when exercising the power of summary dismissal conferred on a

* The terms of the subsection are printed at p. 528, letter G, post.

† The material terms of the relevant Police (Discipline) Regulations appear in the judgment; see pp. 530, 531, post.

watch committee by s. 191 (4) of the Act of 1882 the committee were acting in a quasi-judicial capacity and must observe the principles of natural justice and exercise the power fairly and bona fide (see p. 536, letter A, post; observations of VISCOUNT HALDANE, L.C., in *Local Government Board v. Arlidge*, [1915] A.C. at p. 132, applied); in dismissing the plaintiff, however, the watch committee had acted, in the circumstances of the present case and having regard to the evidence of the plaintiff at his trial, in accordance with the principles of natural justice, although they had not heard the plaintiff before reaching initially their conclusion (see p. 536, letter C, post).

(ii) by appealing under the Police (Appeals) Act, 1927 (by s. 2 (3)* of which the decision of the Home Secretary was final) the plaintiff had waived his right to bring this action (see p. 537, letter I, to p. 538, letter A, post).

Hogg v. Scott ([1947] 1 All E.R. 788) followed.

[As to the statutory power to dismiss a member of a police force, see 30 HALSBURY'S LAWS (3rd Edn.) 103, para. 171.

For the Municipal Corporations Act, 1882, s. 191, see 14 HALSBURY'S STATUTES (2nd Edn.) 140.

For the Police Act, 1919, s. 4 and s. 7 (as amended), and for the Police (Appeals) Act, 1927, s. 1 (1) (as amended) and s. 2 (3), see 18 HALSBURY'S STATUTES (2nd Edn.) 124, 135, 136.

For the Police (Appeals) Rules, 1943, r. 1, r. 2, r. 12, and the Police (Discipline) Regulations, 1952, Sch. 1, see 17 HALSBURY'S STATUTORY INSTRUMENTS 166, 167, 169 and 200.]

Cases referred to:

Board of Education v. Rice, [1911] A.C. 179; 80 L.J.K.B. 796; 104 L.T. 689; 75 J.P. 393; 19 Digest 602, 290.

Cooper v. Wilson, [1937] 2 All E.R. 726; [1937] 2 K.B. 309; 106 L.J.K.B. 728; 157 L.T. 290; 101 J.P. 349; 30 Digest (Repl.) 171, 219.

Hogg v. Scott, [1947] 1 All E.R. 788; [1947] K.B. 759; [1948] L.J.R. 666; 177 L.T. 32; 111 J.P. 282; 2nd Digest Supp.

Local Government Board v. Arlidge, [1915] A.C. 120; 84 L.J.K.B. 72; 111 L.T. 905; 79 J.P. 97; 22 Digest (Repl.) 293, 2986.

Wallwork v. Fielding, [1922] All E.R. Rep. 298; [1922] 2 K.B. 66; 91 L.J.K.B. 568; 127 L.T. 131; 86 J.P. 133; 37 Digest 180, 24.

Action.

In this action the plaintiff claimed against the defendants, who were members of the Watch Committee of the County Borough of Brighton, (a) a declaration that the purported termination of the plaintiff's appointment as chief constable of Brighton was illegal, ultra vires and void; (b) payment of salary from Mar. 7, 1958 (the date on which the defendants purported to terminate the appointment); (c) alternatively, a declaration that the plaintiff was entitled to a pension from Mar. 7, 1958; (d) payment of the pension; (e) alternatively, damages.

The facts are stated in the judgment.

Stanley Rees, Q.C., and *J. L. E. MacManus* for the plaintiff.

Neville Faulks, Q.C., and *Anthony Harmsworth* for the defendants.

STREATFEILD, J.: In this action, the plaintiff, Mr. Charles Feild Williams Ridge, claims against the defendants, who substantially (except for two of them who have since died) form the Watch Committee of the County Borough of Brighton, first, a declaration that his purported dismissal from the office of chief constable of Brighton was illegal, ultra vires and void, and, further, damages for wrongful dismissal under different heads.

This history of this matter, so far as the facts are concerned, is as follows. The plaintiff first became a police officer of the Burnley Police Force in 1924.

* The terms of s. 2 (3) are printed at p. 537, letter F, post.

A After a year he joined the Brighton Police Force as a police constable. After ten years in that rank, he was transferred in 1935 to the C.I.D. He rose through all the ranks in the C.I.D. and finally became chief detective superintendent, the head of the C.I.D., and eventually, in 1954, he became the deputy chief constable of Brighton; so that as far as the evidence goes, and as far as I know, he had a long and distinguished career in the police force. Then in 1956 the office of chief constable of Brighton became vacant and on Jan. 10, 1956, the plaintiff applied for appointment to that office. He was interviewed on Feb. 22, 1956, when he was on the short list, and on Feb. 23 he was notified that, subject to the approval of the Secretary of State, he would be appointed to the office of chief constable of Brighton. On Mar. 2, 1956, the Home Secretary notified the confirmation of that appointment. I shall come back to the terms of the appointment. The plaintiff took over temporarily as deputy chief constable while the retiring chief constable was on leave, and on July 1, 1956, he became the chief constable in his own right by virtue of his appointment.

D So far as the evidence goes and so far as I know, all went well to start with; the plaintiff, having risen from the ranks, had attained this high position in the County Borough of Brighton—a very important and distinguished position, which demands the highest qualities of leadership and a capacity for showing an example to one's subordinates and the setting of a high standard of police conduct and behaviour. Most unfortunately, as is now a matter almost of common knowledge, criminal proceedings were brought against the plaintiff, Detective Inspector Hammersley, Detective Sergeant Heath, and two civilians named Lyons and Bellson, and on Oct. 25, 1957, the plaintiff was arrested on certain criminal charges. Within a day or two, he was suspended from duties as the chief constable under the Police Regulations which were then in force and to which I shall refer presently. In due course after he was committed for trial on bail, the case came on before DONOVAN, J., at the Central Criminal Court, and at that trial there were two indictments against the plaintiff. The first indictment was against all of them on a charge of criminal conspiracy; it was alleged that they conspired together and with others unknown to obstruct the course of public justice, in that the three police officers, including the plaintiff, should act contrary to their public duty as police officers in relation to the administration of the law. Under that indictment for conspiracy, there was a long list of particulars of allegations on which the prosecution relied. In the case of the plaintiff, the principal allegations, so far as I am considering them in this case, concerned his dealings with one Leach and one Page. The allegations in those particulars, which I need not go into in greater detail, alleged impropriety, to say the least of it, in his dealings with those two persons. The second indictment against the plaintiff alleged corruption; the others were also involved, and it appears that there was only one count which affected the plaintiff, although he was mentioned in two other counts of the indictment, one against Bellson and the other against Lyons, as being the alleged recipient of bribes. So far as the plaintiff was concerned, it was alleged that he was guilty of corruption in that he obtained a sum of £20 from one Bennett as a reward for showing favour.

H The conspiracy indictment was proceeded with first and the plaintiff was called as a witness on his own behalf. He was examined by his counsel, Mr. Geoffrey Lawrence, Q.C., and he was cross-examined by learned counsel for the Crown, who was the then Solicitor-General. After a trial of some nineteen days, I on Feb. 27, 1958, the plaintiff and one of the civilians were acquitted by the jury, and the plaintiff was released on bail pending the hearing of the second indictment. It is not altogether without interest that, even before the hearing of that second indictment, Mr. Bosley, his solicitor, possibly with undue enthusiasm, actually wrote to the watch committee asking for the removal of the plaintiff's suspension, even though there was another indictment hanging over his head. On Feb. 28 DONOVAN, J., passed sentence on Bellson (the civilian who was convicted) and on Heath and Hammersley, the two police officers who

had been convicted. Having sentenced Bellson, the learned judge came to consider the proper sentence to pass on Heath and Hammersley, having regard to their position in the police force, they having been found guilty of conspiracy to corrupt the course of justice. In the course of addressing those two accused, the learned judge said this:

"I am not going to prolong your ordeal, but there is this also to be said, and it is based, not on disputed allegations, but on facts admitted in the course of this trial. Those facts establish that neither of you had that professional and moral leadership which both of you should have had and were entitled to expect from the chief constable of Brighton, now acquitted, for if he could contrive, as he did, to go to a suspected briber of the police in private and alone it is small wonder that you, Heath, followed that example in the case of Mrs. Brabiner; and if he could admit, as he did, to his private room a much convicted and hectoring bookmaker and there discuss with him, almost as a colleague, the policy of the police in certain matters, well then, it is small wonder that you, Hammersley, saw little or no wrong in going off on holiday with a local man with a serious criminal record."

It was for those reasons that the learned judge passed on those two police officers a lesser sentence, albeit still a severe one, than otherwise he might have felt it his duty to pass.

In this court the plaintiff was cross-examined by counsel for the defendants, and through that cross-examination my attention was drawn to certain passages in the transcript of the shorthand note of the plaintiff's trial. I think that one would be blinding oneself to the facts of the case if one were to come to any other conclusion than that, although he was acquitted, the plaintiff most certainly did not emerge from that trial without serious blots on his escutcheon. So thought the learned judge who tried the case, because, in addressing the two other police officers, he made direct allusion to these particular facts. In my view, the remarks of DONOVAN, J., cannot be regarded as being any kind of report or allegation to the watch committee; they were remarks addressed to Hammersley and Heath, and they were merely an explanation why he was passing on them a lesser sentence than otherwise would have been the case. To my mind, DONOVAN, J., was, as it were, merely seeing that the curtain did not drop on the scene following the plaintiff's acquittal; he saw to it that the limelight remained on the scenery, so that the watch committee could see for themselves the nature of that scenery.

On Mar. 6 the plaintiff once more appeared at the Central Criminal Court to face the second indictment. Following his acquittal on the first, the learned Solicitor-General offered no evidence against him, with the result that he was in a position to leave the court a free man. Before he left the dock, he heard the learned judge addressing some remarks to the learned Solicitor-General about the case, and therefore, out of respect to the learned judge, he paused near the dock, although he told me that he did not actually hear what was said. But there is not the slightest doubt, as he himself agreed, that within a very short time afterwards, through the Press, he himself was fully aware of what the learned judge had said, not only on Mar. 6, but also on Feb. 28. The national Press was emblazoned with the remarks of DONOVAN, J., and I have not the slightest doubt that the members of the watch committee, who must have followed the trial with great interest because they were deeply concerned, likewise knew of those remarks.

What the learned judge said at the conclusion of the case referred principally to the future of certain members of the Brighton Police Force. There was a grave question about the behaviour of certain members of that police force—not the plaintiff—concerning the theft of some £15,000 worth of cigarettes, and it appears that certain members of the Brighton C.I.D. had obstructed inquiries

into that matter. In the course of making his remarks, the learned judge said this to the Solicitor-General:

"It is not difficult now, however, to foresee the use to which the incidents I have mentioned, and others like them to be found in the case, will or may be put for the purpose of discrediting the officers of that force when they give evidence in future prosecutions, and the results in some cases may be unfortunate. This prospect and this risk will remain until a leader is given to that force who will be a new influence, and who will set a different example from that which has lately obtained. I realise that this is a matter which is about to engage the attention of those persons whose responsibility it is, and I have no desire to trespass on their domain, but, since the matter will also affect the administration of justice in the courts, I felt it right to make these observations."

As I have indicated, there can be no doubt whatever on the admitted facts emerging from the evidence of the plaintiff himself that, although he was acquitted, his conduct, particularly in regard to the two matters concerning Page and Leach, indicated quite clearly that he was failing in those qualities of leadership and the capacity to show a good example to his subordinates; and quite clearly one would have thought that, when that emerged in evidence, there was ample evidence on which a watch committee should come to the conclusion (as, indeed, the learned judge himself did) that he was unfit to hold the appointment as chief constable of Brighton.

Following those happenings, the watch committee of Brighton certainly lost no time, because on the very next day, Mar. 7, 1958, they had a meeting, and, according to the intimation which they sent to the plaintiff and also to his solicitors, they considered, not only his request to have his suspension removed (which, as I have explained, was somewhat premature), but also the length of his period of service, his trial and that of the other police officers on the conspiracy charge, the statements of DONOVAN, J., and the statements made by the plaintiff in evidence at his own trial. They also apparently considered some statements made that very day by members of the watch committee and by the town clerk, and one cannot very well see why they should not. It was said in the course of the case that they could not possibly have considered the transcript of the shorthand notes of a trial lasting nineteen days; nor could they, and they did not say that they had. What they said was that they had considered the statements made by the plaintiff in evidence, and one is driven to the conclusion that they must already have known through the Press what he said in the course of the trial. As a result of having considered those matters, they came to the conclusion that he had been negligent in the discharge of his duty and that he was unfit for the same (1); and in exercise of the powers conferred on them by s. 191 of the Municipal Corporations Act, 1882, they dismissed him forthwith from his office as chief constable of Brighton. They also decided, as they had to, that they would refund to him his contributions to the police pension.

The plaintiff was not present at that meeting. He had not been given notice of any specific charges, although nobody knew better than the plaintiff himself that his conduct in the matters of Leach and Page had been called seriously into question at his trial. The watch committee having dismissed him, correspondence ensued between his solicitor, Mr. Bosley, and the town clerk, and, as a result, on Mar. 18 Mr. Bosley was allowed to address the watch committee, although he had the difficulty that he himself did not know the specific charges; but, again, he must have known perfectly well what was the position with regard to Page and Leach. The watch committee, however, adhered to their previous decision to dismiss the plaintiff. In due course the plaintiff appealed

(1) The words "negligent in the discharge of his duty, or otherwise unfit for the same" are the words of the power of dismissal contained in s. 191 (4) of the Municipal Corporations Act, 1882; see p. 528, letter G, post.

to the Secretary of State against his dismissal, and the Secretary of State had before him a long statement prepared by Mr. Bosley and a counter-statement prepared by the town clerk on behalf of the watch committee. In that statement there were some allegations that certain falsehoods had been uttered by the plaintiff in connexion with his duty, but it is fair to him to point out that the Home Secretary, in intimating that he was dismissing the appeal, disregarded those matters, because he said that there was no evidence to support them, so that, in effect, they do not really form any part of his case. The Home Secretary found that there were sufficient materials before the watch committee to justify the plaintiff's dismissal. A

Let me dispose first of two contentions, one put forward by the plaintiff and the other by the defendants. The one put forward by the plaintiff was that the dismissal of Mar. 7 was capable of being construed as a request to resign with the right to receive a part pension. Let me say straight away that it is quite obviously impossible to construe what was expressly stated to be a dismissal under the Act of 1882 as a request to resign; that submission on behalf of the plaintiff is, in my judgment, quite unsound. A submission made by counsel for the defendants, which, however, he only put forward for the purpose of keeping the matter open for a higher court in case I should be wrong (and in case counsel himself should be wrong), was that the power of dismissal might be construed as a dismissal by the Crown of its servant under its common law powers, the Crown having the right to dismiss at pleasure with no reason stated. Counsel merely mentioned it to me, and almost invited me to reject it; I do reject it because it is quite obvious, it being expressly a dismissal under s. 191 of the Municipal Corporations Act, 1882, that it cannot possibly be construed as a dismissal by the Crown at common law—it was nothing of the kind. C D E

In order to follow and decide on the matters which have been submitted to me, it is necessary to go back to the springboard of this matter and to consider first the appointment of the plaintiff as the chief constable of Brighton and the terms and conditions on which he was appointed. So far as this case is concerned, the fountain-head of this matter is s. 191 of the Municipal Corporations Act, 1882 (2). The watch committee are appointed by virtue of s. 190 of the Act, and have a power to decide matters by a majority. Under s. 191 (1): F

"The watch committee shall from time to time appoint a sufficient number of fit men to be borough constables."

That includes the chief constable. Under s. 191 (4):

"The watch committee, or any two justices having jurisdiction in the borough, may at any time suspend, and the watch committee may at any time dismiss, any borough constable whom they think negligent in the discharge of his duty, or otherwise unfit for the same." G

That is a statutory power given to the watch committee to dismiss any borough constable who is either negligent in the discharge of his duties or otherwise unfit for the same. It is a power which was not new in 1882; indeed, I think it first arose in the Municipal Corporations Act, 1835, (3), which was re-enacted. The power is a purely arbitrary power, although it is a power which, in my view, must be exercised fairly and in accordance with the principles of natural justice. There is no appeal from it; there is no machinery laid down for any such appeal, which, I think, is a matter which one must consider in determining that the power must be exercised fairly and in accordance with natural justice. H I

The next step, so far as the statutory law is concerned, was the passing of the Police Act, 1919, which, among other things, set up a Police Federation

(2) By the Police Act, 1890, s. 38 (4) and Sch. 5, s. 190 to s. 194 of the Municipal Corporations Act, 1882, are deemed to be included in the collective title "the Police Acts, 1839 to 1890." See also footnote (7), p. 530, post.

(3) See s. 77 of the Municipal Corporations Act, 1835, which was repealed and replaced by the Act of 1882.

A throughout the country (4). Section 4 (1) of that Act made it lawful for the Secretary of State

“to make regulations as to the government, mutual aid, pay, allowances, pensions (5), clothing, expenses and conditions of service of the members of all police forces within England and Wales, and every police authority shall comply with the regulations so made.”

B I shall come presently to the regulations which were in fact made, but, while I am dealing with the Act, I draw attention to s. 7 of the Act which reads:

“So much of s. 23 of the Metropolitan Police Act, 1829, as amended by any subsequent enactment, as limits the annual sum to be provided for the purposes of the Metropolitan Police, and (6) so much of s. 197 of the Municipal Corporations Act, 1882, as limits the amount of the watch rate, and so much of any other Act, whether public, general, or local, as limits any rate which may be raised for the purposes of the police, shall cease to have effect.”

D As counsel for the defendants pointed out, that is a section of the Act of 1919 which deals with financial matters and which specifically repeals, or causes the cessation of their effect, of certain sections of other Acts, including the Municipal Corporations Act, 1882. Counsel points out that, had it been intended by Parliament to repeal completely s. 191 (4) of the Act of 1882, then Parliament could quite easily have said so expressly in the Act of 1919, but that nothing whatever is said about s. 191 (4) of the Act of 1882.

E Under the Act of 1919 certain regulations have been made, to which I shall come presently. The appointment of the plaintiff as chief constable took the form of an application to the watch committee dated Jan. 10, 1956; it was on a printed form, and it was headed “Terms and Conditions of Appointment”. Therefore, when his appointment was made and confirmed by the Home Office, the terms and conditions set out in his application became the terms and conditions of his appointment. Condition 4 of such conditions is this:

F “The conditions of service will be in accordance with the Police Regulations for the time being in force and the successful applicant will be required to pay pension contributions in accordance with the Police Pension Regulations for the time being in force.”

G Condition 5 reads: “The appointment may be terminated by three months’ notice on the part of the successful applicant . . .” Nothing so far has been said as to how it may be terminated by the watch committee, but it goes on:

“... and will be subject to the Police Acts and regulations and to the successful candidate passing a medical examination.”

H It is submitted by counsel for the plaintiff that in this contract the words “Police Acts and regulations” can only refer to something which is called in terms a “Police Act”, and he says that there is no ground for the construction of importing into the contract any reference to the Municipal Corporations Act, 1882. I am quite unable to take that narrow view. It is quite clear that what is intended is that the terms and conditions of the appointment of the chief constable shall be subject to the statutory enactments, whatever they may be called, which govern the police forces. If I were to put that narrow construction on this contract, I should be obliged to exclude, in London, the Metropolitan Police Act, because although it has the words “Police Act” in it, it is called “The Metropolitan Police Act”; I should have to exclude in certain cases other Acts which govern the police forces and which import other words as well, and if the legislature had ever thought of enacting an Act of Parliament

(4) See s. 1 (1) of the Police Act, 1919.

(5) The word “pensions” was repealed by the Police Pensions Act, 1948, s. 3, and Sch. 1, Part 1.

(6) The words preceding “so much of s. 197” were repealed by the Local Government Act, 1948, s. 147 (5), and Sch. 2, Part 4.

called "The Chief Constables Act"—which it has not—I suppose it could be argued that it would not apply to the appointment of a chief constable if the contract referred to "the Police Acts". Part 9 of the Municipal Corporations Act, 1882, (7) is specifically headed "Watch Committee; Constables"; in s. 190 a watch committee is set up, and then follows s. 191 which governs the appointment, dismissal and suspension of borough constables. To my mind, it is quite impossible to say that the wording of this contract excludes the operation of the Municipal Corporations Act, 1882, which in this part of it is certainly a Police Act (8); and I am not prepared to give such a narrow construction as was submitted by counsel for the plaintiff.

It was argued that, quite apart from the terms of the contract, the Police Act, 1919, followed by its regulations, in effect repealed s. 191 (4) of the Act of 1882, and, therefore, it is necessary to consider the regulations which have been made pursuant to the powers conferred on the Secretary of State by s. 4 of the Act of 1919. The regulations are, first, the Police (Discipline) Regulations, 1952 (S.I. 1952 No. 1705); there have, of course, been other similar regulations intervening, but those were the regulations which were in force at the time. The Police (Discipline) Regulations, 1952, apply to members of the police forces other than chief constables, assistant chief constables and deputy chief constables (9). The regulations do not fall at this stage for any particular comment by the court except to point out that in Sch. 1 there is set out what is called the "Discipline Code". Among the offences specified in the Discipline Code, which may be the subject of proceedings under the regulations for various forms of punishment, from dismissal downwards, the first (in para. 1 of Sch. 1) is:

"*Discreditable conduct*, that is to say, if a member of a police force acts in a disorderly manner or any manner prejudicial to discipline or reasonably likely to bring discredit on the reputation of the force or of the police service."

Then, in para. 2, there is "Insubordinate or oppressive conduct"—none of which appears to fit the facts of this case. The offence set out in para. 4 is "Neglect of duty", and again, although it is true that the watch committee appear to have come to the conclusion that the plaintiff had been guilty of negligence, there do not appear to be any items there which affect this case. The offence set out in para. 5 is "Falsehood or prevarication", but, inasmuch as the Home Secretary came to the conclusion that there was no evidence to support the allegations of falsehood (10), it does not seem that that is applicable either. Paragraph 6 deals with "Breach of confidence"; again, none of that seems to be appropriate here. Paragraph 7 relates to "Corrupt practice"—the plaintiff was acquitted of any corruption. Then there are other items of conduct which are quite outside this case.

The nearest breach of discipline which could come within the four corners of the plaintiff's conduct here would be that in para. 1, called "Discreditable conduct", that is to say, behaving in a manner "prejudicial to discipline or reasonably likely to bring discredit on the reputation of the [police] force..." The only materiality of those regulations is that they have been imported (11) into the Police (Discipline) (Deputy Chief Constables, Assistant Chief Constables and Chief Constables) Regulations, 1952 (S.I. 1952 No. 1706). Regulation 1 of the regulations affecting chief constables reads:

(7) Part 9 of the Act of 1882 consisted of s. 190 to s. 200, inclusive, under the main heading "Police". Section 199 and s. 200 have been repealed. Section 190 to s. 195, inclusive, appear under the sub-heading "Watch Committee: Constables".

By the Police Act, 1946, s. 1 (4), Part 9 of the Act of 1882 (with the exception of s. 190) ceased to have effect as from Apr. 1, 1947, except in regard to county boroughs.

(8) See also footnote (2), p. 528, ante.

(10) See p. 528, letter A, ante.

(9) See reg. 23 of the regulations.

(11) By reg. 21 (1) of S.I. 1952 No. 1706: "'offence' has the same meaning as it has in the Police (Discipline) Regulations, 1952."

"Where a report or allegation is received [that must mean by the watch committee] from which it appears that a deputy chief constable or assistant chief constable [that phrase, by reg. 18, includes the chief constable as well] . . . may have committed an offence, the police authority shall, unless they are satisfied that he has not committed an offence, inform him in writing of the report or allegation and ask him whether or not he admits that he has committed an offence and give him an opportunity, if he so desires, of making to the police authority any oral or written statement he may wish to make concerning the matter."

Regulation 3 sets out the procedure for formulating the charges for the tribunal to hear. Under reg. 5, the tribunal is to consist of, inter alios, not more than five members of the police authority. There are provisions relating to the procedure at the hearing; and then there is reg. 11 (1) (b), which lays down that the punishment in the case of a chief constable may be either dismissal, or requirement to resign forthwith as an alternative to dismissal, or a reprimand.

By reg. 1 (1) of the Police (Discipline) (Deputy Chief Constables, Assistant Chief Constables and Chief Constables) Regulations, 1954 (S.I. 1954 No. 1688), a new paragraph has been substituted for reg. 15 (1), dealing with suspension from duty. Regulation 15 (1), as substituted, reads:

"Where a report or allegation is received from which it appears that a deputy chief constable or assistant chief constable . . . may have committed an offence against discipline or a criminal offence, the police authority may suspend him from duty until such time as either—(a) it is decided that he shall not be charged with an offence against discipline, or (b) the disciplinary proceedings referred to in these regulations are concluded."

Regulation 15 (4), as substituted by reg. 1 (2) of the Regulations of 1954, contains provisions as to what happens when he returns to duty.

Those are the regulations which came into force by virtue of the Police Act, 1919, and, as it seems to me, the governing requirement is that a report or allegation is received from which it appears that a chief constable may have committed an offence, and, if such a report or allegation is received, there is, under reg. 15 (1), as amended, merely a power to suspend him from duty. When the plaintiff was suspended from duty following his arrest, it was, of course, by virtue of that regulation that he was so suspended, because at that time there was obviously a report or allegation which showed that he might have committed a criminal offence and it was for such criminal offence that he was prosecuted at the Central Criminal Court, so that no difficulty arises under reg. 15 (1) with regard to the power of suspension. As it seems to me, the governing requirement is that the report of an allegation is received by the watch committee from which it is shown that the officer may have committed an offence.

It is submitted by the plaintiff that the Act of 1919 with its regulations in effect repeals the Municipal Corporations Act, 1882; and that, if there is any question of dismissing a chief constable, it can only be done by virtue of those regulations and by following the procedure under them. The argument is based, in the first instance, on *Wallwork v. Fielding* (12). That case did not concern the power of dismissal under the Act of 1882; it concerned the power of suspension. The ratio decidendi is that, inasmuch as there was no reference to the power of suspension in the regulations then in force, it could not possibly be said that the Act of 1919 had repealed the provisions of the Municipal Corporations Act, 1882. It is submitted in the present case, therefore, that now that the Regulations of 1952 (and, indeed, earlier regulations as well) do deal with the power of suspension, then the decision of the Court of Appeal in *Wallwork v. Fielding* (12) would have been different, because the Court of Appeal would have said that at any rate the power of suspension under s. 191 (4) of the Act of

1882 was supplemented by new regulations. I am not prepared to come to any conclusion on that matter and it would certainly not be necessary for me to do so for the purposes of this judgment. It may very well be that the Court of Appeal on any future occasion, on such an argument, might adopt the same line of reasoning as the Home Office in the present case, in which a distinction has been drawn between the power to suspend a police officer generally under the Act of 1882 and the power to suspend him from duty under the regulations. It does not follow, therefore, that these regulations concerning suspension would have the effect for which counsel for the plaintiff contended; I do not think that *Wallwork v. Fielding* (13) is any authority at all for saying that the Act of 1919 in fact repeals s. 191 of the Act of 1882.

The next case to which I was referred, which gets nearer to the point and which is of more assistance in this court, is *Cooper v. Wilson* (14). That case did concern a question of the power of dismissal and, very properly, great reliance was placed by counsel for the plaintiff on the words of GREER, L.J., who said (15):

"These observations seem to me to show that the power to make regulations under the Police Act, 1919, s. 4 (1), does not impliedly repeal s. 191 (4) of the Act of 1882. The regulations, in my judgment, must be read as applying to the way in which the watch committee are to exercise their powers in a borough, and to the way in which the chief constable is to exercise his similar powers in a county. They cannot be used to repeal a provision which Parliament has expressly left applicable to boroughs."

The case, of course, does not support the argument of counsel for the plaintiff that the Act of 1882 is repealed by the regulations made under the Act of 1919; GREER, L.J., in terms says that they do no such thing:

"They cannot be used to repeal a provision which Parliament has expressly left applicable to boroughs."

SCOTT, L.J., expressed this view (16):

"Substantially the same provisions were repeated in the Municipal Corporations Act, 1882, s. 190, s. 191, which are still in force today, with the exception that the power of dismissal was taken from the justices and reposed solely in the watch committee."

Therefore, one could, on that authority, only come to the conclusion that the Act of 1882 has not been repealed by the Act of 1919 and its regulations.

Nothing daunted, however, counsel for the plaintiff says that it does have the effect that the power of dismissal under the Act of 1882 can now only be exercised under the procedure laid down by the regulations made under the Act of 1919; it can only be carried out by charging what he called a "code offence", by giving notice of it to the accused, by giving him an opportunity of being heard, and then adjudicating on the matter as though it were a full inquiry under those regulations.

Counsel for the defendants, on the other hand, used what I thought was a happy phrase which illustrated very clearly his meaning; he said that, inasmuch as the Act of 1882 is still in force, there may well be a state of "peaceful co-existence" between the power of suspension or the power of dismissal under the Act of 1882 and the power of dismissal under the regulations made under the Act of 1919. He concedes that, in cases where those regulations obviously and clearly apply, then the Act itself says that the police authority shall observe them; but he suggests and submits that there are cases where a power of dismissal may be exercised, not because of a code offence but by virtue of the original 1882 offence. He points out that, just as there is a duty on the watch committee

(13) [1922] All E.R. Rep. 298; [1922] 2 K.B. 66.

(14) [1937] 2 All E.R. 726; [1937] 2 K.B. 309.

(15) [1937] 2 All E.R. at p. 730; [1937] 2 K.B. at p. 316.

(16) [1937] 2 All E.R. at p. 738; [1937] 2 K.B. at p. 338.

A to appoint fit persons to be borough constables, so there is a corresponding power in them to dismiss people who, in their opinion, are unfit. It does not always follow that a person is guilty of the code offence of behaving in a discreditable manner such as is calculated to bring disrespect to the police and is prejudicial to discipline; the behaviour may well amount to such an offence, but there may equally be cases where conduct may be obviously such as to make a person
B unfit to hold office. Counsel for the defendants submitted that, where a police officer is convicted, it would be a pure farce if one had to formulate a code charge against him to give him notice, when he is actually in prison undergoing sentence, so as to give him an opportunity of being heard in respect of an offence against discipline; counsel submits that quite clearly there still survives a power in such a case under the Act of 1882 to dismiss an officer who had been
C convicted because obviously he is unfit to hold office.

Indeed, that was the fate which at once overtook Hammersley and Heath, following their convictions at the Central Criminal Court. No code charges were made against them; no notice was given to them, but, in the words of counsel for the defendants, the watch committee simply said to them: "Out you go". Nobody could suggest that the watch committee were not perfectly entitled to
D take that course, where, because it was not a case where the matter had been set in train by any report or allegation received by them, the conviction spoke for itself and cried aloud for instant action. The plaintiff conceded in evidence that, had he unhappily likewise been convicted, he would not have expected to be served with a notice under the regulations; he would not have expected anything other than being turned out. The submission of counsel for the defend-
E ants, therefore, is that the regulations can apply only where the matter has been supported, so far as the watch committee are concerned, by a report or allegation from which it appears that one of the offences in the code might have been committed. As I have pointed out, there may be conduct which amounts to discreditable conduct within para. 1 of the Discipline Code, but the same conduct may well support an allegation that a person is unfit for office, and that is not a
F code offence. Counsel for the defendants conceded that, if, from some outside source quite independently of these criminal proceedings, an allegation had been received that the chief constable had committed a code offence, then it might have been necessary to go through the procedure laid down by the regulations; but counsel submitted that, having regard to the criminal proceedings, when it came to the knowledge of the watch committee—not as the result of any report or
G allegation, but as it became known to the country as a whole—that these admitted facts were such that the plaintiff was no longer fit to be chief constable, then the watch committee were perfectly entitled to exercise their power under the Act of 1882.

Another authority—one which is important from this point of view—is *Hogg v. Scott* (17). Although that case is not binding on me, being a decision of a
H court of co-ordinate jurisdiction, it was decided by CASSELS, J., and is bound to command the utmost respect. Having read the report more than once, I think that there is only one matter which is different in effect from the present case; that is that the police officer in that case was in fact convicted of a criminal offence and sentenced to a month's imprisonment and, he having been so sentenced, the watch committee, like the watch committee of Brighton in the cases
I of Hammersley and Heath, at once dismissed him and did not go through the procedure laid down by the regulations.

CASSELS, J., having carefully analysed the powers of the police authority for the different kinds of police forces throughout the country, said (18):

"Here, the commissioner acted under the powers which he has under [the Metropolitan Police Act, 1829] and the General Orders . . . The contention

(17) [1947] 1 All E.R. 788; [1947] K.B. 759.

(18) [1947] 1 All E.R. at p. 792; [1947] K.B. at p. 766.

of the plaintiff that his dismissal is a nullity because procedural requirements were not complied with does not prevail. I find that he was regularly and legally, and on good and proper grounds, dismissed. If it were otherwise, the position would be difficult to maintain. Splendid as the police force is, it is a fact that occasionally, though very rarely, a member of it is convicted of a criminal offence and sentenced to a term of imprisonment. It would amount almost to a farce to say that in such circumstances the commissioner was powerless to dismiss unless he had set in motion the procedure applicable to a case of insubordination."

Although that case was under a different Act of Parliament, the Metropolitan Police Act, 1829, CASSELS, J., mentioned the corresponding provision of the Municipal Corporations Act, 1882; there was quite clearly power in the hands of the police authority to dismiss that police officer. The question is: Does it make any difference that the plaintiff in the present case was not convicted of a criminal offence? If there were grounds, based on evidence given at the Central Criminal Court, for the watch committee to come to the conclusion that the plaintiff was unfit to remain chief constable of Brighton, then, in my judgment, they had power under the Act of 1882 to dismiss, and that is a different power from the power which is originated by a report or allegation received from outside and independently of any criminal proceedings. I think that they had power to do it, and I accept the submission of counsel for the defendants that that power still exists and survives under the Act of 1882, which is not repealed by the Act of 1919 and the regulations made thereunder.

The next question which arises is how that power is to be exercised. As I have already indicated, in my view it is a power which must be exercised fairly and in accordance with the principles of natural justice. That was strongly submitted to me by counsel for the plaintiff, and it was equally strongly opposed by counsel for the defendants, who said that the power under the Act of 1882 was completely unfettered; that the principles of natural justice did not apply; and that, in effect, the watch committee could do whatever seemed right to them, so long as they acted bona fide—and in this case it is conceded that the watch committee did so act. I agree with the submissions of counsel for the plaintiff on this matter. I think that he is right when he submits that one has to consider what it is that the watch committee are doing. It is not merely an administrative matter, as a result of which some person may be prejudiced or may be deprived of the right of property, and so on; what the committee were here doing was to take a very serious step under an Act of Parliament which, of itself, gave no right of appeal—they were exercising the right to dismiss a man, to deprive him at the age of fifty-eight of his living, and to deprive him of his accumulated pension rights, although they would be obliged to return his own contributions to him. Because of all that, I think that one must have regard to the seriousness of what was being contemplated.

Reliance was placed on *Local Government Board v. Arlidge* (19), which concerned an appeal to the Local Government Board in regard to a closing order, under the Housing, Town Planning, etc., Act, 1909. VISCOUNT HALDANE, L.C., said (20):

"My Lords, when the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice. But it does not follow that the procedure of every such tribunal must be the same. In the case of a court of law tradition in this country has prescribed certain principles to which in the main the

A procedure must conform. But what that procedure is to be in detail must depend on the nature of the tribunal. In modern times it has become increasingly common for Parliament to give an appeal in matters which really pertain to administration, rather than to the exercise of the judicial functions of an ordinary court, to authorities whose functions are administrative and not in the ordinary sense judicial. Such a body as the Local Government Board has the duty of enforcing obligations on the individual which are imposed in the interests of the community. Its character is that of an organisation with executive functions. In this it resembles other great departments of the state. When, therefore, Parliament entrusts it with judicial duties, Parliament must be taken, in the absence of any declaration to the contrary, to have intended it to follow the procedure which is its own, and is necessary if it is to be capable of doing its work efficiently. I agree with the view expressed in an analogous case by my noble and learned friend LORD LOREBURN. In *Board of Education v. Rice* (21) he laid down that, in disposing of a question which was the subject of an appeal to it, the Board of Education was under a duty to act in good faith, and to listen fairly to both sides, inasmuch as that was a duty which lay on every one who decided anything. But he went on to say that he did not think it was bound to treat such a question as though it were a trial. The Board had no power to administer an oath, and need not examine witnesses. It could, he thought, obtain information in any way it thought best, always giving a fair opportunity to those who were parties in the controversy to correct or contradict any relevant statement prejudicial to their view."

E That is the general principle, that a tribunal need not follow the ordinary procedure of a court of justice; but there are cases where it must act judicially and it must give parties the opportunity to be heard.

F A number of cases, which I do not think it is necessary for me to cite, were quoted showing that the question of acting in accordance with the principles of natural justice might depend on whether there was a controversy between the parties. I think that probably the most helpful guide to whether the rules of natural justice apply to such a case as this is *Cooper v. Wilson* (22). Of the other cases to which reference was made, some concerned detention under reg. 18 (b) of the Defence (General) Regulations, 1939, others concerned members of the medical profession (23), and there was a case concerning a student at a university (24). None of those cases helps me very much; but in *Cooper v. Wilson* (22), brought as it was under the Police Act, 1919, GREER, L.J., said (25):

H "An application to the watch committee to discharge a constable by reason of the regulations takes the form of an application for confirmation of the chief constable's decision, but it is none the less an application to the watch committee to dismiss, and must be heard and determined by the watch committee acting judicially or quasi-judicially. Until the preliminary decision of the chief constable comes before the watch committee for confirmation, it cannot have the effect of operating as a dismissal."

I SCOTT, L.J., analysed the position with regard to dismissals under the regulations and came to the same conclusion, that the watch committee was acting in a quasi-judicial capacity. It is true that both of those learned lords justices were dealing with dismissal under the regulations made under the Act of 1919; but I cannot bring myself to the conclusion that there is any different position in regard to the power of dismissal under the Act of 1882 which, I think, still survives, from that which obtains under the regulations themselves, particularly

(21) [1911] A.C. 179.

(22) [1937] 2 All E.R. 726; [1937] 2 K.B. 309.

(23) See, for example, *General Medical Council v. Spackman*, [1943] 2 All E.R. 337; [1943] A.C. 627.

(24) *Ceylon University v. Fernando*, [1960] 1 All E.R. 631.

(25) [1937] 2 All E.R. at p. 731; [1937] 2 K.B. at p. 317.

when there is not a right of appeal. I have come to the conclusion, for those reasons, that counsel for the plaintiff is right in saying that the exercise of a power of dismissal under the Act of 1882 must be exercised fairly and bona fide, in accordance with the principles of natural justice.

Counsel for the defendants, however, submits that, even so, the plaintiff has in fact had natural justice. He says that this is a case of *res ipsa loquitur*; that, out of the plaintiff's own mouth at the Central Criminal Court, for the purposes of his trial, for all the world as well as the watch committee to hear, the plaintiff convicted himself of unfitness to hold the office of chief constable. Although the plaintiff complains now that he ought to have had specific charges formulated against him and particulars of this unfitness for office, and that he ought to have been given the opportunity of being heard and of calling witnesses, I have come to the conclusion that, on the evidence which he himself gave at the Central Criminal Court, there was no need for the watch committee to do other than what they in fact did. It is true that, if they had desired to be particularly punctilious, they might have followed the opposite procedure; but I have come to the conclusion that, under their surviving power under the Act of 1882, they did in fact act in a manner which was in accordance with the principles of natural justice, whatever else they might have done to be on the safe side. For those reasons, therefore, I have come to the conclusion that the plaintiff has failed to make out that there was any illegality in his dismissal or that it was in fact a nullity. Even if I am wrong on that point and even if the regulations apply, there is one further difficulty which seems to me to be quite unsurmountable, and that is in relation to the Police (Appeals) Act, 1927. The long title of that Act, as amended by the Police (Appeals) Act, 1943, s. 1, is:

"An Act to provide for a right of appeal by members of police forces who are punished by dismissal, by being required to resign . . ."

The words are not "by dismissal under the regulations", but are merely the general words "by dismissal". Section 1 (1), as amended by s. 1 of the Act of 1943, provides:

"A member of a police force who after the passing of this Act is punished by dismissal, or by being required to resign as an alternative to dismissal . . . may appeal to a Secretary of State in accordance with this Act and the rules made thereunder, if he gives notice of appeal in the prescribed manner and within the prescribed time."

It was argued that the words "A member of a police force who after the passing of this Act is punished by dismissal" can apply only to an officer who has been dismissed by virtue of the regulations, because of the provisions in the Police (Appeals) Rules, 1943 (S.R. & O. 1943 No. 473), made under the Act of 1927. Rule 1 reads:

"These rules shall apply to all appeals by a member of a police force in England or Wales under the Police (Appeals) Act, 1927, as amended by the Police (Appeals) Act, 1943 . . ."

By r. 2:

"(1) A person who desires to appeal under the provisions of the Act shall send to the Secretary of State a notice of appeal in the form set out in the schedule to these rules and shall annex to the said notice the statements and lists specified in the said form.

"(2) The notice of appeal shall be sent to the Secretary of State within ten days from the date when the appellant received on the misconduct form the notification of the decision against which he desires to appeal . . ."

It was argued by counsel for the plaintiff that that could not be carried out because no misconduct form was served on the plaintiff; and that the plaintiff could not serve the appropriate notice of appeal because, in the form of notice of appeal laid down in the schedule, there appears this:

A "I desire to submit additional evidence not taken into consideration at the hearing of the charge against me."

Counsel says that, if there was no hearing, that part of the notice of appeal cannot be filled in. Then the form of notice reads:

B "I annex . . . (2) a list (marked B) of the documents, if any (other than documents produced at the hearing of the charge) which I desire to submit . . ."

Counsel submits that that part cannot be filled in appropriately. Rule 8 (1) of the Rules of 1943 reads:

C "Unless the tribunal otherwise determines, the inquiry shall be conducted by way of re-hearing the charge and the evidence in support thereof shall be given first."

Counsel asks how there can be a re-hearing by the Secretary of State if there has not, in the first instance, been a hearing by the watch committee.

D In my view, that is a somewhat flimsy argument when one considers not only the words of s. 1 (1) of the Act of 1927 (as amended) which refer to "A member of a police force who . . . is punished by dismissal" —the subsection does not say whether under the Act of 1882 or under the Act of 1919—but also r. 12 of the Rules of 1943, which reads:

"If any question arises as to the proper compliance with any provision of these rules it shall be determined by the Secretary of State whose decision shall be final."

E In other words, if in any given case the precise wording or requirements of the formal notice of appeal cannot be carried out, there is that power of dispensation given to the Home Secretary, and it seems to me that the words of r. 12 are specifically put in so as to make the rule applicable to a dismissal under the Act of 1882 as well as under the Act of 1919.

F The difficulty about this point is, that, by s. 2 (3) of the Police (Appeals) Act, 1927:

"An order made by the Secretary of State under this section shall as soon as it is made be sent to the appellant and the respondent together with, if an inquiry was held, a copy of the report of the person holding the inquiry, and the order shall be final and binding upon all parties."

G In other words, the Act of 1927 gives what the Act of 1882 did not give, namely, a right of appeal from a dismissal, and it states in terms that the order of the Home Secretary shall be final and binding on the parties.

H It is true that, in correspondence as well as in the statement to the Secretary of State, the plaintiff's solicitor, Mr. Bosley, stated categorically that he reserved the right to contend that the dismissal was invalid and was a nullity; that, in effect, his appeal was without prejudice to his right of testing the matter in the Queen's courts. But, in the face of the provision of the Act of Parliament which says that the Home Secretary's decision shall be final and binding on all parties, it cannot be circumvented by any reservations of that kind, and it is noticeable that in *Hogg v. Scott* (26) CASSELS, J., disposed of a similar question in one sentence, and I think that I can do the same:

I "I think the plaintiff may be said to have waived his right to succeed in these proceedings by appealing to the Home Secretary and accepting and acting on the decision of the Home Secretary for three years."

With the exception of the words "acting on the decision of the Home Secretary for three years", the present case is just the same. I think that the plaintiff is in the appalling difficulty that, although he was dismissed, and even if he were right in saying that he ought to have been dismissed under the regulations

themselves, he has waived his right to go to the courts. It is said that the Home Secretary's decision cannot be effective because the decision by the watch committee was a nullity, and, therefore, one cannot afterwards add another nullity; that the Home Secretary's decision was in fact a nullity, because it purported to confirm what in itself was a nullity. But I have already stated that, in my view, what was done by the watch committee was not a nullity. The plaintiff then availed himself of the right of appeal under the Act of 1927, and under that Act the decision of the Home Secretary is final and binding. A
B

A number of other authorities was cited to me, dealing with the plaintiff's remedies either by way of damages, or a declaration, or both; but, on the conclusion at which I have arrived, on either ground—either that the dismissal was valid under the Act of 1882, or that, by taking the course which he did, the plaintiff has waived his rights in these courts—it is unnecessary for me at this stage to review those decisions. In the result, and for the reasons which I have given, in my view this action must fail and there must be judgment for the defendants. C

Judgment for the defendants.

Solicitors: *Haslewoods*, agents for *Bosley & Co.*, Brighton (for the plaintiff); *Sharpe, Pritchard & Co.*, agents for *Town clerk*, Brighton (for the defendants). D

[Reported by WENDY SHOCKETT, Barrister-at-Law.]

BYERS v. HEAD WRIGHTSON & CO., LTD.

[QUEEN'S BENCH DIVISION (Elwes, J.), December 8, 9, 12, 13, 21, 1960.] E

Building—Building regulations—Application—Nuclear reactor—Installation in Sealed Reactor building of nuclear reactor under construction—"Construction . . . of a building"—Removal of welding set across an improvised plank bridge over a trench—Scaffold—Workman in charge injured by fall of welding set when crossing bridge—Building (Safety, Health and Welfare) Regulations, 1948 (S.I. 1948 No. 1145), reg. 2 (1), reg. 3 (2), reg. 5, reg. 7 (1), reg. 12 (1), reg. 26 (3), and reg. 93. F

Statutory Duty—Breach—Causation—Employee injured was himself in charge of operation—Task of appraisal beyond competence of employee—Whether employer liable—Whether contributory negligence.

The plaintiff was a steel erector employed by the defendants who were engaged in carrying out a contract to instal the fuel element and other highly specialised components in the Sealed Reactor building of a nuclear reactor under construction. Their contract provided that they should not do "builders' work", which was the responsibility of other contractors. On the Saturday on which the accident occurred the plaintiff was placed in charge of the operation of removing, with two other men, a movable welding set from the building. The welding set was an awkward, top-heavy machine with a high centre of gravity. The route which the machine had to traverse crossed a shallow depression or trench outside the Sealed Reactor building. This was usually bridged by planks laid above steel joists and supported by sleepers packed beneath the planks, but on that day there was only one unsupported plank sufficient merely for the passage of men. The plaintiff and the two other men attempted to make the bridge suitable for the passage of the welding set by widening it by adding three planks. The planks lay at an angle over a joist and were of inadequate strength but were all that was available. The plaintiff supported them with timber collected from the site. While the men were attempting to man-handle the machine across the bridge, the planks sagged, and the machine toppled and fell on the plaintiff who was injured. The plaintiff claimed damages against the defendants for breach of statutory duty under the Building G
H
I

A (Safety, Health and Welfare) Regulations, 1948, which by reg. 2 (1) applied to "the construction . . . of a building", and the defendants alleged, among other defences, that the plaintiff's injury was due solely to or was contributed to by his own negligence or breach of statutory duty.

Held: the defendants were liable in damages for breach of statutory duty under the Building (Safety, Health and Welfare) Regulations, 1948, for the following reasons—

B (i) the regulations applied because the defendants were taking part in the construction of a "building" within reg. 2 (1), viz., the Sealed Reactor building (see p. 542, letter B, post).

Elms v. Foster Wheeler, Ltd. ([1954] 2 All E.R. 714) and *McGuire v. Power Gas Corp., Ltd.* (unreported) (see p. 544, letter C, post) followed.

C (ii) the improvised plank bridge was a scaffold within the definition of "scaffold" in reg. 3 (2)*.

(iii) on the facts, and on the basis that the regulations applied, the defendants were in breach of reg. 5, reg. 7 (1), reg. 12 (1), reg. 26 (3), and reg. 93, and

D (iv) since the task of appraising what was necessary for bridging the trench at an angle with planks of inadequate strength was not within the competence of the plaintiff, the principle that a plaintiff could not recover damages for a breach of statutory duty, established vicariously against his employer by reason of the plaintiff's own act or omission in breach of the statutory duty, had no application, and in the present case the plaintiff was not disentitled to recover on the ground that the responsibility was his nor was contributory negligence established against him (see p. 543, letters A to F, post).

E *Ginty v. Belmont Building Supplies, Ltd.* ([1959] 1 All E.R. 414) distinguished.

[For the application of the Building Regulations, see 17 HALSBURY'S LAWS (3rd Edn.) 126, para. 206, note (p); and for cases on the subject, see 24 DIGEST (Repl.) 1037-1042, 111-142.]

F For the Building (Safety, Health and Welfare) Regulations, 1948, as amended, see 8 HALSBURY'S STATUTORY INSTRUMENTS 209 and Supplement.]

Cases referred to:

Elms v. Foster Wheeler, Ltd., [1954] 2 All E.R. 714; [1954] 1 W.L.R. 1071; 24 Digest (Repl.) 1081, 361.

G *Ginty v. Belmont Building Supplies, Ltd.*, [1959] 1 All E.R. 414; 3rd Digest Supp.

McGuire v. Power Gas Corp., Ltd., (Oct. 6, 1960), unreported.

Action.

H The plaintiff, George Burrell Byers, in an action begun by writ dated Nov. 19, 1957, claimed damages for personal injuries suffered and losses and expenses incurred as a result of an accident which occurred on Sept. 22, 1956, arising out of the negligence or breach of statutory duty of the defendants, Head Wrightson & Co., Ltd. The plaintiff, at the material time, was employed by the defendants as a charge-hand steel erector in connexion with the construction of a nuclear reactor tank, the defendants being sub-contractors for the installation of highly specialised constituents, such as the fuel element, steel shields, cooling system, with incidental works in the Sealed Reactor building at Harwell.

I On the day of the accident, a Saturday, the plaintiff's task was to remove a movable welding set from the site. He was in charge of the operation, assisted by two men; only one other man was on the site. The welding set was a rather awkward machine, top-heavy and with a high centre of gravity. The wheels were of unequal base, front and rear, and liable to be unstable on uneven ground, particularly if moved on an unsteady surface. The best and easiest method of removal was by means of a crane, but no crane was available at the time. The

* For this definition, see footnote (7), p. 542, post.

route involved crossing a shallow depression or trench outside the Sealed Reactor building. Usually this depression was filled in with sleepers which supported a run over which lorries were able to be driven, but on this Saturday the sleepers had been removed and a single plank remained simply for pedestrians. The plaintiff and the other two men widened and strengthened this plank bridge by adding three further planks. These, however, were insufficient for the purpose of providing a safe passage for the welding set both because the planks were of insufficient thickness, and because they had to be laid at an angle across one of the two steel joists which traversed the depression but which, being below ground level, afforded no support, though the planks would touch it in a pronounced sagging position under weight. The planks were the best that were then available on the site. The plaintiff attempted to support the planks with some timbering collected from the site, but it was inadequate to achieve the necessary stability. When the three men were man-handling the welding set onto the planks, with one man in front pulling, another behind pushing and the plaintiff on the nearside trying to hold the machine upright, it developed an alarming angle as one plank took the undistributed weight and despite the plaintiff's efforts fell on top of him, breaking his leg.

By para. 6 of his statement of claim the plaintiff pleaded that the accident was caused by the defendants' breach of statutory duty or by their negligence and in his particulars of breach of statutory duty the plaintiff alleged breaches (a) contrary to reg. 5 of the Building (Safety, Health and Welfare) Regulations, 1948, by failure to provide any suitable or sufficient scaffold across the depression or trench and by failure to provide a sufficient safe means of access to the plaintiff's place of work; (b) contrary to reg. 7 (1) by failure to ensure that every part of the bridge, constructed across the trench as before-mentioned, was of good construction or of suitable or sound material or of adequate strength for the purpose for which it was being used; (c) contrary to reg. 12 (1) by failure to ensure that the bridge was securely supported or sufficiently and properly strutted or braced to ensure stability; (d) contrary to reg. 26 (3) by failure to ensure that the planks forming the bridge were so fixed or supported as to prevent undue or unequal sagging; alternatively, (e) if (as was not admitted) the bridge were not a scaffold within the regulations, contrary to reg. 93, by failure to ensure that it was of good construction or sound material or adequate strength and stability having regard to the purpose for which it was used. Particulars of negligence, immaterial to this report, were also pleaded. By their defence the defendants denied that the work on which the plaintiff was engaged was a building operation, and denied that they were negligent or in breach of statutory duty and alleged that the plaintiff's injury or loss was solely caused or was contributed to by his own negligence or his own breach of statutory duty as he failed to pack the underside of the plank bridge so that the planks would not sag, he chose and supervised the placing of every part of the plank bridge, and he, as a person employed, was himself in breach of duty under the regulations, if they applied, to comply with their requirements.

R. I. Kidwell for the plaintiff.

R. E. Hopkins for the defendants.

Cur. adv. vult.

Dec. 21. **ELWES, J.**, read the following judgment: This plaintiff sustained injuries, happily not serious or permanent, on Sept. 22, 1956, in the course of his employment as a charge-hand steel erector by the defendants. He sues them at common law and also alleges breaches of the Building (Safety, Health and Welfare) Regulations, 1948 (1). The question whether those regulations apply to the operations in progress at the material time is strongly contested and I deal with this issue first.

(1) S.I. 1948 No. 1145, as amended.

The defendants were engaged under a sub-contract with one of their subsidiary companies in highly specialised construction work on a partially completed nuclear reactor at Harwell. A useful plan has been exhibited and from the key diagram it is clear that a congeries of associated structures was being put up, some of which are admittedly buildings to which the regulations would apply; for example, laboratories and offices. Central to this congeries, both geographically and in point of importance, was the "Sealed Reactor building" (as it is described in the key diagram), and it was with this that the defendants' men were concerned exclusively, since, as is emphasised for the defendants, the lines of demarcation as between the main contractors and sub-contractors were strictly observed under the control of the Ministry of Works. The heart, in every sense, of the Sealed Reactor building is the Fuel Element. How it works and what it does have been clearly and patiently explained to me by counsel for the defendants, but, in the view that I take of the problem which I must solve, I need only concern myself with the measures taken in the design to prevent these formidable elements from escaping and with the cooling system which, to some extent, functionally overlaps. The fuel elements are surrounded by a jacket filled with heavy water which circulates throughout a system of pipes and tanks. Helium, an inert gas, is used in connexion with the heavy water, and the air ducts, gas holders and expansion tanks in which it passes and is contained are coloured blue on the plan. The cooling jacket is surrounded by a thickness of what are called "graphite reflectors", having the character of composite blocks and possessing chemical properties which are unnecessary for me to specify; outside this is a steel thermal shield and then a lead gamma shield. Around the whole of this is constructed the "biological shield", which I understand to be similar to concrete, and the whole is contained in a steel outer casing. The defendants' contract was to instal the fuel elements, steel shields, lead gamma shield and the graphite reflector blocks, also the cooling system, heavy water, light water and helium gas, the associated pipes, tanks and other containers, and some other incidental works to which my attention has been drawn in the contract documents. They also set up steel platforms, hand-rails and steps, two of which can be seen in the diagram. The ministry, apparently, required that they should not do "builders' work", so called, which was sub-contracted to two companies, Whessoe, Ltd. and Chivers, Ltd. Obviously, a good deal of this constructional work was proceeding simultaneously, employees of the different contractors being busy on the site at the same time.

The question accordingly is, was this a building within the meaning of the Building (Safety, Health and Welfare) Regulations, 1948? The material provision is reg. 2 (1) which applies the regulations to the following operations:

"... the construction, structural alteration, repair or maintenance of a building . . . the demolition of a building, and the preparation for, and laying the foundation of, an intended building whether or not the building is on or adjacent to the site of work of engineering construction within the meaning of the Factories Act, 1937, and to machinery or plant used in such operations . . ."

There follows a proviso excluding a considerable number of works of civil and marine engineering, to some of which the word "building" could only be applied by straining language, for example, canals, tunnels, sewers, pipelines and filter beds. The question whether a particular structure is or is not a building is, as the courts have pointed out, in each case a question of fact to be decided on evidence. In *Elms v. Foster Wheeler, Ltd.* (2), the Court of Appeal held that the defendants, who were installing "a steam generating plant, floors and galleries connected by stairways and chutes, and boilers and cooling chambers", were participating in the construction of a building within the scope of reg. 2 (1).

Looking at that case generally, it is clear that the court agreed with the trial judge, ORMEROD, J., in attributing a wide meaning to the word "building". I have also been shown the transcript of the unreported judgment of SALMON, J., in *McGuire v. Power Gas Corpn., Ltd.* (3), delivered last October as well as some photographs of a catalytic oil plant which that learned judge held to come within the statutory description. Approaching this problem in the same way as did SALMON, J., and having regard to the judgment in *Elms v. Foster Wheeler, Ltd.* (4), and in particular that of ROMER, L.J. (5), I reach the conclusion that the Building Regulations apply to the Sealed Reactor building and that the defendants were taking their part, the most important part, in the construction of that building.

I may add that I have paid close attention to the argument of counsel for the defendants and its emphasis on the very specialised scientific character of the defendants' contribution to this constructional operation. It seems to me that in principle his contentions in this connexion would be entirely applicable to the catalytic oil plant in *McGuire v. Power Gas Corpn., Ltd.* (3), the only difference between the two buildings being referable to the degree of scientific complexity which they present to the lay observer. In my opinion, this aspect of the matter is, if not immaterial, at least inconclusive. Considering this nuclear reactor in the broad sense, as I conceive authority requires, I ask myself, is this a building and are the men putting it up engaged on a building operation? I answer both questions in the affirmative.

[HIS LORDSHIP then considered the circumstances in which the plaintiff sustained injury and the evidence thereof and found that the plaintiff and the other two men had attempted to support the planks from below with whatever they found to their hand, but that the support so given was inadequate, and continued:] It is beyond argument that breaches of the Building (Safety, Health and Welfare) Regulations, 1948, are established. In my opinion, this temporary bridge was a "scaffold" by definition (6) under the interpretation regulation, reg. 3, and all the particulars under para. 6 (a) to (d), inclusive (7), are made out as breaches of statutory duty. There was also, plainly, a breach of reg. 93, which is apt to apply particularly to this temporary structure. Accordingly, subject to further argument by counsel for the defendants as to the question of apportionment, the plaintiff's claim must succeed.

On the basis that the regulations apply, as I have held that they do, counsel for the defendants then contends that the plaintiff is wholly responsible himself on the principle of *Ginty v. Belmont Building Supplies, Ltd.* (8). The judgment of PEARSON, J., in that case, if I may respectfully say so, illuminates by reference to authority the problem which so often arises and causes difficulty in these cases when a breach of statutory duty is established against an employer by way of vicarious liability for an act or omission of the plaintiff himself in breach of a statutory duty, the employer's liability being in fact founded on the plaintiff's act or omission and not extending beyond it or being independent of it. I should certainly follow that decision, gratefully accepting the exposition of the principle, but the facts of this case wholly exclude its application in my opinion and perhaps

(3) Noted at p. 544, letter C, post.

(4) [1954] 2 All E.R. 714.

(5) [1954] 2 All E.R. at p. 718.

(6) Regulation 3 (2) of the Building (Safety, Health and Welfare) Regulations, 1948, provides: "'Scaffold' means any temporary structure on or from which persons perform work in connexion with an operation to which these regulations apply, and any temporary structure which enables persons to obtain access to or which enables materials to be taken to any place at which such work is performed, and includes any working platform, gangway, run, ladder or step-ladder . . . together with any guard-rail, toe-board or other safeguards and all fixings, but does not include a lifting appliance or a structure used merely to support such an appliance or to support other machinery or plant."

(7) Viz., para. 6 (a) to (d) of the statement of claim, summarised at p. 540, letters D to G, ante.

(8) [1959] 1 All E.R. 414.

A illustrate the importance of confining it strictly within the limits defined by that learned judge. In my opinion, this is not a true instance of vicarious liability at all. Looking at the situation generally on the evidence, I have reached the clear conclusion that the task of appraising what was necessary was not within the competence of the plaintiff. Counsel for the defendants has pressed me to hold that this was all very easy and that any man with the intelligence and experience B that a charge-hand should have ought to have planned and carried it into effect without difficulty. This, I am satisfied, is something less than fair to the plaintiff. I have sufficiently indicated the difficulties involved in bridging this depression at an angle across awkwardly placed sub-structures with planks of inadequate strength. Further than this, I am sure that the tendency of the welding set to topple right over as soon as the centre of gravity was shifted was not properly C appreciated by the plaintiff. I am in general of the opinion that the plaintiff did the best that he could with the materials that were to hand having, as we now know, an imperfect appreciation of the necessities of the situation. These features are relevant, obviously, to the issue of contributory negligence, but they go directly to the application of the principle of *Ginty v. Belmont Building Supplies, Ltd.* (9), and, further, they represent the obverse side of the medal in considering the D nature of the breaches of statutory duty here established. The defendants, in my opinion, required the plaintiff by means of improvisation at short notice and unassisted by supervision to undertake a task which, as I have said, was beyond his competence as a charge-hand steel erector. It is possible that the general foreman, who gave him the order, also underestimated the chances of mishap and the manner and suddenness with which a mishap might occur, but E this is nothing to the present purpose. The general foreman was not called and it has not been possible to explore what his tactical appreciation would have been. I suspect that he might not have been quite so prone to wisdom after the event as were some of the witnesses whom I have seen.

For the reasons that I have given, I reach the conclusion that the plaintiff has made out his case under the regulations, and, in my opinion, he succeeds also F at common law in showing that he was exposed to a danger at his work which proper planning and supervision would have avoided. I hold further that he was not guilty of contributory negligence, and, in deference to a confident submission by counsel for the defendants that he should in any event carry one hundred per cent. of the liability under this heading, I add a few words to what I have already said indirectly referable to this issue. The plaintiff made a good impression G on me, not merely as honest, but as sensible and competent within the limits of his range as a charge-hand steel erector, a somewhat specialised employment as I understand it. In point of honesty, in the witness-box he was, I think, genuinely puzzled by the weight of counsel's attack on the packing point, counsel expecting, as I have said, to prove affirmatively that there was no packing under the planks immediately after the accident, and making this plain in H cross-examination to the plaintiff. In my opinion, the plaintiff went about this improvisation job as one would expect a sensible sort of man to do within the limits of his range, those limits being referable not merely to experience but to general grasp. What counsel for the defendants is doing is tantamount to faulting a corporal for not measuring up to the standard of a trade-qualified staff-sergeant. The evidence on which he founded his criticism is to some extent I accurate and to some extent exaggerated, and, in my opinion, it wholly fails after the careful tests and investigations which were properly applied to it.

[HIS LORDSHIP then considered the quantum of damages. The plaintiff had suffered a comminuted compound fracture of the right tibia and fibula. He was immobilised in plaster in hospital for a little less than three months, was subsequently an out-patient for a period and returned to work five months after the accident. The plaintiff had virtually made a complete recovery, though

there was a slight loss of full movement of the ankle and foot, not constituting a disability, which might cause slight discomfort occasionally. His LORDSHIP assessed general damages at £400, which, with agreed special damages of £298 6s. 4d., made a total award of £698 6s. 4d.]

Judgment for the plaintiff.

Solicitors: *W. H. Thompson* (for the plaintiff); *Abbott, Baldwin & Co.* (for the defendants).

[*Reported by WENDY SHOCKETT, Barrister-at-Law.*]

NOTE.—In *McGuire v. Power Gas Corpn., Ltd.* (Q.B.D. 1958 M.No. 2190, Oct. 6, 1960), to which reference is made in the judgment at p. 542, letter A, ante, the plaintiff claimed damages against the defendants, his employers, for injuries he sustained in falling from a catalytic oil plant under construction by the defendants, alleging, among other grounds, that the defendants were in breach of their statutory duty under the Building (Safety, Health and Welfare) Regulations, 1948 (S.I. 1948 No. 1145), as amended. The function of the plant was to convert oil into gas. It consisted of a large reactor and large super-heater, a gas washing plant and a wash box, all of which were connected by pipes. Along the whole of one side there were stanchions, galleries and staircases leading to the various platforms. The whole structure covered an area of eighty square feet and was over thirty feet high. SALMON, J., in the course of his judgment, considered the question whether the catalytic oil plant was a building within the meaning of the Building (Safety, Health and Welfare) Regulations, 1948. His LORDSHIP said:

“It seems to me that whether any given structure is a building within the meaning of those regulations [i.e., the Building (Safety, Health and Welfare) Regulations, 1948] must turn very largely upon the facts of the particular case. The courts have from time to time considered what structures are or are not buildings. In each case, however, the court has pointed out that it is in effect deciding no more than a question of fact and at the end of the day one has to bear in mind the evidence about the structure and look at the pictures and models, if there are any, and say, in effect, is that in fact a building? In this case, not without some hesitation, I have come to the conclusion that the structure with which I am concerned is a building, and that the defendants were engaged in the operation of constructing it when the accident occurred. I am fortified in that conclusion by the case of *Elms v. Foster Wheeler, Ltd.* ([1954] 2 All E.R. 714), and particularly the observations of SOMERVELL, L.J. (*ibid.*, at p. 715) ‘... the installation of plant may involve the operation of the construction of a building’. It is true that in that case one member of the court, ROMER, L.J., apparently relied upon the fact that the plant in question in that case was enclosed in something which was admittedly a building and he, I think, founded his judgment largely on the view that the plant was an integral part of that building. On the other hand, neither SOMERVELL, L.J., nor BIRKETT, L.J., made this fact the basis of their judgments.

“It seems to me that it is quite possible for a structure to be a building within the meaning of the regulations notwithstanding that it is not enclosed by walls and a roof, and is not one of the more ordinary forms of buildings. The proviso [to reg. 2 (1) of the regulations; cf. p. 541, letter I, ante] itself suggests that the word ‘building’ in [reg. 2] is used in a very wide sense—for example, the proviso excludes from the ambit of the word ‘building’ sewers, filter beds, pole or lattice work structures designed solely for the support of machinery and gasholders. The fact that these are excluded seems to denote that but for their express exclusion they might be included in the word ‘building’. I do not think that too much emphasis can be laid upon this argument and I respectfully agree with the observations of SOMERVELL, L.J., on that point (see *Elms v. Foster Wheeler, Ltd.*, [1954] 2 All E.R. at p. 715). Nevertheless, I think that some help can be gained from the consideration of the proviso and more especially from the mischief aimed at by the regulations. I can see no reason why Parliament should have intended that workmen engaged on the construction of such a structure as this should alone be denied any statutory protection. It is common ground that if the regulations do not apply, then there are no statutory provisions applicable; that is to say, no statutory safeguards for the workers engaged upon the construction of structures of this kind. In constructing this plant it was necessary not only to put in cylinders and pipes but to erect a substantial amount of steel stanchions, girders and joists and to erect galleries, stairs or floors as part of the whole edifice. I accordingly hold that the defendants were engaged upon the construction of a building at the material time.”

A. ROBERTS & CO., LTD. AND ANOTHER v.
LEICESTERSHIRE COUNTY COUNCIL.

[CHANCERY DIVISION (Pennycuik, J.), April 18, 19, 20, 21, 25, 26, 27, May 3, 1961.]

Mistake—Rectification—Unilateral mistake—Estoppel—Building contract—Time for completion of building specified in plaintiff's tender as eighteen months—Contract drawn up by defendants specifying thirty-month period for completion—Plaintiff executed contract believing that eighteen-month period for completion specified therein—Defendants knowing of plaintiff's mistake did nothing to correct it—Whether plaintiff entitled to rectification.

In December, 1953, a county council published an advertisement for tenders for the erection of a school. A company put in a tender leaving blank the period for completion of the works. The council resolved to accept this tender subject to a reduction of price. The company sent the council a revised tender containing a lower price and specifying that it would complete the works within seventy-eight weeks of instructions to proceed (i.e. on Sept. 30, 1955). After a discussion, two officers in the county architect's department decided that the period for completion to be inserted into the contract should be thirty months, not eighteen. The alteration was for the benefit of the council and not of the company. A memorandum was sent from the county architect to the clerk of the county council asking for contract documents to be prepared giving the date for completion as Sept. 30, 1956, and a letter was sent to the company saying that its tender had been accepted and instructing it on arrangements for completing the contract and starting to build. No officer of the council ever called the company's attention to the fact that the period for completion to be included in the contract differed from the period specified in the tender. When the seal of the company was affixed to the contract on Mar. 24, 1954, it was not noticed on the company's behalf that the date for completion was entered as Sept. 30, 1956, but at all relevant times the directors and officers of the company were under the belief that the date for completion of the works was Sept. 30, 1955, which allowed seventy-eight weeks for the work. Before the council executed the contract, two meetings took place between officers of the company and of the council. At the first, on Mar. 30, 1954, an officer of the company stated that the company intended to complete in eighteen months and was warned by S., the officer of the county architect's department then having conduct of the matter, that the council did not think that the company would be able to complete in this time. At the second, on Apr. 5, 1954, a progress schedule was produced by the company showing a period of seventy-two weeks for completion which was seen by S. The council executed the contract on Apr. 12, 1954, and work on the building then began which, after encountering delay with sub-contractors nominated by the council, the company completed early in 1956. In an action by the company for rectification of the contract by altering the date for completion from Sept. 30, 1956, to Sept. 30, 1955,

Held: on the facts, S. knew at latest on Apr. 5, 1954, that the company believed the period for completion of the work to be eighteen months; accordingly, when the council executed the contract it knew that the company was mistaken as to the date for completion entered therein, and, as the council then stood by and took no steps to draw the attention of the company to the mistake, the company was entitled to have the contract rectified by substituting Sept. 30, 1955, as the date for completion.

[As to rectification generally, see 26 HALSBURY'S LAWS (3rd Edn.) 914, para. 1698; and for cases on the subject, see 35 DIGEST 127-130, 282-304.]

As to contract where one party by conduct leads the other party to believe

that he assents, see 26 HALSBURY'S LAWS (3rd Edn.) 900, para. 1666, and 15 A HALSBURY'S LAWS (3rd Edn.) 169, para. 338.]

Cases referred to:

Cohen (George), Sons & Co., Ltd. v. Docks and Inland Waterways Executive, [1950] 84 Lloyd's Rep. 97.

North Thames Gas Board v. Sunbury-on-Thames Urban District Council, (1955), unreported.

Smith v. Hughes, (1871), L.R. 6 Q.B. 597; 40 L.J.Q.B. 221; 25 L.T. 329; 35 Digest 107, 125.

Whiteley v. Delaney, [1914] A.C. 132; 83 L.J.Ch. 349; 110 L.T. 434; 35 Digest 129, 297.

Action.

In this action the plaintiffs, A. Roberts & Co., Ltd. and A. Roberts & Co. (Holdings) Ltd., claimed against the defendants, Leicestershire County Council, rectification of a contract under seal dated Apr. 12, 1954, and made between the second plaintiff and the defendant; damages for breach of the contract or alternatively £15,437 2s. 10d., being money due to the second plaintiff in accordance with the terms of the contract. The facts appear in the judgment.

J. S. Daniel, Q.C., and *A. J. Butcher* for the company.

J. L. Arnold, Q.C., and *D. A. Thomas* for the council.

Cur. adv. vult.

May 3. **PENNYCUICK, J.:** By this action the plaintiffs, A. Roberts & Co., Ltd. and A. Roberts & Co. (Holdings) Ltd. claim against Leicestershire County Council rectification of a contract under seal dated Apr. 12, 1954, and made between the second plaintiff and the defendant; damages for breach of the said contract and alternatively £15,437 2s. 10d., being money due to the second plaintiff in accordance with the terms of the said contract. The action has been heard before me on the issue of rectification only.

The second plaintiff at all relevant times carried on the business of contractors under the name now borne by the first plaintiff, but as the result of a reconstruction in 1956 it became a holding company with its present name, and the first plaintiff was incorporated as a trading company to take over its business. The second plaintiff was the party concerned in all the proceedings to which this action relates and the first plaintiff may be disregarded for the purpose of this judgment. I shall henceforth refer to the second plaintiff as "the company" and to the defendant as "the council". The action has been heard before me on the issue of rectification alone. I shall proceed to state the facts as they appear from the documents and as I find them on the oral evidence of the witnesses called before me, being for the most part officers of the company and the council respectively. There was also read evidence given on commission by a former officer of the council now in Ghana.

On Dec. 23, 1953, the council published an advertisement for tenders for the erection of a school to be known as the Hinckley Burbage Secondary Modern School. It was important to the council that work on the school should begin before Mar. 31, 1954, since otherwise it would not qualify for a grant for the year 1953-54 from the Ministry of Education. On Jan. 30, 1954, the company put in a tender in the following terms:

"Leicester County Council. Hinckley Burbage Secondary Modern School—Erection. Form of Tender. To the Leicester County Council. We the undersigned do hereby tender and undertake to carry out the above-mentioned works in accordance with the conditions of contract, drawing and bills of quantities and to the satisfaction of the county architect, for the sum of (in words) one hundred and sixty five thousand nine hundred and ten pounds only. Amount of tender £165,910. We agree to maintain in complete repair the whole of the new works executed for a period of six

A months after the certified date of completion. If this tender is accepted we agree to enter into an agreement for the due performance of the works, and to complete the works within . . . of the date of instructions to proceed. As witness our hand this thirtieth day of January, 1954. Signature E. B. Cruse, Technical Director. A. Roberts & Co., Ltd."

B It will be observed that in this tender the period within which the company agrees to complete the works is left blank.

On Feb. 5 the tenders sub-committee of the education committee of the council resolved that the company's tender be accepted, subject to a reduction being negotiated to bring the cost within the figure authorised by the ministry. On the same date Mr. Collins, the county architect, wrote to the company as follows:

C "Hinckley Burbage Secondary Modern School. I have to inform you that your tender for the erection of the above-named school is among the low ones receiving consideration. I enclose a copy of the bill of quantities and shall be glad if you will price this in and let me have it back again by Monday, Feb. 15, 1954."

D On Feb. 9, 1954, Mr. Collins wrote to the company as follows:

"With reference to my letter of Feb. 5, 1954, I shall be grateful if when you forward the completed bill of quantities you will give me a list of recent contracts which you have carried out and the extent of these."

On Feb. 12, 1954, the company replied complying with these requests.

E On Feb. 22, 1954, Mr. Collins wrote to the company in these terms:

F "I have to inform you that the committee has recommended for acceptance your tender for the erection of the above-named school, subject to the tender being reduced by the adjustment of P.C.'s and the omission of certain items, by £28,000 approximately, and to the approval of the Ministry of Education. It is hoped that this approval will be received within the next fourteen days. In the meantime would it be possible for you to make preliminary arrangements for the contract guarantee bond in a sum of 10 per cent. of the amount of contract, and let me have a letter from your guarantors that they will be prepared to act as surety and that there will be no delay when the contract documents are forwarded for completion. This information is required to ensure that the work is started before Mar. 31, 1954."

G The company obtained an assurance from its bank that the bank would be prepared to join in a performance bond and so informed Mr. Collins.

H On Mar. 8, 1954, the company sent to the council a revised tender in which the figure of £138,399 9s. 3d. is substituted for the figure of £165,910. The revised form of tender contains a further important departure from the original tender in that it proceeds to specify the time within which the company agrees to complete the works, namely, seventy-eight weeks of the date of instructions to proceed. A day or two after receipt of this tender Mr. Thornton, the progress officer in the architect's department of the council, asked Mr. E. D. Smith, the assistant county architect for the education section who, under Mr. Collins, had the handling of the matter, whether the date for completion under the contract should or should not be seventy-eight weeks, i.e., the period mentioned in the revised tender as the period from the date of instructions to proceed to the date of completion. As the result of this question Mr. Smith had a discussion with Mr. Collins at which they decided that the period for completion to be inserted in the contract should be not eighteen months, but a whole year longer, namely, thirty months. The date was altered for the benefit of the council and not that of the company. There is a direct relationship between price and contract period, and if the company had made its tender on the basis of a thirty-month

period the price would have been higher. Mr. Collins and Mr. Smith have positively deposed to the deliberate selection of the thirty-month period. Mr. Thornton deposed that he was instructed by Mr. Smith that the period was to be thirty months. I accept the evidence of these three officers on this point, however difficult it is to understand how in the circumstances Mr. Thornton came to write the letter dated Mar. 13, 1954, mentioned below.

At this stage Mr. Collins personally drops out of the picture, leaving the matter in the hands of Mr. Smith. It is accepted by the council that Mr. Smith acted throughout with the authority of Mr. Collins. Mr. Smith in turn gave instructions to Mr. Thornton to take the next steps in the matter. Mr. Thornton proceeded to make certain important communications. On Mar. 11, 1954, he sent a memorandum over the signature of Mr. Collins to the clerk of the council to the following effect:

“Memorandum from county architect to the clerk of the county council. Mar. 11, 1954. Hinckley Burbage Secondary Modern School. I shall be grateful if you will arrange for the preparation of the contract documents for the erection of the above-named school. Particulars you require are as follows—[I need not read (a) and (b)]—(c) Amount of tender: £138,399 9s. 3d., (d) Amount of bond: £13,839, (e) Name, address and status of contractors: A. Roberts & Co., Ltd., 79, Ecclestone Square, Victoria, London, S.W.1., (f) Date for possession: Mar. 25, 1954, (g) Date for completion: Sept. 30, 1956.”

On Mar. 13, 1954, Mr. Thornton, again over the signature of Mr. Collins, wrote a letter to the company in the following terms:

“Dear Sirs, Hinckley Burbage Secondary Modern School. I have to inform you that the committee has accepted your tender amounting to £138,399 9s. 3d. for the erection of the above-named school. The official order No. CA/A.2623 is enclosed. Working drawings will be forwarded to you in due course. The contract documents will be sent by the clerk of the county council within the next few days. I am inserting in the contract a provisional starting date of Mar. 25, 1954. Will you kindly note that the work must not be started until the contract documents have been completed and returned to the clerk. When the contract documents are received I shall be glad if you will deal with these as quickly as possible as it is imperative that the work be commenced as near as possible to the date given in the contract and in any case not later than Mar. 31, 1954. I shall also be glad if you will endeavour to have the contract guarantee bond completed as expeditiously as possible. When you are in a position actually to commence the work, will you kindly inform me by letter when I will arrange for my representative to meet you on the site.”

With that letter was included what is described as an official order addressed to the company and containing the following terms:

“Please execute the work stated below, in accordance with your tender 8/3/54 @ £138,399 9s. 3d. The whole of the work to be done in a thoroughly workmanlike manner and to my entire satisfaction. The enclosed postcard(s) are to be sent to me on commencement and/or completion of the work. All goods to be despatched to: Burbage Secondary Modern School. Erection as per plans and bills of quantities. See letter attached.”

None of the officers of the council at any time called the attention of the company to the fact that the period for completion to be included in the contract differed by a whole year from the period specified in the tender, and the letters which I have just read were well calculated to divert the attention of the company from that matter. Apparently neither Mr. Smith nor Mr. Thornton considered that he was under any obligation to call the attention of the company to this change in the date for completion under the contract. Mr. Collins admitted in evidence

A that it would have been better to have done so, as did Mr. Hurst, then an assistant architect to the council and now in Ghana.

On Mar. 17, 1954, the clerk of the council wrote to the company enclosing a form of contract in respect of the proposed work. This document, which is the document sought to be rectified in this action, is, so far as now material, in the following terms:

B "Articles of agreement made Apr. 12, 1954. Between the Leicester County Council . . . (hereinafter called 'the employer') of the one part and A. Roberts & Co., Ltd. . . . (hereinafter called 'the contractor') of the other part. Whereas the employer is desirous of erecting a secondary modern school (hereinafter called 'the works') at Burbage, Hinckley in the county of Leicester and has caused drawings and bills of quantities showing and describing the work to be done to be prepared by or under the direction of Tom Anderson Collins A.R.I.B.A. . . . (hereinafter referred to as 'the architect') And whereas the said drawings numbered one to fourteen inclusive (hereinafter referred to as 'the contract drawings') and the said bills of quantities have been signed by or on behalf of the parties hereto: Now it is hereby agreed as follows: 1. For the consideration hereinafter mentioned the contractor will upon and subject to the conditions annexed hereto execute and complete the works shown upon the said drawings and described by or referred to in the said bills of quantities and conditions. 2. The employer will pay to the contractor the sum of £138,399 9s. 3d. (hereinafter referred to as 'the contract sum') or such other sum as shall become payable hereunder at the times and in the manner specified in the said conditions. 3. The term 'the architect' in the said conditions shall mean the said Tom Anderson Collins . . ."

There followed twenty-seven conditions which I understand are in a common form and an appendix by reference to certain of the conditions which includes these words:

F "Date for possession: Mar. 25, 1954. Date for completion: Sept. 30, 1956."

G On or about Mar. 24, 1954, the common seal of the company was affixed to this document in the presence of Mr. Frank Johnson and Mr. E. B. Cruse as directors and Mr. A. D. Munrow as secretary of the company. At all relevant times, including the date when the seal was so affixed, the two directors and the secretary were under the belief that the period for completion specified in the contract was eighteen months. Mr. Munrow failed to notice that the date specified was 1956 and not 1955, and the directors did not at this stage read the contract. None of the three officers of the company discovered until a much later time, the date in fact specified in the contract. These facts appear from the whole tenor of the evidence given by Mr. Cruse and Mr. Munrow and are borne out by the circumstances leading up to the execution of the contract by the company, and also by the subsequent conduct of the company's officers acting on the instructions of the board. Mr. Cruse was not asked a direct question on his belief as to the length of the period for completion under the contract, but I do not think that there is any real doubt on this point. Mr. Johnson, the other director of the company in 1954, suffers, I understand, from high blood pressure and was not called as a witness; but it is accepted on behalf of the council that he should be treated as confirming the evidence of Mr. Cruse on matters within his own knowledge.

I The contract was returned by the company to the council on Mar. 25, 1954, but the council did not execute the contract for over a fortnight. Before such execution two important meetings took place. On Mar. 30, 1954, there met, first at the council's architect's office, and later on the building site, Mr. Smith, Mr. Hurst, Mr. Cruse, Mr. Mottram (then area control manager of the company) and Mr. Corby (then area manager of the company). A number of matters concerning the building project were discussed, including the preparation of a

progress schedule for the erection of the building. Mr. Cruse mentioned an eighteen-month period, but was probably referring to the period in which the company hoped to complete rather than to the period for completion mentioned in the contract. Mr. Corby said that he intended to finish the work in eighteen months. Mr. Smith warned Mr. Corby that he did not think that the company would be able to complete in eighteen months. A

On Apr. 1, 1954, Mr. Corby wrote to the county architect a letter opening with the following paragraphs: B

"We confirm the meeting at your office and on site on Mar. 30, between Mr. Smith and Mr. Hurst, Mr. E. B. Cruse (technical director) Mr. Mottram and the writer. We take this opportunity of thanking you for the courteous reception accorded to our representatives, and record the following points discussed. 1. Progress schedule. We are to prepare a draft progress schedule for the work, to be the basis of a further meeting to be arranged later this week by telephone, for Monday, next, Apr. 5. 2. Nominated sub-contractors. You will give us as far as possible on Monday next, a list as complete as possible of the nominated sub-contractors you desire to appoint, in order that we may arrange a co-ordinated programme with them." C

On Apr. 5, 1954, there met at the council's architect's office Mr. Smith, Mr. Hurst, Mr. Mottram and Mr. Corby, together with two representatives of Messrs. Gleeds and Partners, the quantity surveyors nominated by the architect. At that meeting there was a further discussion as to the programme for the execution of the works. Mr. Mottram produced a progress schedule prepared by him then in draft form and subsequently printed in the form of a document which was produced in this action. This document shows a period of seventy-two weeks for the completion of the works. I am satisfied that Mr. Smith saw this document at this meeting. Mr. Mottram testified positively to this effect and says that Mr. Smith and Mr. Hurst themselves mentioned seventy-two weeks. Mr. Corby testified to the same effect rather more cautiously. Their evidence is borne out by that given on commission by Mr. Hurst. The two representatives of Messrs. Gleeds do not remember seeing a progress schedule. Mr. Smith denies that he saw the progress schedule on this occasion. The letter dated Apr. 1, 1954, and the inherent probabilities strongly indicate that a progress schedule would be produced on Apr. 5, 1954, and I am satisfied that Mr. Smith's recollection on this point is at fault. It will be observed that this meeting was held in Mr. Smith's office, and it would be hardly possible that if the progress schedule was produced at all he should not personally have seen it. In the course of the discussion Mr. Mottram and perhaps also Mr. Corby made it clear that the company intended to complete within the seventy-two weeks. Mr. Hurst also leaves no doubt on this point, his statement being: "What was clear to me was the fact that they were going to get the job done in eighteen months". The discussion was largely concerned with the sub-contractors whose work had to be fitted in with that of the company, and timing was a matter of major concern. I will return at a later stage to the inference to be drawn as to Mr. Smith's state of mind by the end of the meeting on Apr. 5, 1954. D E F G H

On Apr. 12, 1954, the council executed the contract. Work on the building then began. Colonel Lucking, a surveyor employed by the company, prepared applications for interim monthly certificates under the contract and submitted these to Mr. Ward, one of Messrs. Gleeds' representatives. Colonel Lucking was informed by Mr. Ward that the period for completion under the contract was thirty months, and on this information he prepared the first two certificates accordingly. He was then informed by someone in the company's office that the period for completion under the contract was eighteen months. He prepared, and Mr. Ward accepted, all subsequent certificates on this basis. The company encountered various difficulties with the sub-contractors nominated by the council, and in the event was unable to complete the work till a date early in 1956. I

In February, 1955, the directors of the company, probably as the result of a conversation between Mr. Corby and Mr. Hurst, learned that the council was working to a thirty-month period for completion, and on Feb. 28, 1955, Mr. Corby wrote to the council's architect as follows:

"We are very concerned to discover that there would appear to be a clerical error on the form of contract for the above, in that the date for completion is given as Sept. 30, 1956, instead of Sept. 30, 1955, which is the correct date. You will find that our tender dated Mar. 8, 1954, undertook the completion of the works within seventy-eight weeks of the date of instructions to proceed. We received your official order No. CA/A.2623 dated Mar. 12, 1954, instructing us to execute the works in accordance with our tender, under cover of a letter dated Mar. 13, 1954, wherein it was stated that it is imperative that the work be commenced as near as possible to Mar. 25, 1954, and in any case not later than Mar. 31, 1954. In all these circumstances, we shall, therefore, be glad if you will kindly arrange for the date on the contract documents to be corrected and initialled by the parties."

A meeting was held on Mar. 2, 1955, between representatives of the council and of the company and certain others. Mr. Collins made a note of this meeting which will be found in the agreed correspondence, and on Mar. 9, 1955, wrote to the company as follows:

"With reference to your letter of Feb. 28, I cannot see that any useful purpose would be served by altering the contract date at this juncture. There is no objection to your completing the work much earlier than the date stipulated. For your information, I enclose a note of our conference on Mar. 2, when the above question, *inter alia*, was discussed."

Ultimately the writ in this action was issued on Nov. 11, 1958. As I have said, the action has been heard before me on the issue of rectification only, and I deliberately abstain from making any findings which do not go to this issue.

The company claims rectification of the contract on two alternative grounds, namely (i) that it was the common intention of the parties that the contract should include a period for completion of eighteen months and the period of thirty months was inserted under common mistake; and (ii) that the council cannot be heard to say that it was not mistaken as to the date for completion since when it executed the contract it well knew that the company was mistaken as to the date for completion included in the contract, yet stood by and took no step to draw the company's attention to its mistake. The second ground is formulated in full in the reply delivered by the company in this action.

On the facts as I have stated them it is clear that the council and the company were not at one on the length of the period for completion intended by them respectively to be inserted in the contract, and accordingly the company is not entitled to rectification on the first ground relied on.

The second ground rests on the principle that a party is entitled to rectification of a contract on proof that he believed a particular term to be included in the contract and that the other party concluded the contract with the omission or a variation of that term in the knowledge that the first party believed the term to be included. Counsel appearing for the council formulated the principle in slightly different terms, as follows, viz., the plaintiff must show that his intention was that the term sought to be introduced by rectification should be included in the contract and, so far as now relevant, that the omission of the term was occasioned by the dishonest conduct of the defendant in acceptance of the formation of the contract without the term, in the knowledge that the plaintiff thought the term was included. Counsel thus introduces into his formulation of the principle the word "dishonest", but he accepts that such conduct by the defendant in his formulation is of its nature dishonest, so that the word "dishonest" appears to carry the matter no further. I do not think that there is any substantial disagreement as to the scope of the principle.

The principle is stated in SNELL'S PRINCIPLES OF EQUITY (25th Edn.), p. 569, as follows:

"By what appears to be a species of equitable estoppel, if one party to a transaction knows that the instrument contains a mistake in his favour but does nothing to correct it, he (and those claiming under him) will be precluded from resisting rectification on the ground that the mistake is unilateral and not common."

The exact basis of the principle appears to be in some doubt. If the principle is correctly rested on estoppel it seems to me that it is not an essential ingredient of the right of action to establish any particular degree of obliquity to be attributed to the defendant in such circumstances. If, on the other hand, the principle is rested on fraud, obviously dishonesty must be established. It is well established that a party claiming rectification must prove his facts beyond reasonable doubt, and I think that this high standard of proof must equally apply where the claim is based on the principle indicated above.

I have been referred to two recent decisions on rectification in the Court of Appeal, namely, *George Cohen, Sons & Co., Ltd. v. Docks and Inland Waterways Executive* (1), and *North Thames Gas Board v. Sunbury-on-Thames Urban District Council* (2). In the former of these cases the court was concerned primarily, and in the second exclusively, with the question whether on the particular facts there had been such common mistake as to warrant rectification on the primary ground, a question which was answered in the affirmative in the former, and in the negative in the latter case. In the former case there was also some discussion on an alternative ground for rectification germane to the second ground relied on here, and there was considerable argument before me as to the exact scope of what was said on this alternative ground. I have also been referred to a number of other cases in this connexion, including *Smith v. Hughes* (3), and *Whiteley v. Delaney* (4). For the purpose of the case before me it will be sufficient to rely on the principle set out previously. Nothing in the cases cited throws any doubt on this principle, and I do not think that I can usefully go further into the law.

Almost at the end of the trial, during his speech in reply, counsel for the company asked for leave to amend the reply by including certain alternative claims based on a representation alleged to have been contained in the order form dated Mar. 12, 1954, and the letter dated Mar. 13, 1954. I did not think it right to allow at that stage these amendments which involved issues of fact, and one of which alleged fraud.

Returning to the facts of the present case, the company, as I have held, believed that the eighteen-month period of completion was included in the contract. The question then is: did the council, when it concluded the contract with the thirty-month period, do so in the knowledge that the company believed the eighteen-month period was included in it? Counsel for the council accepts that for this purpose the knowledge of the council's officers should be treated as the knowledge of the council. He also accepts that the relevant officers are Mr. Collins and Mr. Smith and that the county clerk, who drew the contract on their instructions as transmitted by Mr. Thornton, may be left out of account. I do not think that on the evidence either of the officers concerned, that is Mr. Collins and Mr. Smith, could properly be held to have had knowledge of the company's belief in the eighteen-month period during the interval between the despatch on Mar. 17, 1954, of the contract specifying the thirty-month period and the meeting on Mar. 30, 1954. The point then narrows itself to the knowledge of Mr. Smith as the result of the meetings held on Mar. 30, 1954, and Apr. 5, 1954. Do the facts raise beyond reasonable doubt, the inference that by the end of the latter meeting Mr. Smith knew that the company was under the belief that the period of completion under the contract was eighteen months?

(1) [1950] 84 Lloyd's Rep. 97.

(3) (1871), L.R. 6 Q.B. 597.

(2) (1955), unreported.

(4) [1914] A.C. 132.

I proceed to summarise the facts relevant to the state of Mr. Smith's knowledge by the end of the meeting on Apr. 5, 1954: (i) He knew that under the revised tender the company had agreed to complete the works within seventy-eight weeks of instructions to proceed; (ii) as an experienced architect he must have appreciated that the price under the tender was related to the period for completion and that if the period had been longer the price would probably have been higher; (iii) he had discussed the period for completion with Mr. Collins and on the latter's instructions had, through Mr. Thornton, instructed the council's clerk to include in the contract thirty months as the period for completion; (iv) he had taken no steps to call the attention of the company to the inclusion of thirty months as the period for completion instead of eighteen months; (v) he had been told by Mr. Cruse and Mr. Corby on Mar. 30, 1954, that the company aimed to get the work finished in eighteen months and had told Mr. Corby that he did not think that this would be possible; (vi) he had been shown by Mr. Mottram on Apr. 5, 1954, the progress schedule showing a period of seventy-two weeks for completion of the work and had been assured by Mr. Mottram, and perhaps also by Mr. Corby, that the company intended to complete in that time; (vii) as an experienced architect, he could not fail to appreciate that seventy-two weeks for completion in the progress schedule was appropriate to an eighteen-month period for completion under the contract and inappropriate to a thirty-month period for completion under the contract; (viii) Mr. Mottram and Mr. Corby had made no comment on what, if they believed the period for completion under the contract to be thirty months, must have seemed to them a startling anomaly.

In my judgment, these facts raise, beyond reasonable doubt, the inference that Mr. Smith did know, at the latest by the end of the meeting on Apr. 5, 1954, that the company believed the period for completion under the contract to be eighteen months. Only if he were unusually stupid or unusually heedless could he have failed to understand the company's state of mind, at least by the end of this meeting. I am satisfied he was neither stupid nor heedless, and it seems to me that he did realise the company's mistake. It is suggested that it would be inconceivable for an official of Mr. Smith's position, if he did realise the company's mistake, to stand by without bringing it to the company's notice; but after hearing Mr. Smith's evidence, and in particular his views on the propriety of inserting a new date for completion in the contract without communication with the company, I am unable to attribute any weight to this argument. It is also contended that Mr. Smith had no motive for acting as he did. No one suggests that he had any corrupt personal motive, but, as a loyal officer of the council he must have recognised that it would be extremely inconvenient if the contract were to go off, bearing in mind that work under it must begin by the end of March in order to qualify for the ministry grant.

As I have said, this issue appears to me to depend on the state of Mr. Smith's knowledge, and I do not feel myself concerned either to criticise, or to excuse, his conduct. I propose accordingly to order that the contract be rectified by the insertion of Sept. 30, 1955, in place of Sept. 30, 1956, as the date for completion.

Order accordingly.

Solicitors: *Sydney Redfern & Co.* (for the company); *Kingsford, Dorman & Co.* agents for *Clerk of the county council*, Leicester (for the council).

[*Reported by JENIFER SANDELL, Barrister-at-Law.*]

McCULLIE AND ANOTHER v. BUTLER.

[QUEEN'S BENCH DIVISION (Diplock, J., sitting with two assessors), May 10, 1961.]

Legal Aid—Costs—Taxation—Costs of negotiations between plaintiff's solicitors and defendant's insurers recoverable against fund—Scottish solicitors acting as agents not solicitors within Legal Aid and Advice Act, 1949—Proper method of taxing charges incurred by Scottish solicitors—Country solicitors' fee for attending trial in London—Costs of review of taxation—Legal Aid and Advice Act, 1949 (12 & 13 Geo. 6 c. 51), Sch. 3, para. 2 (3).

On a taxation between solicitor and client under the Legal Aid and Advice Act, 1949, arising out of an action for damages for personal injuries, the costs of negotiations between the assisted plaintiff's solicitors and insurers acting for the defendant are properly recoverable against the legal aid fund (see p. 555, letter G, post).

Wylie v. Bartlett (Dec. 14, 1960, unreported) followed.

Scottish solicitors employed to perform services in Scotland in relation to litigation in England and Wales are not solicitors within the meaning of the Legal Aid and Advice Act, 1949, and, accordingly, para. 2 (3) of Sch. 3 to the Act of 1949* does not apply to them, just as it does not apply to any other foreign agent. It follows that for the purposes of taxation, charges incurred by or paid to Scottish law agents are properly taxable as disbursements in the ordinary course, and in the case of a taxation under the Legal Aid and Advice Act, 1949, such charges should be included, with detailed particulars, as disbursements in the bill of costs and should not be included in the item "Instructions for Brief", where they would be subject, under the Act, to a reduction of fifteen per cent. (see p. 556, letters A to E, post). For the convenience of the taxing master in determining the proper rate of charge for the services of a foreign agent the bill of costs should include a detailed statement of the circumstances requiring those services and a detailed charge for the individual items (see p. 556, letter E, post).

A charge for the personal attendance of country solicitors at a trial in London is only allowed in special circumstances; in the present case, however, leading counsel having advised that the country solicitor should be present, it was proper on a taxation under the Legal Aid and Advice Act, 1949, to allow the fee for the attendance (see p. 557, letter F, post).

The costs of bringing in objections under R.S.C., Ord. 65, r. 27 (39)† were allowable on a taxation under the Legal Aid and Advice Act, 1949 (see p. 558, letter B, post).

Sutton v. Sears ([1959] 3 All E.R. 545) followed.

The applicants should have their costs of the review of taxation (see p. 558, letter G, post).

[As to remuneration of solicitors, taxation of costs and review of taxation under the Legal Aid and Advice Act, 1949, see 30 HALSBURY'S LAWS (3rd Edn.) 526, para. 997.

For the Legal Aid and Advice Act, 1949, Sch. 3, para. 2 (3), see 18 HALSBURY'S STATUTES (2nd Edn.) 566.]

Cases referred to:

Rolph v. Marston Valley Brick Co., Ltd., [1956] 2 All E.R. 50; [1956] 2 Q.B. 18; [1956] 2 W.L.R. 929; 3rd Digest Supp.

Sutton v. Sears, [1959] 3 All E.R. 545; [1960] 2 Q.B. 97; [1959] 3 W.L.R. 791; 3rd Digest Supp.

Wylie v. Bartlett, (Dec. 14, 1960), unreported.

* Paragraph 2 (3) of Sch. 3 is printed at p. 556, letter B, post.

† R.S.C., Ord. 65, has now been revoked (with certain exceptions) by the Supreme Court Costs Rules, 1959, and replaced by the code of rules set out therein; see footnote (5) p. 558, post.

Summons to review taxation.

By this summons, dated Mar. 6, 1961, taken out under r. 35 (3) of the Supreme Court Costs Rules, 1959, the plaintiff's solicitors (referred to hereafter as "the applicants"), in an action brought in the High Court, applied to DIPLOCK, J., sitting in chambers, for an order reviewing the taxation under the Legal Aid and Advice Act, 1949*, of the plaintiff's costs of the action and of an appeal to the Court of Appeal. Pursuant to reg. 21 of the Legal Aid (General) Regulations, 1960 (S.I. 1960 No. 408), the Lord Chancellor appointed a solicitor, who appeared by counsel, to intervene in the review. As the review raised questions of general importance the application was adjourned into open court for judgment. The facts, the items under review, and the taxing master's answers to the applicants' objections to the taxation of those items are referred to in the judgment.

E. P. Wallis-Jones for the applicants.

Brian T. Neill for the intervening solicitor.

DIPLOCK, J.: It is necessary by way of introduction to say a word or two about the nature of the action. The infant plaintiff sustained personal injuries in Hampshire, I think in 1952, when she was a child of some two and a half years. By the time when the action was brought and the civil aid certificate issued to the applicants in this review, who are solicitors carrying on their profession in Farnham, the infant plaintiff and her parents had moved to Scotland, and, accordingly, it was necessary that instructions should be got from her and particularly from her parents, in that country. The action was heard in London before DONOVAN, J., and, on May 16, 1958, he gave judgment for the defendant. There followed an appeal to the Court of Appeal in London which, on Mar. 18, 1959, upheld the judgment of DONOVAN, J., dismissing the action.

The first matter with which I am concerned relates to the five items in the bill of costs dealing with negotiations which proved to be abortive, which took place between the plaintiff's solicitors and the insurers of the defendant. The learned taxing master in the taxation which took place in the summer of 1960 disallowed those costs on the grounds that the defendant's insurers were not parties to the action. In an earlier case, which I decided in chambers in December of this year, called *Wylie v. Bartlett* (1), I held that the costs of such negotiations were properly recoverable out of the fund (2) under the Legal Aid and Advice Act, 1949. It seems to me that such negotiations are invaluable in the interests of the client and, indeed, in the interests of the legal aid fund for, as everyone knows, in a number of cases the result of such negotiations is a settlement of the action and the avoidance of the incurring of costs. I, accordingly, following my decision in chambers in *Wylie v. Bartlett* (1), hold that the costs of these negotiations are properly recoverable. No question arises as to their quantum and I accordingly allow the objections in respect of those items.

The next matter, which raises a question of principle, relates to the services performed by the firm of solicitors in Scotland. As I have said, at the time the action began the plaintiff and her parents were resident in Scotland and it therefore became necessary and proper for the applicants to instruct agents in Scotland to interview the plaintiff, her parents and other witnesses, and to assist in taking instructions and the like. It is desirable that I should state what the position of Scottish law agents is when they are employed for the purposes of performing services in Scotland in relation to litigation which takes place in England and Wales. Scottish solicitors are, for the purposes of the

* The Legal Aid (General) Regulations, 1950 (S.I. 1950 No. 1359), reg. 18 (3) (b), as substituted by S.I. 1954 No. 166, reg. 27, provides that where judgment is given in proceedings to which an assisted person is a party the court must order taxation of the costs of the assisted person as between solicitor and client in accordance with Sch. 3 to the Legal Aid and Advice Act, 1949. (1) December 14, 1960, unreported.

(2) I.e., the fund set up under s. 9 of the Legal Aid and Advice Act, 1949, to meet the expenses of providing legal aid and advice under the Act.

Act of 1949, in no different position from other foreign lawyers or from other foreign professional or ordinary agents who are employed for the purpose of preparing litigation in this country. They are not solicitors within the meaning of that expression in the Legal Aid and Advice Act, 1949, which relates only to legal aid and advice in England and Wales. Accordingly, para. 2 (3) of Sch. 3 to this Act, which provides:

“Where a solicitor has acted as agent for another, the sums allowed under the foregoing provisions of this paragraph shall be the aggregate amount allowed them, but may be divided between them as they may agree”,

has no application to Scottish solicitors or to any other foreign lawyer. It relates only to the ordinary agency between solicitors of the Supreme Court for this country. It follows, therefore, that a Scottish solicitor employed in the circumstances in which the Scottish solicitors were employed in this case must be treated, for the purposes of taxation, simply as a foreign agent and the charges incurred by him and paid to him are charges properly taxable as disbursements in the ordinary course. It may be that it does not have much practical consequence whether they are in fact put into the item of “Instructions for Brief”, or into the detailed particulars of disbursements. But in the case where there is taxation under the Legal Aid and Advice Act, 1949, the items “Instructions for Brief” are subject to a reduction of fifteen per cent. (3) and it is obviously desirable, therefore, that they should be properly charged as disbursements where they would not be subject to that reduction. As in the case of other foreign agents, the proper amount to be allowed for disbursements is the proper rate of charge in the country concerned, in this case Scotland, for the performance of the necessary services through the agent employed. To avoid any difficulty for the taxing master in determining what is the proper rate of charge for services, it seems to me to be very desirable that when an item of this kind is included in the bill of costs there should be a detailed statement of the circumstances which required the services of the foreign lawyer or, in this case, the Scottish solicitor, and that there should be a detailed charge for the individual items. In the present case the learned master disallowed any claim for disbursements in respect of the bill of costs of the Scottish solicitors, which amounted to £176 7s. 3d. But he made some allowance in respect of the disbursements which he regarded as properly incurred in respect of services under the general item “Instructions for Brief”, which he allowed at two hundred guineas. As I have said, I think that is not the correct way of dealing with an item of this kind, and that it should be dealt with as disbursements.

As regards quantum, the position is a little complicated by the fact that the Scottish solicitors, and indeed the applicants in this case, apparently regarded their position as being the principals, of whom the applicants were the agent, which is a complete reversal of the real situation. Accordingly, the Scottish solicitors rendered their bill to the next friend of the plaintiff and on reading their bill it is quite apparent that they were putting in an ordinary bill as if they were solicitors having conduct of the action and were not acting merely as agents for the applicants for the services required to be done by the professional agent in Scotland. I might illustrate that by referring to one or two items. One minor item is a charge for “Writing you”—that is to say, the father of the infant plaintiff—

“we have now had a report from our Farnham correspondents on what took place at the trial and as to the point of law in doubt: suggesting that it might be a nice gesture of you and Mrs. McCullie to write a short note of appreciation to the counsel.”

Quite plainly that is an item, charged at 7s. 6d., which is not recoverable by the

(3) See para. 2 (1) of Sch. 3 to the Legal Aid and Advice Act, 1949.

A Scottish solicitors. Then there is another item, a large item, at the end corresponding to an item "Instructions for Brief" in which they claim

"for very considerable time expended in the study and consideration of the issue and matters which arise from time to time, and the evidence of fact, medical evidence and the law involved",

B a law which so far as they were concerned was foreign law. It is quite evident, therefore, that there is a number of items in that account which are quite inappropriate to the proper position of the Scottish solicitors in this case, namely professional agents for doing in Scotland those things which were reasonable and necessary for the preparation of the case. Having looked at the very detailed items in the bill with the great assistance of the learned assessors who have been sitting with me, I have come to the conclusion that a proper figure for their charges, that is to say, limited to the services which it was reasonable and necessary for them to perform as agents in Scotland for the applicants, is one hundred guineas. I propose, therefore, allowing as part of the disbursements in respect of the accounts of Messrs. Miller and Mackay the sum of £105.

D Doing that makes it necessary to re-consider the item "Instructions for Brief" which the learned master allowed at two hundred guineas on the basis that he included charges in respect of disbursements for services performed by Messrs. Miller and Mackay. Having regard to the length, nature and gravity of the case, I think that the proper figure for "Instructions for Brief", now that Messrs. Miller and Mackay's services are dealt with by a separate item, to which I have referred, is 175 guineas.

E There remain three small items which may be considered together, namely, the expense for fees and attendance at the trial in London by the partner of the applicants. The general rule as to the right of the country solicitors to charge for personal attendance in London at a trial in London is that it is only allowed in very special cases (4). The question is, is this an item which should be allowed in this particular case? My own view is that this is very much a border-line case, but I have been informed that leading counsel advised that the country solicitor should be present at the trial. In the light of that, it seems to me to be proper in the case of a legal aid taxation to allow that fee. However, there is another related item, and that is the attendance on the defendant's solicitors in London by the partner of the applicants, the country solicitors. The learned master disallowed that item on the basis that the matters dealt with at the attendance are normally dealt with by the London agent and I see no reason to interfere with that discretion of the master. No reason has been advanced why that attendance should not quite reasonably and properly have been done by the London agents.

G The last item with which I have to deal is a small item of £6 for drawing the bill of costs and copy for taxation which the learned master allowed at £2. H I think that the learned master must have meant £4 and not £2, and I propose to allow that objection up to the amount of £4. The matter arose in this way. The £6 represents the costs of drawing not only the applicants' own bill of costs but also the bill of costs of the Scottish solicitors. Again, I think that arises out of a misconception of the position of the Scottish solicitors to which I have already referred. It seems to me quite plain that the persons entitled to charge I for drawing up their bill, if they are entitled to charge at all, must be the Scottish solicitors themselves. They would be entitled to recover that against the English solicitors who themselves, if it is a proper charge, can recover it as a disbursement. No charge was made by the Scottish solicitors for that and, in so far as the applicants claim the costs of drawing up the Scottish solicitors' bill of costs, that cannot be allowed.

There is one final matter which arises on this review. The learned master

(4) See 30 HALSBURY'S LAWS (3rd Edn.) 434, para. 811.

refused the applicants their costs of bringing in the objections. Those objections were brought in under the old rule, which has since been amended (5) and there is a conflict of authority in courts of first instance whether or not these costs are allowable. In *Rolph v. Marston Valley Brick Co., Ltd.* (6) DEVLIN, J., came to the conclusion that he had no jurisdiction to allow them, but in *Sutton v. Sears* (7) MCNAIR, J., after considering the reasoning of DEVLIN, J., came to the contrary conclusion. I have to choose which I prefer in this difference of opinion among my brethren. I prefer the reasoning of MCNAIR, J., that this particular item of costs is allowable and should be allowed. I am comforted in reaching my choice between the rival views of two learned judges, for whose opinion I have the highest respect, by the fact that the rule has now been altered (5) and this probably will be the last occasion on which this point can arise.

I can deal with the next matter very shortly. This is the objection in relation to the taxation of the bill of costs in the Court of Appeal. There are only three items. The first item claimed for is: "Fee in relation to attending and correspondence etc." at twenty guineas. The learned master allowed one guinea on the ground that "A general instructions item was not allowed under Appendix N (8) on appeal, unless further evidence called". It seems to me the learned master rightly approached the question of general instructions, and, accordingly, I do not propose to alter his decision on that.

The other two items relate again to the Scottish solicitors. There is a claim for £10 ls., being the costs of the Scottish solicitors in relation to the appeal. Counsel for the applicants concedes that the earlier items in that bill were before the civil aid certificate and cannot be recovered. So far as the other items are concerned, they seem to me to be items which are not allowable because they were not reasonably necessary for the appeal. Indeed one of them is "Writing to Mr. McCullie reporting the result of the appeal and sending a full report with indorsement on counsel's brief". All the items in that bill ought to have been done and could have been done by the applicants themselves, and there was no need to employ the Scottish agents for that purpose. Therefore, I allow nothing in respect of that. The third item which is related to it is two guineas for a letter to Messrs. Miller and Mackay reporting the result of the appeal. That is not a proper item.

Consequently, I allow the appeal to the extent that I have indicated as regards the costs of the action and disallow the objections in the taxation on the appeal.

This review comes under the new rules (9). I think that the applicants are entitled to their costs whatever I say because they are authorised under the appropriate rules (10) to apply for this review. If they are not so entitled to them, I say that they can have their costs of this review out of the legal aid fund.

Order accordingly.

Solicitors: *Graham Page & Co.*, agents for *Potter, Crundwell & Bridge*, Farnham (for the applicants); *Joynton-Hicks & Co.* (for the intervening solicitor).

[Reported by WENDY SHOCKETT, Barrister-at-Law.]

(5) The old rule was R.S.C., Ord. 65, r. 27 (39). Order 65 (except certain rules relating to security for costs) has now been revoked and replaced by the Rules of the Supreme Court (No. 3), 1959 (S.I. 1959 No. 1958), Sch. 2 of which contains the Supreme Court Costs Rules, 1959, r. 33 (3) of which provides for bringing in objections to a taxation. Appendix 2 to the Rules of 1959 sets out the new scale of costs and under Part 6, item 40, the scale of costs for drawing objections to a taxation is set out.

(6) [1956] 2 All E.R. 50; [1956] 2 Q.B. 18.

(7) [1959] 3 All E.R. 545; [1960] 2 Q.B. 97.

(8) Viz., Appendix N to the Rules of the Supreme Court which has now been revoked and replaced in the new code of rules set out in the Supreme Court Costs Rules, 1959.

(9) Viz., r. 35 of the Supreme Court Costs Rules, 1959, which came into force on Jan. 1, 1960.

(10) Viz., the Legal Aid (General) Regulations, 1960 (S.I. 1960 No. 408), reg. 21 (2).

A

CLABON v. CLABON.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Baker, J.), April 17, 18, 1961.]

B

Magistrates—Husband and wife—Appeal—Infant respondent—Service on infant respondent—No guardian ad litem—Infant respondent represented by solicitor and counsel—Jurisdiction of Divisional Court to proceed with appeal—Matrimonial Causes Rules, 1957 (S.I. 1957 No. 619), r. 66 (11), as substituted by Matrimonial Causes (Amendment) (No. 2) Rules, 1960 (S.I. 1960 No. 1261).

C

During the course of the hearing of an appeal by the husband against a maintenance order made by a magistrates' court in the wife's favour, it appeared that although the wife was still under twenty-one years of age, the notice of appeal had been served on her personally and that no guardian ad litem had been appointed. The wife was, however, represented on the appeal by solicitor and counsel, who supported the husband's application that the court should continue to hear the appeal, notwithstanding the procedural defects.

D

Held: (i) the court would exercise its power under the Matrimonial Causes Rules, 1957, r. 66 (11), and order that service of the notice of appeal on the wife personally should be deemed to have been proper service.

(ii) the court had jurisdiction, which it would exercise in the present case, to proceed without the appointment of a guardian ad litem.

Levy v. Levy ([1957] 1 All E.R. 478) applied.

E

[As to service on an infant, see 12 HALSBURY'S LAWS (3rd Edn.) 325, para. 662, note (i); and for cases on the subject, see 3rd DIGEST Supp.]

Cases referred to:

Gore-Booth v. Gore-Booth, [1953] 2 All E.R. 1000; [1954] P. 1; [1953] 3 W.L.R. 602; 3rd Digest Supp.

F

Levy v. Levy, [1957] 1 All E.R. 478; 121 J.P. 128; [1957] 1 W.L.R. 369; 3rd Digest Supp.

Stanga v. Stanga, [1954] 2 All E.R. 16; [1954] P. 10; [1953] 3 W.L.R. 609; 3rd Digest Supp.

Appeal.

G

This was an appeal by the husband against an order of the justices for the petty sessional division of Strafforth and Tickhill Upper, in the West Riding of Yorkshire, adjudging him to have deserted the wife and ordering him to pay £2 10s. per week for her maintenance. In the course of the hearing of the appeal it became apparent that the wife was an infant, but that the notice of appeal had been served on her personally and that no guardian ad litem had been appointed. The case is reported solely on this point.

H

P. N. Garland for the husband.

M. P. Picard for the wife.

I

LORD MERRIMAN, P., in the course of his judgment, said: I must deal with a procedural point which, unfortunately, came to light rather late in the proceedings, but it is a serious one. It turns out that the wife is still an infant. I do not doubt that the rules about process in relation to infants cover an appeal from magistrates to the Divisional Court just as much as they cover the procedure in a divorce suit, although there are manifest differences, with which I will deal in a moment. There is authority for saying that it is so (1). Even if there were not authority I should be prepared to hold it so, because I have no doubt that the notice of appeal from magistrates is a document which requires to be served personally and if it is a document which requires to be served personally it brings into play, just as much as do the various stages in a

(1) *Levy v. Levy*, [1957] 1 All E.R. 478.

divorce suit, the provisions about service on an infant. Here there was nothing but personal service. There was no attempt to find the father or other guardian, or, failing anybody else, the person with whom she was living. She was not living with her husband at the time when she was served. I do not know whether it has been expressly stated with whom she was living, but it is plain that the service was defective. A

In those circumstances it is important to point out that there is a dispensing power in the rules. I am referring to, the Matrimonial Causes Rules, 1957, r. 66, which was substituted (2) for an earlier rule in that year and came into force on Nov. 1, 1960. After dealing in general terms with documents which are required to be served personally in the case of an infant, the rule has this dispensing clause: B

“(11) Notwithstanding anything in the last foregoing paragraph the court may order that a document which has been, or is to be served, on the person under disability or on a person other than a person mentioned in that paragraph shall be deemed to be duly served on the person under disability.” C

Application was made to us to exercise this dispensing power.

Seeing that the wife is represented here by solicitors and experienced counsel, who concurred in the view that the dispensing power should be used, we felt ourselves able to do so; but it does not settle the whole question. There remains the question whether, in spite of putting the mistaken service in order, there ought to have been a guardian ad litem appointed. In that respect, at any rate, a Divisional Court appeal from magistrates does differ procedurally from service in a divorce suit on a respondent infant wife, for it is plainly necessary in the divorce suit that there should be a guardian ad litem because the infant has to take various procedural steps in order that she should ultimately be before the court, and expense is incurred at each stage; there is, therefore, a clear provision of the rules that a guardian should be appointed. I am not saying that a guardian ad litem is neither necessary nor desirable in a Divisional Court appeal, but manifestly there is not the same urgency for one because, when once the notice of appeal has been served and we have allowed it to stand as being deemed to be served properly, all that the respondent to the appeal has to do is to come here and ensure that her case is heard. Again we have been invited, if not pressed, by counsel for the infant not to incur the expense of setting matters aside and beginning all over again with a guardian ad litem when, in fact, she is fully and properly advised. D E F

I think that, although it perhaps does not go the whole way, *Levy v. Levy* (3), a decision of COLLINGWOOD, J., and myself, is sufficient to enable us to proceed, having put the service right. At any rate, we have been prepared to go on, without holding up the proceedings in order that a guardian ad litem may be appointed and proceeding afresh. If we are wrong, that is our fault, but I think that we have the power to do so. G H

BAKER, J., in the course of his judgment, said: In conclusion I want to say a word about the problem of a guardian ad litem. Having at the invitation of the parties used the dispensing power to remedy the defective service in the present case, the question arose whether this court had jurisdiction to go on with the hearing without the appointment of a guardian ad litem for the wife, who is still under twenty-one. I am not saying that a guardian ad litem is unnecessary in this court—far from it. But when one looks at the decision of this court in *Levy v. Levy* (3), to which LORD MERRIMAN, P., has referred, it seems to me that it is possible for this court to hear an appropriate case without the appointment of a guardian ad litem. I notice that the heading of *Levy v. Levy* (3) is “*Levy (by her next friend) v. Levy*” and I do not read that case as I

(2) By the Matrimonial Causes (Amendment) (No. 2) Rules, 1960 (S.I. 1960 No. 1261).
(3) [1957] 1 All E.R. 478.

indicating anything more than that a civil aid certificate had been granted to the respondent to defend through his father and next friend, David Levy. It does not appear that the next friend was ever a party to the proceedings.

The cases referred to in *Levy v. Levy* (4), namely, *Gore-Booth v. Gore-Booth* (5) and *Stanga v. Stanga* (6) were cases in which action had been completed. In *Stanga v. Stanga* (6), which was a case in the undefended list, a decree nisi of divorce had been granted without the appointment of a guardian ad litem. That was an entirely different case. We were urged to proceed with this case without the appointment of a guardian ad litem in order to save costs and time. To that we have acceded, and in my view there is jurisdiction in this court so to do.

Dispensation with service; hearing continued without appointing guardian ad litem.

Solicitors: *Thomas Boyd Whyte*, Bexley Heath (for the husband); *Jackson & Jackson*, agents for *J. W. Fenoughty, Dunn & Co.*, Rotherham, Yorks (for the wife).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

YAGER v. MUSA.

[COURT OF APPEAL (Devlin and Davies, L.JJ.), May 10, 1961.]

Contempt of Court—Committal—Breach of injunction—Successive breaches and successive committals—Period of imprisonment—Order for release at future date—Form of order not to be such as to preclude prior application to court.

On Sept. 29, 1959, the plaintiff was granted an injunction restraining the defendant from causing a nuisance or annoyance to him or his family. On Dec. 1, 1959, the defendant was committed to prison for contempt of court in disobeying the injunction. On Mar. 8, 1960, he was released from prison after expressing his regret and undertaking to refrain from further disobedience, but on May 31, 1960, he was again committed for contempt, having again disobeyed the injunction. He was released on Nov. 1, 1960, after again expressing his regret and giving an undertaking in regard to his future conduct, but on Dec. 6, 1960, he was committed for contempt for the third time. On Apr. 18, 1961, an application by the defendant to be released from prison forthwith came before the court, and the judge made an order that "the application be adjourned generally with liberty to restore and be not restored to the list before the expiration of three months from the date hereof". On an appeal by the defendant to the Court of Appeal,

Held: (i) the order of the judge would be varied so as to specify a date on which the defendant would be released, since, unless an applicant for release from prison had been guilty of an abuse of the process of the court, the court should not make an order that might prevent him from having access to the court (see p. 564, letters B and D, post).

(ii) the period of imprisonment which the defendant should serve should be substantially longer than that which he had served on his second committal, and, accordingly, an order would be made for him to be released on Aug. 7, 1961, viz., after he had served a term of eight months.

Observations on length of periods of imprisonment for repeated disobedience of orders of the court (see p. 563, letter I, to p. 564, letter B, post).

[As to an order for committal for contempt of court, see 8 HALSBURY'S LAWS (3rd Edn.) 40, para. 69.]

Appeal.

This was an appeal by the defendant from an order made by HOWARD, J.,

(4) [1957] 1 All E.R. 478.

(5) [1953] 2 All E.R. 1000; [1954] P. 1.

(6) [1954] 2 All E.R. 16; [1954] P. 10.

in chambers, on Apr. 18, 1961, on an application by the defendant to be released from Brixton Prison where he had been committed, pursuant to an order dated Dec. 6, 1960, for contempt of court in disobeying an injunction granted to the plaintiff against him by an order dated Sept. 29, 1959. A

The facts are stated in the judgment of *DEVLIN, L.J.*

Neil Butter for the defendant.

I. R. Carmichael for the plaintiff. B

DEVLIN, L.J.: In this case counsel appeals from an order made by *HOWARD, J.*, in chambers in relation to the imprisonment for contempt of court of *Brima Musa*, who was the defendant in an action and was committed for contempt of court for breach of an injunction which was made in the course of the action. C

It is a very unfortunate case. *Mr. Musa*, a coloured man, comes from *Sierra Leone* and some years ago, I think in 1958, he obtained employment with the plaintiff and he formed an obsession for the plaintiff's daughter. All that I need say about it is that it was wholly unreciprocated and in no way encouraged by her. He began to pursue her and to make a nuisance of himself, not only to her but also to the plaintiff and his family. By 1959 he had already got into trouble as the result of that. He appeared before magistrates for offences that arose out of a disturbance which he created outside the house and for assault, and was sentenced to a term of imprisonment. That, unfortunately, did not stop his behaviour and eventually on Sept. 9, 1959, the plaintiff issued a writ asking for an injunction D

"... to restrain the defendant by himself his servants agents or otherwise from causing a nuisance and/or annoyance to the plaintiff or his family by telephone or by calling on them or by writing to them." E

Affidavits have been put in which describe the nature of the nuisance: the defendant was ringing up on the telephone and appearing outside the house and so on. I need not go into the matter in detail. The consequence was that on Sept. 29, 1959, an injunction was granted in the terms of the writ. He disobeyed it, and on Dec. 1, 1959, he was committed to prison for his contempt in disobeying the injunction. He was released from that term of imprisonment, after about three months, on Mar. 8, 1960, but he continued with the same course of action and was committed for contempt of court again on May 31, 1960. He was released on that occasion, after serving five months' imprisonment, on Nov. 1, 1960. He then returned again to the same sort of conduct and was committed for a third time to prison for contempt of court on Dec. 6, 1960. It was an application to be released from that imprisonment which was brought before *HOWARD, J.*, in chambers when he made the order which is under appeal. By the order which was made on Apr. 18, 1961, it was ordered F

"... that the application be adjourned generally with liberty to restore and be not restored to the list before the expiration of three months from the date hereof." G

On the previous occasions on which the defendant has been released, he made an affidavit in which he expressed his regret for his disobedience and gave solemn undertakings that he would refrain from disobedience in the future, but he has broken them. On his appearance before the learned judge, he was not in a position to do more than he had done before, namely, to give the same sort of apology and undertaking. There has been some change in circumstances. In the first place, the plaintiff's daughter whom the defendant was molesting has married and has moved to another address. It is urged on the defendant's behalf that that may well be some sort of guarantee that his pursuit of her will end because he will not be able to find out what her address is. On the other H

I

A hand, it is pointed out that it may be that his fixation or obsession, whatever it may be, will be all the more forceful, and that he may be tempted to some violent action towards either the daughter or her husband. He was interviewed while in prison by the medical officer who could find no evidence of any sort of mental disorder. The medical officer said that the defendant told him that he would make no further attempt to contact or molest the plaintiff's household, but he also said that that was qualified by the defendant's saying that the plaintiff must not interfere with him. The interference which the defendant resents is apparently the fact that, when approached by other persons prepared to employ the defendant, the plaintiff would not give him a very glowing reference, which can well be understood in the circumstances. If that is the sort of thing that is regarded as interference and if it is what the defendant had in mind when he said to the prison governor (because we have a report from the prison governor) that he would keep well away from the plaintiff's family, but that, if they interfered with him, he might lose control of himself, then it is plainly something which has to be seriously considered by the court which is responsible for setting him at liberty. There was also evidence before the learned judge that in January the defendant spoke to one of the prison officers and said specifically that he would kill the plaintiff's daughter and her relatives, and that, since then, the defendant has had moods in which he has repeated threats of that sort in a vaguer way. Unfortunately there is nothing that can be done to help the defendant, as there might have been if he had had some friends or relatives in this country who were prepared to look after him and to be responsible to some extent for his behaviour. He has no friends here; he will not consider returning to Sierra Leone in any circumstances, notwithstanding that the plaintiff has, we understand, earlier offered to pay for him to return there. We were told by counsel for the defendant, who said everything that could possibly be said on behalf of the defendant, that the plaintiff had throughout behaved in the most considerate manner possible, notwithstanding the great molestation and annoyance to which he and his family were subjected.

F The question, then, with which the learned judge was faced was, what was he to do? The application which was made to him, and which has been renewed to us, that the defendant should be released forthwith, i.e., after he had served some four or five months in prison, hardly longer than his previous term, was declined by the learned judge, and it is not, I think, one to which we could properly accede. The question then is, what is to be done with the defendant?

G It is a particularly difficult case, because counsel for the defendant is right when he says that there is no way of testing the sincerity of the defendant's further protestations unless he is allowed out; no one can take them at their face value, having regard to the fact that similar protestations have twice been ignored in the past, but, on the other hand, he cannot be kept in prison indefinitely merely because there is a danger that if he is released he may commit some further act of disobedience. I see no way of dealing with a man of this sort except in the way in which a criminal court deals with a persistent offender such as a housebreaker when, after a preliminary warning or probation, it has to impose a sentence of imprisonment. If, immediately after he comes out of prison, the housebreaker, notwithstanding that he said he was going to turn over a new leaf, immediately goes back to housebreaking, a longer sentence of imprisonment has to be imposed, and so on. The court has to balance the need for protecting the public from his molestations or depredations against the principle that, subject to that need, no man's liberty should be taken away unnecessarily. In my judgment, the period of imprisonment which the defendant should now serve should be one—this being his third period—which is substantially longer than the second one, which evidently was not sufficient. If, when he is released after that, he gives any further evidence of disobedience, the inevitable result will be that he will be brought back before this court again and yet a longer period will be imposed on him, and, if that is not sufficient,

then the court will have to impose a still longer period, which may amount to something that will keep him in prison for a very long time indeed. That is the only way in which, against irrationality of this sort which falls short of mental disorder, the court can discharge its duty of protecting members of the public who are molested by men of this sort so as to give them freedom to live out their lives without suspense, annoyance and anxiety. A

The order which the learned judge made in this case was an order that the application should not be restored until three months had expired from Apr. 18. I think that that order is not in a form that is desirable for the court to make. Counsel for the defendant urged objections to it which, I think, are well founded. On principle, it is not desirable that the court should make any order which denies the person against whom it is made from having access to the court, at any rate unless he is shown clearly to have been guilty of an abuse of the process of the court. There is no evidence of that in this case. I think that what the learned judge probably had in mind was that, if an application was made on July 18, 1961, it would come on in due course and be granted, and a release would be made perhaps in early August after the defendant had served eight months, which would compare with his previous terms of three and five months. It is not disputed that that same result could have been achieved by the court simply ordering that the defendant should remain in custody until a fixed date and thereafter be released or that he should be released on such and such a date in the future. That is an order that could have been made in the first instance, and it is one which, I think, it is well within the power of the court to make on an application for release if the court considers that an immediate release is not desirable but that some termination should be put to the period which the applicant has to serve. I have myself seriously considered whether the period of eight months would be long enough, having regard to the fact that this is the third application and that there is no evidence that on his release the defendant will behave any better than he has done before. I think, however, that we ought to have regard to the fact that the learned judge, as we were told, not merely saw the defendant in chambers, but spoke to him himself and evidently formed his view as to what was the best thing to do. I do not think, therefore, that we ought to interfere substantially with the view which the learned judge took. The only thing that, in my judgment, we should do is to vary the order by substituting for the order that the application be adjourned generally, with liberty to restore, an order that the defendant be released on Aug. 7, 1961. B C D E F G

DAVIES, L.J.: I agree.

Order varied accordingly.

Solicitors: *Official Solicitor* (for the defendant); *Offenbach & Co.* (for the plaintiff).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

Re NARANJAN SINGH.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Salmon and Edmund Davies, JJ.), February 24, 28, May 5, 1961.]

Extradition—Discharge of fugitive—Discretion—Application for return of fugitive made in good faith—Circumstances rendering it unjust or oppressive to return the fugitive—Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), s. 10.

On the true construction of s. 10 of the Fugitive Offenders Act, 1881, which confers on a superior court a discretion where “by reason of the trivial nature of the case, or by reason of the application for the return of a fugitive not being made in good faith in the interests of justice or otherwise, it would . . . be unjust or oppressive or too severe a punishment to return the fugitive . . .”, a wide construction should be given to the words “or otherwise”; and accordingly, apart from cases of a trivial nature, the court's discretion to discharge a fugitive can be exercised in any case where the return of the fugitive would be unjust etc., and is not confined to cases where the application appears not to be “made in good faith”.

Re Henderson, Henderson v. Secretary of State for Home Affairs ([1950] 1 All E.R. 283) considered.

[As to discharge of fugitive offenders by order of a superior court, see 16 HALSBURY'S LAWS (3rd Edn.) 589, para. 1225; and for cases on the subject, see 24 DIGEST (Repl.) 1012-1015, 161-175.]

For the Fugitive Offenders Act, 1881, s. 10, see 9 HALSBURY'S STATUTES (2nd Edn.) 901.]

Cases referred to:

Henderson, Re, Henderson v. Secretary of State for Home Affairs, [1950] 1 All E.R. 283; 24 Digest (Repl.) 1014, 175.

R. v. Brixton Prison Governor, Ex p. Campbell, (July 12, 1956), “The Times”.

R. v. Brixton Prison Governor, Ex p. McCheyne, [1951] 1 T.L.R. 1155; 24 Digest (Repl.) 1012, 164.

Waite, Re, (Feb. 22, 1921), “The Times”.

Motion.

Naranjan Singh, the applicant, was committed to Brixton Prison by SIR ROBERT BLUNDELL, the Chief Metropolitan Magistrate, at Bow Street, on Feb. 9, 1961, to await return to India on a warrant, sent over from India, charging offences contrary to art. 420 of the Indian Penal Code. This application for habeas corpus, alternatively for discharge under s. 10 of the Fugitive Offenders Act, 1881*, came before the Queen's Bench Divisional Court ex parte on Feb. 24, 1961, when the court adjourned the application for all parties to be represented. On Feb. 28, 1961, on the application of the Government of India, the hearing was adjourned for two months to enable affidavits to be filed. The application then came on for hearing on May 5, 1961. The facts are stated in the judgment of LORD PARKER, C.J.

B. L. Leary for the applicant.

J. M. G. Griffith-Jones for the Governor of Brixton Prison.

T. O. Kellock for the Government of India.

LORD PARKER, C.J.: In these proceedings counsel moves on behalf of one Naranjan Singh, now detained in Her Majesty's Prison at Brixton, for an order of habeas corpus or, alternatively, for an order under s. 10 of the Fugitive Offenders Act, 1881. The applicant was committed to Brixton Prison by the Chief Magistrate on Feb. 9, 1961, he having been satisfied on a warrant and depositions duly authenticated which had been sent over from India that a prima

* The relevant part of s. 10 is printed at p. 567, letter D, post, in the judgment of LORD PARKER, C.J.

facie case had been made out against this applicant in respect of offences contrary to art. 420 of the Indian Penal Code. The alleged offences in this case were committed round about October, 1951, and their nature was as follows. The applicant was the managing director of a company called Public Pictures, Ltd., and he got a number of people, up to twenty-eight, to deposit sums in rupees as a condition of being taken into employment; the applicant in fact used that money without their authority in the purchase of shares in their names in the company, and thereafter dismissed them without paying them any salary. The offences in question are five in number, involving the equivalent in rupees of about £112. A B

In April, 1952, he came to this country. He says that he knew of no complaint having been made, but it is only right to say that from the depositions it does appear that a number of these people alleged that they complained to him, and indeed they did complain also to the Registrar of Companies, some thirty of them sending a written petition to the registrar on Nov. 12, 1951. Having come to this country he obtained employment at Ealing, where he worked for a company for two and a half years, and in March, 1956, he was joined by his wife and child whom he had left in India. After that, they moved to West Bromwich, where he purchased a house on mortgage and worked till September, 1960, in a rolled steel factory. His employers in that factory give him a glowing reference, saying that he is considered to be one of the best coloured workers ever to be employed by this firm, and they were sorry when he left of his own accord. In 1960 he left that job and came south to Southall in Middlesex, where he obtained work with the British Overseas Airways Corporation. Meanwhile, in 1956 he had surrendered his Indian passport and had applied for and obtained British nationality. This is the case of a man who, for whatever motive he left India in 1952, has a home and new life, which he has made for himself in this country. He has a wife and now three children with him. That is the position from his point of view. C D E

From the point of view of the Indian authorities, it appears that after the registrar had drawn the attention of the police to the petition that he had received on Nov. 12, 1951, certain steps were taken. It is only right to say that in my judgment everything that was done, making all allowances for the difficulties involved in India, was dilatory in the extreme. At any rate, the applicant had left the country before anything was done because the first record of anything is a report from the superintendent of police on Oct. 4, 1952. Thereafter, there was a long period of delay until the depositions were taken, apparently in the early part of 1956. It is said that there was difficulty in tracing the witnesses and their addresses, but it is difficult to believe that there was any really serious difficulty when, as I have said, there had been a written petition from these complainants to the Registrar of Companies. However, the depositions having been taken, they were not authenticated until 1958, and it was not until Dec. 4 that a warrant was issued. On Feb. 5, 1959, the signature on the warrant was authenticated, and then there was a delay of yet another year before the application was in fact made to the Chief Magistrate in London. Finally, to complete the dates, there was then an adjournment for further authentication until the Chief Magistrate indorsed the warrant on Mar. 3, 1960, and thereafter almost another year's delay before he was arrested on Feb. 12, 1961. F G H

The Government of India have supplied the court with affidavits seeking to explain the delay, and I should like to say at once that, of course, I entirely accept that the work involved inevitably caused some delay, and that I quite accept what is said in the affidavit that the Indian authorities are entirely sincere in the matter and that they intend to prosecute. At the same time I feel that this was a very simple case and, making allowances for all the difficulties involved, it is almost inconceivable that if due diligence had been exercised the matter could not have been dealt with at a very much earlier stage; but, be that as it may, I

A one thing is clear, and that is that this applicant, apart from the fact that he may have left India originally fearing some action, has done nothing but live perfectly openly under his own name in the circumstances which I have indicated. He is quite well known to the police under his proper name. His wife was living perfectly openly in India under her proper name before she came to this country in 1956. She was never questioned. She was never asked for photographs, and again she has done nothing to conceal the whereabouts of her husband.

B Pausing there, I feel that, if the discretion of this court is an unlimited discretion to do what in all the circumstances is just, it would in the particular circumstances of this case be unjust and oppressive for this man at this very late date, having made his home here and having started a new life here, to be returned for trial in India on these charges. Having regard to the delay, one has only to envisage the difficulties in which he would be in defending himself. While the courts there would no doubt take due account of the difficulties facing the applicant, it seems to me that the delay is of such a nature that this court can properly say that it would be unjust and oppressive for him to be forced to return.

D However, counsel for the Government of India has taken a point which has been, if I may so put it, in the offing ever since 1881, but has never as yet been effectively taken, namely, that the powers of this court under s. 10 are, on a true construction, very limited powers. Section 10 reads thus:

E “Where it is made to appear to a superior court that by reason of the trivial nature of the case, or by reason of the application for the return of a fugitive not being made in good faith in the interests of justice or otherwise, it would, having regard to the distance, to the facilities for communication, and to all the circumstances of the case, be unjust or oppressive or too severe a punishment to return the fugitive either at all or until the expiration of a certain period, such court . . .”

F may exercise its discretion in a certain way (1). The rival interpretations of this section concern the meaning in the context of the words “or otherwise” that I have read. The limited construction, and the one for which counsel for the Government of India contends, is that the words “or otherwise” are merely descriptive of the application which is not made in good faith. In other words, he would read it as “Where it is made to appear . . . that . . . by reason of the application for the return of a fugitive not being made in good faith either because it is not being made in the interests of justice or otherwise not in good faith”, and he points out that in so far as one is entitled to look at commas in an Act of Parliament, there is no comma, as one would otherwise expect, after the words “interests of justice”. That is the limited construction. The wider construction is that one should read it as if there was a comma after the words “interests of justice”, and that it would then mean that the court’s discretion should be exercised in any other case where it would, having regard to the distance, etc., be unjust and oppressive.

H As I have said, this point has been in the offing all these years, and there is no decision on it. What has happened, quite shortly, in the past is that in *Re Waite* (2), the attorney-general had made a submission favouring what I may call the wide construction. The court made no decision on it. In a case which followed, *Re Henderson, Henderson v. Secretary of State for Home Affairs* (3), the point was quite plainly before the court, but the intervening government in that case, which was again the Government of India, conceded for the purposes of that case that the wider construction was right, and the court proceeded on that wider construction, expressly saying that they were making no decision on the point of construction. Since then there have been

(1) Section 10 empowers the court, inter alia, to “discharge the fugitive, either absolutely or on bail . . .”

(2) (Feb. 22, 1921), “The Times”.

(3) [1950] 1 All E.R. 283.

several cases before this court; in particular, there was *R. v. Brixton Prison Governor, Ex p. Campbell* (4), in which an order was made under s. 10 of the Act of 1881, the court again, as I understand it, without argument, having, as they appear to have done, come to the conclusion that the wide construction was correct. I have not seen "The Times" newspaper report myself, but it is only right to say that it is not clear whether it was the triviality of the alleged offence which determined the decision or merely the matter of delay. At any rate, the court assumed that the wide construction was correct. The same was true in *R. v. Brixton Prison Governor, Ex p. McCheyne* (5), in which the court there went so far as to assume that the wide construction had been decided in *Re Henderson* (6) to be correct. In fact, however, the report in *Re Henderson* (6) did expressly reserve the point.

The position, therefore, is this, that in every case which has so far come before this court, the wide construction has either been conceded by the intervening government or has been accepted without argument by the court as the proper construction. For my part, I am quite satisfied that the wider construction is correct. In the first place—and this is approaching it on a broad basis—one would expect that the court would have a general discretion in all the circumstances of the case to do what is just. If the limited construction is correct, however, this court could only order the release of an applicant under the section on the ground of the triviality of the nature of the offence or on the basis that the application for the return of the prisoner was made in bad faith. It seems to me extraordinary that the powers of this court should be so limited. At any rate it is a consideration to bear in mind if there is any ambiguity of construction. Looking at it as a narrow point of construction, there are two matters which influence me. In the first instance, if the discretion can only be exercised in what I may call the trivial case or a case of bad faith, the words

"having regard to the distance, to the facilities for communication, and to all the circumstances of the case",

would seem to be quite inapt and meaningless. If the court is ordering release on the ground of bad faith, what do the other circumstances matter? What do the distances matter? What do the facilities for communication matter? Similarly, if it is the release of the prisoner because of the trivial nature of the offence. Finally, and again as a point of construction, if the limited construction is right, what is the need for the words "in the interests of justice or otherwise" as qualifying good faith? On the limited construction "or otherwise" is merely indicating something being done not in good faith yet in the interests of justice. Again, and it is really the same point, one asks oneself: can one think of a case in which an application is not being made in good faith which is not also being made otherwise than in the interests of justice? It seems to me that as a matter of construction the position is plain, and that even if there can be said to be an ambiguity the obvious purpose of this section would dictate that a wide construction should be given to it. Accordingly, holding as I do that under the section there is a wide discretion in the court, I would, as I have said, in the circumstances of the present case come to the conclusion that the applicant ought to be discharged absolutely.

SALMON, J.: I agree.

EDMUND DAVIES, J.: I also agree.

B. L. Leary applied for an order for costs against the Government of India. *T. O. Kellock*: In *Ex p. McCheyne* (5) there was no order, but there was in *Ex p. Campbell* (4). This is an application in which the applicant has to ask for the discretion of the court, he is coming to beg for something which in the normal course of events he would not be able to obtain. The Government of India

(4) (July 12, 1956), "The Times".

(6) [1950] 1 All E.R. 283.

(5) [1951] 1 T.L.R. 1155.

A is doing its duty in presenting the facts before your Lordships. It is a matter for the discretion of your Lordships' court, and your Lordships have indicated that the Government of India has acted in good faith, and they have acted equally in good faith in presenting this argument in the circumstances.

LORD PARKER, C.J.: We think that the applicant should have an order for costs against the Government of India.

Applicant discharged absolutely, with costs against the Government of India.

Solicitors: *Victor J. Lissack* (for the applicant); *Director of Public Prosecutions* (for the Governor of Brixton Prison); *T. L. Wilson & Co.* (for the Government of India).

[Reported by HENRY SUMMERFIELD, ESQ., Barrister-at-Law.]

R. v. TERRY.

[COURT OF CRIMINAL APPEAL (Lord Parker, C.J., Ashworth and Lawton, JJ.), May 8, 1961.]

Criminal Law—Murder—Capital murder—Diminished responsibility—Abnormality of mind—Summing-up—Explanation of defence of diminished responsibility to be given—Medical evidence to be analysed in case of conflict—Insufficient to hand transcript of voluminous medical evidence to jury—Homicide Act, 1957 (5 & 6 Eliz. 2 c. 11), s. 2 (1), (2).

The appellant, armed with a gun and ammunition, raided a bank with another man and made off with £1,000. During the course of the raid the appellant shot an employee of the bank, who died almost immediately of his injuries. The trial of the appellant on a charge of capital murder lasted eight days, of which the medical evidence took one and a half days and occupied one hundred pages of transcript. Two eminent psychiatrists called on behalf of the appellant testified to his suffering from abnormality of mind, the abnormality being that the appellant had the delusion of being possessed by another person (being motivated, it seemed, by the mind of Jack "Legs" Diamond, a Chicago gangster), or that the appellant was living in a dream world, induced by schizophrenia aggravated by drugs and that his ability to control his acts was substantially impaired. The psychiatrists spoke of a family history of epilepsy, but their opinions were founded in the main on what the appellant had told one or both of them, and they believed that he had not been shamming. Two doctors called on behalf of the Crown were emphatic that the appellant was sane, that he had been putting on an act for the benefit of the psychiatrists, and that he was shamming. In summing-up the trial judge referred without substantial explanation to the words of the Homicide Act, 1957; he put to the jury the issue whether the appellant had been shamming before his psychiatrist, and in his summing-up stated that he did not intend to analyse the medical evidence in detail but that the jury would be handed one copy of the transcript of the medical evidence (which was in fact the judge's copy that he had marked and some pages of which he had turned down), and that the jury could "study the whole thing and analyse it." After the jury had retired the judge recalled them and read out to them various passages in *Rose v. Reginam* and *R. v. Byrne*. The appellant was convicted. On appeal against conviction on the ground that the jury had been misdirected on the defence of diminished responsibility under s. 2 and that the medical evidence had not been summed up in detail,

Held: although a proper explanation of the terms of s. 2 (as interpreted in *R. v. Byrne* ([1960] 3 All E.R. 1)) ought to have been put before the jury, and although it was insufficient and bad practice to dispose of medical evidence merely by handing a transcript of it to the jury (see p. 574, letters B to E, post), yet in this case the sole issue for the jury was whether they accepted the medical evidence that the accused had not been shamming before his psychiatrists or accepted the medical evidence for the prosecution that he had been shamming; on that issue the summing-up of the trial judge had been unexceptionable and the Court of Criminal Appeal would not interfere with the conviction (see p. 575, letter H, post).

Rose v. Reginam ([1961] 1 All E.R. 859) considered and adopted.

Appeal dismissed.

[As to the defence of diminished responsibility, see SUPPLEMENT to 10 HALSBURY'S LAWS (3rd Edn.), para. 534A; and for cases on the subject, see 3rd DIGEST Supplement.

For the Homicide Act, 1957, s. 2, see 37 HALSBURY'S STATUTES (2nd Edn.) 174.]

Cases referred to:

R. v. Byrne, [1960] 3 All E.R. 1; [1960] 2 Q.B. 396; 44 Cr. App. Rep. 246; [1960] 3 W.L.R. 440; 3rd Digest Supp.

R. v. Spriggs, [1958] 1 All E.R. 300; [1958] 1 Q.B. 270; 42 Cr. App. Rep. 69; [1958] 2 W.L.R. 162; 3rd Digest Supp.

Rose v. Reginam, [1961] 1 All E.R. 859; [1961] 2 W.L.R. 506.

Appeal.

The appellant, Victor John Terry, was convicted at Lewes Assizes on Mar. 28, 1961, before STABLE, J., and a jury after a trial of eight days, of the capital murder of John Henry Pull on Nov. 10, 1960, and was sentenced to death. He appealed against his conviction on two main grounds—(i) that the judge failed to direct the jury adequately about the defence of accident, and (ii) that the judge misdirected the jury on the defence of diminished responsibility under s. 2 of the Homicide Act, 1957. The appellant was indicted with two youths, Hosier and Tucker, who were convicted of non-capital murder, and a girl called Salter who was convicted of being an accessory after the fact to murder. The facts were as follows. The killing was committed by the appellant in the course of a raid on a branch bank of Lloyds Bank, Ltd., at Worthing. The raid was made as the result of a carefully pre-arranged plan between the appellant and two other youths, Hosier and Tucker. They all lived in London, but the appellant had apparently worked in Worthing for a short time that year. On Nov. 9, 1960, the day before the raid, they bought a shot-gun and some ammunition for it at the suggestion of the shopkeeper. On the same night, Nov. 9, 1960, they took and drove away without the owner's consent a Wolseley car which was parked in a London street, and went to Worthing in it. They took the gun and ammunition with them and on the way the appellant loaded and fired the gun, saying that he wanted to try it. On Nov. 10, 1960, soon after the bank opened, about two minutes after ten o'clock, the three of them went to the bank in the car, and the appellant and Tucker went inside, whilst Hosier waited in the car. The appellant had the gun loaded and cocked with him at the time. There was a young cashier called Barker there. The two of them walked past him and down the passage to a space at the back where there was a safe, and it was at that moment that the deceased man, Pull, who had been in the cloak-room, emerged from the cloakroom carrying a kettle. Pull apparently had a slight mannerism in that when he was about to talk to anybody he would raise his hand shoulder high and on this occasion, faced with two strangers, and particularly the appellant, he apparently raised his hand and, on the evidence, he did actually touch the appellant. The appellant then appeared to draw

A back and to raise the gun. The gun was fired pointing slightly upwards and the full shot went into Pull's left eye. He fell to the ground and died shortly afterwards. The appellant and Tucker then turned to the young cashier and said something like: "Where is the money?", and they seized a bag containing over £1,000 in cash. They went out to the waiting car and drove away.

As regards the defence of accident the appellant, who did not go into the witness-box, had made a statement to the police in which he contended that Pull had grabbed the gun and that it had gone off. A girl, with whom the appellant had been associating and who was a co-prisoner, stated in evidence that the appellant had said to her that he had not intended to kill anybody—Pull had got hold of his gun and it went off. Tucker and Hosier both gave evidence, the former stating that the appellant said that it was Pull's fault and the latter that the appellant had said that Pull had got hold of the gun and wrestled with him, when it went off. At the same time, Barker, the cashier, as an eye-witness, testified that the appellant and Pull were never in contact at all. In his summing-up STABLE, J., did not refer to the fact that although there was no contact between Pull and the appellant at the moment that the gun was discharged, there had been contact a moment or two earlier. Nevertheless, it was emphasised in the summing-up that the onus of proof throughout was on the prosecution. The trial judge, having put to the jury the defence that the gun went off by accident, turned to the defence of diminished responsibility, viz., the contention that the appellant was mentally unbalanced, and at the material time was possessed by the spirit and mind of a deceased American gangster, Jack "Legs" Diamond. There was some evidence that his mental unbalance had been exaggerated by various factors, e.g., there was evidence of a family history of epilepsy, that he had had a disturbed childhood so that on one occasion his father advised him to consult a psychiatrist. Evidence was given by his associates in Worthing and London that for some months prior to November, 1960, he had been taking drugs, and that he was under the influence of drugs on Nov. 8, 1960, though his parents never noticed the symptoms. A witness spoke of his seeing a film portraying the life of Diamond, and of his frequent references to Diamond thereafter. The medical evidence was conflicting—two medical witnesses for the defence were firmly of the opinion that the appellant was not fully responsible for his acts (see p. 573, letters C to F, post), but two doctors called for the prosecution took the view that the appellant was quite sane and had deliberately tried to mislead them by building up a picture of mental abnormality. In his summing-up to the jury on the defence of diminished responsibility, STABLE, J., first explained the M'Naghten rules* and then read s. 2 (1) of the Homicide Act, 1957†, and said that what the section postulated was an abnormality of mind which arose "from a condition of arrested or retarded development of mind"—i.e., some one who had never grown up—"or any inherent causes or induced by disease or injury". His Lordship stated that no one had suggested that if the appellant had an abnormal mind it arose from a condition of arrested or retarded development, or that it arose from injury: what was suggested was that it was induced by disease and to some extent, perhaps, by drugs. On the medical evidence the judge told the jury that s. 2 of the Act provided that on a charge of murder it was for the defence to prove that the person charged was by virtue of the section not liable to be convicted of murder; that meant that the jury had to decide the matter on

* See (1843), 10 Cl. & Fin. at p. 210.

† Section 2, so far as material, provides: "(1) Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.

"(2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder."

the balance of probabilities, but did not mean that the defence had to prove the matter up to the hilt, as had the prosecution to prove the facts on which they relied. His Lordship then said that he was not going to attempt to analyse the three volumes of medical evidence—he would hand the transcripts of the shorthand notes to the jury to study at their leisure. He then summarised the medical evidence of Dr. Paterson and Dr. Brown for the defence (compare p. 573, letters C to F, post), and said that Dr. Paterson based his opinion that the appellant was suffering from schizophrenia substantially on interviews with the appellant in prison, when the appellant said that from Nov. 9 to Nov. 13 (when he was arrested) with the exception of one short interval of five minutes in a cinema, he was activated throughout by the mind and direction of Jack “Legs” Diamond. Dr. Paterson had believed the story to be true, and in that belief had formed his diagnosis. Dr. Brown was of the opinion that the appellant was suffering from a severe abnormality of mind which influenced his behaviour substantially. His Lordship directed the jury to approach the problem from the standpoint that both Dr. Paterson and Dr. Brown had unequivocally expressed the opinion that the appellant was suffering from such abnormality of mind, induced by disease, as substantially impaired his responsibility for his acts. His Lordship then referred to the evidence of the doctors for the Crown, Dr. Pearce and Dr. Brisby, who were both of the opinion that the appellant was putting on an act and was trying to sham that he was mentally disturbed and deranged. His Lordship asked the jury whether, if they came to the conclusion that the appellant had been putting on an act, the whole defence of abnormality of mind did not fall to the ground? After the jury retired the judge called them back, stating that he had not given them a sufficient direction on s. 2 of the Homicide Act, 1957, and, as stated at p. 574, letter C, post, quoted to them passages from *R. v. Byrne** and from *Rose v. Reginald*†.

M. A. B. King-Hamilton, Q.C., and *J. Bolland* for the appellant.

Geoffrey Lawrence, Q.C., and *F. P. Crowder* for the Crown.

LORD PARKER, C.J., delivered the following judgment of the court: This appellant was convicted at Sussex Assizes of the capital murder of one Pull on Nov. 10, 1960. From that conviction he now appeals to this court. [His LORDSHIP then summarised the facts as set out above and continued:] On the bare facts it is plain that this is a case of murder in the course of theft, and a very deliberate one. The defence was twofold, first, that the gun had gone off by accident, and secondly and alternatively, that the appellant was suffering from diminished responsibility within s. 2 of the Homicide Act, 1957, two defences which do not run easily in double harness.

[His LORDSHIP set out the main grounds put forward at p. 571, letters B and C, ante, on the defence of accident and said that the court's view was that the judge's direction to the jury was an accurate and perfectly adequate presentation of the evidence. His LORDSHIP continued:] The second defence was diminished responsibility. This defence was advanced by two eminent psychiatrists for the defence, Dr. Paterson (1) and Dr. Brown (2). The appellant had many interviews with them. He told Dr. Paterson at any rate, and I think Dr. Brown, although Dr. Brown may merely have read Dr. Paterson's report, a long story of his history from his childhood onwards down to the date and time of the killing. It is unnecessary to go into it in any detail, but the story was that for years he had not felt at all normal. In one passage he said that he felt doomed at thirteen, and he had a feeling of being possessed at fifteen, and when he was asked: “So your whole outlook is different when you are the real you from when you have the feelings?”,

* [1960] 3 All E.R. 1; [1960] 2 Q.B. 396.

† [1961] 1 All E.R. 859.

(1) Dr. Paterson held the qualifications of Doctor of Medicine (F.R.C.P. (Edinburgh)), M.R.C.P. (London) and a diploma in psychiatry.

(2) Dr. Brown held the qualifications of Doctor of Medicine (Oxford) and M.R.C.P. (London).

he said: "Yes, but when I am normal I still think that I was born to be doomed, but I cannot think why I want to be a great gangster", and in the passage for the relevant period, that is, the period from Nov. 9, 1960, down to Nov. 13, 1960, when he was arrested, he told the story that except for five minutes in a cinema at Portsmouth he had felt that he was possessed by the spirit of a deceased American gangster, one Jack "Legs" Diamond, whose commands in effect he had to obey even if he knew that what he was required to do was wrong. He said that he had had that feeling for a number of years.

The psychiatrists also spoke of a family history of epilepsy which they said would make him an unstable personality, one liable to be addicted to drugs and one in whom schizophrenia would more easily develop. They also spoke of the history that they had been given, not solely by the appellant but by other witnesses, of his having taken drugs for a period of some five months.

If we understand it aright, Dr. Paterson was saying that this young man was suffering from abnormality of mind, the abnormality being the delusion that he was possessed by another or, as it was sometimes put, that he was living in a dream world. Dr. Paterson said that that was induced by schizophrenia aggravated by drugs and rendered more likely by epilepsy in the family. Finally, he expressed the opinion that thereby the appellant's ability to control his acts was impaired and substantially impaired. Dr. Brown also proceeded on the basis that having heard the appellant's story, it was clear that he was suffering from delusions, and that those delusions amounted to an abnormality of mind. As regards the disease he expressed it rather differently by saying, I think, that the appellant was "an extremely psychopathic personality who has had episodes of a schizophrenic type of psychosis, especially under the influence of drugs". He did, however, add that but for the drugs the killing would not have taken place. Both these eminent psychiatrists had to rely on what they were told by the appellant. They said they accepted his story. They did not think he was shamming, and it was on his story almost entirely that they based their evidence. As against that, Dr. Pearce (3) and Dr. Brisby (4), who were called for the Crown, were emphatic that the appellant had throughout been putting on an act for the benefit of the psychiatrists, in other words, that he was shamming.

The summing-up of the learned judge in regard to diminished responsibility has been criticised in a number of respects. Perhaps the most serious criticism is that not only in the first instance did the learned judge merely refer without explanation to the words of s. 2 (1) of the Homicide Act, 1957, but also that he made little attempt to review the medical evidence in detail. Thus he said this:

"Members of the jury, I am not going to attempt to analyse these three volumes (5) of medical evidence; I am going to hand you the transcripts of the shorthand note and you can study them at your leisure."

At the end of his summing-up he said:

"Members of the jury, that concludes all I have to say to you. Here are the transcripts of the medical evidence, which I will hand to you. I am afraid there is only one copy for you; but you can study the whole thing and analyse it."

The court would like to say emphatically that they disapprove of such a practice. It is true that in 1958 in *R. v. Spriggs* (6), this court laid down that it was sufficient for the judge to hand copies of s. 2 to the jury without any further explanation of the terms of the section; but in that case it is to be

(3) Dr. Pearce held the qualifications of Doctor of Medicine (Edinburgh), F.R.C.P. (London), F.R.C.P. (Edinburgh), and a diploma in psychological medicine at the College of Physicians, London.

(4) Dr. Brisby was Principal Medical Officer of H.M. Prison, Brixton.

(5) The medical evidence occupied one and a half days and filled one hundred pages of transcript.

(6) [1958] 1 All E.R. 300; [1958] 1 Q.B. 270.

observed that the learned judge there went with meticulous care into the evidence given on one side and the other, reviewing it in detail. In the present case it is said that the learned judge really went further than that because not only in the first instance did he only refer to the section, but also he made no attempt to make a meticulous and careful review of the medical evidence. In the opinion of this court, ever since *Rose v. Reginam* (7), a case in the Privy Council, it is not sufficient merely to refer to the words of the section. That decision of the Privy Council refers with approval to the interpretation that this court put on the section in *R. v. Byrne* (8), and in the light of that interpretation it seems to this court that it would no longer be proper merely to put the section before the jury but that a proper explanation of the terms of the section as interpreted in *R. v. Byrne* (8) ought to be put before the jury. In fairness, however, to the learned judge, it must be stated that after the jury had retired he called them back and read out to them passages from these two cases.

So far as the handing of the transcripts is concerned, the court feels that that is a bad practice and, in an ordinary case, would not be an adequate direction to the jury in regard to the medical evidence. Medical evidence on these matters is difficult to follow and difficult to understand, and it would be quite impossible for a jury in a jury room without any assistance really to understand and appreciate the effect of the evidence. The practice was made worse in the present case in that only one transcript was available, and that a transcript which had been marked by the learned judge in red pencil and with pages turned down. That, as it seems to this court, is an objectionable practice.

Other criticisms made of this summing-up are that the learned judge did not adequately refer to the medical evidence in regard to drugs, in regard to the family history and matters of that sort. The court feels that in an ordinary case there would be considerable ground for those matters of criticism, but this is in some ways a rather curious case. It went on for some eight days, and no less than one hundred pages of the transcript are occupied with this medical evidence, but at quite an early stage it became clear that the opinions formed by Dr. Paterson and Dr. Brown were in the main the result of the story which the appellant had told them. Thus, it is to be observed that early on in the cross-examination of Dr. Paterson, counsel for the Crown in going through the necessary ingredients of s. 2 began to ask him about the abnormality of mind which he suggested was there:

"Q.—What is the abnormality of mind which you say this man was suffering from at the time when he committed these acts? A.—That he had a delusion that he was possessed by another person—by a spirit.

"Q.—Anything else? A.—No, that is the main thing.

"Q.—That is the abnormality? A.—Yes.

"Q.—I do not know whether that has got anything to do with schizophrenia or not—has it? (9) A.—Yes, it has.

"Q.—Then we will examine its connexion in a moment; but let us concentrate for the moment on the abnormality. That is an abnormality of mind that can have absolutely no effect in this case at all unless it was genuine? A.—Yes, quite.

"Q.—In other words, it is a delusion which is subjective to Terry himself? A.—Yes.

(7) [1961] 1 All E.R. 859.

(8) [1960] 3 All E.R. 1; [1960] 2 Q.B. 396.

(9) At the beginning of his cross-examination of Dr. Paterson counsel for the Crown asked the witness: Q.—" . . . I want to know quite clearly what position you take up with regard to this man's state of mind at the time this act was committed. In your view was he insane?" A.—" May I read out what he said about it, my Lord?" STABLE, J.: " No, but you may answer the question." A.—" My opinion, my Lord, is that he was suffering from schizophrenia."

"Q.—If in fact objectively—and it is the jury who have to determine the state of this man's mind—he was not suffering from any delusion at all, then we need not trouble about any of the other words in the section, need we? A.—No."

[HIS LORDSHIP then interposed a question and a little later on Dr. Paterson was referred to the answer that he had given:]

"Q.—Then I put to you that it followed that if there never was such a delusion, there was then no abnormality of mind? A.—I do not say that it follows; I do not think it follows that there is no abnormality of mind."

Then it became quite clear from the questions of the judge that the witness was not appreciating the question, and the learned judge then said:

"Q.—Now will you apply your mind to the hypothesis that Mr. Lawrence is putting to you? He is simply putting it as an hypothesis; he is not asking you to accept the position that this man was not living in a dream world, but on the hypothesis that he was not, is there any other abnormality of mind? A.—No, my Lord."

Later on in the cross-examination the matter became still more clear because a time was reached when the learned judge said to counsel for the Crown:

"Mr. Lawrence, I imagine the jury would agree with the proposition that if Terry's story was true and the whole of this operation was carried out by him while he really thought he was 'Legs' Diamond, a distinguished Chicago gangster, obviously they would not be able to hold him responsible for what he was doing, if that story is true."

Counsel for the Crown, in answer, said: "If it is true, yes, my Lord." Then counsel asked a question of the witness in these terms:

"Q.—So we are getting down to the rival views, the other view of the matter that this is an ordinary case of full responsibility of the criminal, who planned it deliberately risking the consequences of not resisting the temptation to commit crime? A.—Yes."

"Q.—And the whole thing ultimately depends, does it not, on whether what Terry is putting up to the psychiatrist is believable or not. A.—Yes."

It is perfectly clear, therefore, that at the end of the eight days and when the jury retired, the real and only question was: Was Terry fooling his psychiatrists or was his story a genuine story? If it was a genuine story, it was clear, as the learned judge himself said, that on the evidence he must be suffering from diminished responsibility. On the other hand, if he was fooling the psychiatrists, there was Dr. Paterson saying, "there is no other abnormality of mind other than these so-called delusions to which I can refer." In the light of what clearly, therefore, was the question in the end, it seems to this court that the summing-up by the learned judge is quite unexceptionable. Thus, on p. 551 he tells the jury that without, as it were, going through the medical evidence in detail, they can take it that both Dr. Paterson and Dr. Brown have unequivocally expressed the opinion that Terry was suffering from an abnormality of mind induced by disease such as substantially to impair his mental responsibility. Having said that, the learned judge then goes on to refer to the emphatic evidence of Dr. Pearce and Dr. Brisby that the appellant had put on an act and was shamming. On the next page, having dealt with that, the learned judge says:

"If you come to the conclusion that this story that he told the psychiatrist of being motivated and activated by the mind of Jack 'Legs' Diamond is false, that it is an act he has been putting on, then, members of the jury, does not the whole defence of abnormality of mind fall to the ground?"

It is said by counsel for the appellant to whom the court is indebted for his argument, that even if that were the real issue at the end, yet the learned judge's summing-up failed in two respects. First, it is said that even if the appellant's story of his delusions was not to be accepted, there was other evidence which came from independent sources, independent of the appellant, which pointed in that direction and to which the learned judge should have referred. I need not refer to the points in detail, but they were matters such as the fact that he had had eleven jobs in two years, that for some reason or another his father at one period thought he ought to see a psychiatrist, that there was evidence that he was seen for six minutes with his arms rigid, flexing his muscles looking into a mirror, which it was said was a catatonic episode, and there were other matters of that sort. It is sufficient to say that the burden of proof is put on the defence, and that none of these matters were matters of such substance as required reference being made to them by the learned judge, particularly having regard to the answers, which I have referred to, which Dr. Paterson had made in cross-examination.

Secondly, it is said, and this is really the high-water mark of what can be said, that the learned judge ought at any rate on this real live issue whether the appellant was putting on an act or not, to have given the jury detailed directions about it. The court has come to the conclusion that there was very little that the learned judge could say. The matter had been going on for eight days. The sole issue for the jury was whether they accepted Dr. Paterson and Dr. Brown in saying that in their opinion he was not putting on an act, or whether they accepted Dr. Pearce and Dr. Brisby in being certain that he had been putting on an act. The court feels that in the circumstances of this case, that being the sole issue, there was little more that the learned judge could reasonably be expected to do.

The court has given this matter anxious consideration. They are indebted for the arguments of counsel on both sides but, having fully considered the matter, they can find no ground to interfere. Accordingly, the appeal is dismissed.

[After counsel for the appellant had sought leave to appeal to the House of Lords on the ground that the trial judge ought not to have handed the transcript to the jury but should have referred in his summing-up to the passages in those transcripts which tended to show that there was some criticism of the evidence of the doctors for the Crown on the issue whether the appellant was shamming or not and that to leave it to the jury was too much of a hazard, LORD PARKER, C.J., said that the court felt unable to certify that there was a point of law of general public importance involved and, accordingly, no question of an appeal to the House of Lords arose.]

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[*Reported by N. P. METCALFE, Esq., Barrister-at-Law.*]

REARDON SMITH LINE, LTD. v. MINISTRY OF
AGRICULTURE, FISHERIES AND FOOD.

GARIBALDI SOCIETA CO-OPERATIVA DI NAVIGAZIONE
A.R.L. v. PRESIDENT OF INDIA.

CARLTON STEAMSHIP CO., LTD. v. MINISTRY OF
AGRICULTURE, FISHERIES AND FOOD.

CAPE OF GOOD HOPE MOTORSHIP CO., LTD. v. SAME.

[COURT OF APPEAL (Sellers, Willmer and Donovan, L.JJ.), January 17, 18, 19, 20, 23, 24, 25, 26, 27, 30, 31, February 1, 2, 3, 6, 7, March 28, 1961.]

Shipping—Charterparty—Construction—Exception—Strikes, "force majeure" or "hindrance . . . beyond charterers' control"—Nomination of loading port where five out of seven grain elevators strike-bound—Wheat intended cargo, but alternative cargo options—Decision of Wheat Board to load only liners and not tramps at port during strike—Sufficient wheat in non-strike bound elevators to load tramps concerned—Delay in loading tramps—Whether nomination of strike-bound loading port valid—Whether charterers protected from demurrage claims by exceptions clause—Whether charterers bound to ship alternative cargoes—Whether, on a berth charterparty, charterers were in breach for not acquiring cargo until congestion of shipping after strike would allow ship to berth.

Shipping—Demurrage—Computation—Lay days—Method of computation of time—Saturdays.

By agreements made in 1952 between the governments of Great Britain and India and the Canadian Wheat Board, the board undertook to sell certain quantities of wheat to the respective governments, for shipment between August, 1952 and July, 1953, from Canadian Pacific ports. The Canadian Wheat Board, which was a statutory body exercising its powers as agent for the Crown, had the monopoly of exporting ninety-five per cent. of the grain produced for export in Canada; further, at the ports of shipment the board controlled both the quantity of grain loaded into vessels and the choice of loading berths. On Feb. 17, 1953, a strike broke out at five of the seven grain elevators at Vancouver and at the single elevator at the neighbouring port of New Westminster, which together handled eighty-seven per cent. of the bulk grain shipments from these ports. On Feb. 18 the railways stopped movement of grain from up-country elevators to the strike-bound elevators; soon after this, the board decided as a matter of policy to restrict the two non-strike bound elevators at Vancouver to loading parcel shipments into liners and not to use these elevators for loading chartered tramps during the strike; the board decided that tramps would be loaded after the strike was over in the order of their arrival at Vancouver. The strike continued without interruption until May 7, 1953. Before the strike broke out the British government had chartered three tramps, the Queen City, Riverton and Cape Rodney, to ship wheat from Canada; during the strike, the government of India chartered the Agostino Bertani for the same purpose. The material terms of the charterparties for these vessels were substantially similar, the charterparties being Pacific Coast Grain Charters. Each charterparty provided that the vessel should proceed to a usual loading place, where she could safely load, as the charterers might order at Vancouver, New Westminster, Victoria, Tacoma, Seattle or certain other named places, and there load a full and complete cargo of wheat in bulk. The Queen City, Riverton and Cape Rodney charterparties included alternative cargo options* which attracted extra

* The wording of these options is set out at p. 582, letter D, post.

freight; in fact the charterers intended to load, and made arrangements to load, full cargoes of wheat in all four cases. Six weather working days were allowed for loading each vessel, lay days for all the vessels commencing twenty-four hours after receipt at the loading port of the captain's notice of readiness to load whether the vessel was in berth or not. By the exceptions clause contained in the charterparties it was provided that, "Lay or working days shall not count at ports of loading during any time when . . . the supply or bringing by rail . . . to port of loading or alongside the vessel, or the loading of the cargo, or intended cargo, or any part thereof, is delayed by . . . force majeure . . . strikes . . . or any other hindrance of whatsoever nature beyond the charterers' control". The charterers nominated Vancouver as the loading port for each of the vessels. The nomination of Vancouver for the Queen City was made before the strike began; the nominations for the Riverton, Cape Rodney and Agostino Bertani were made on dates during the strike. The Queen City, Riverton, Cape Rodney and Agostino Bertani arrived and gave notice of readiness to load at Vancouver during the strike, viz., on Feb. 18, Mar. 25, Apr. 2, and Apr. 29, 1953, respectively. As a result of the strike the Queen City, Riverton, Cape Rodney and Agostino Bertani were subject to serious delay since no loading was done during the strike, and, thereafter, the vessels had to wait their turn to load.

To load bulk wheat required the services of both elevator men and longshoremen. Normal working hours at Vancouver, the port of loading, were eight hours on each weekday, other than Saturdays for elevator men, but longshoremen's normal hours included, in addition, four hours on Saturday morning. Elevator men sometimes worked Saturday mornings if required, but only if paid time and a half for the Saturday work. The charterparties stipulated weather working days for lay time in relation to loading.

In actions by the owners of the vessels claiming demurrage from the charterers the court found and held that, on the facts existing before and during the strike, the strike was unlikely to last more than six weeks, but that a well-informed charterer could not have reliably estimated its duration; that the action of the Canadian Wheat Board in deciding not to load tramps during the strike was taken in the board's executive capacity and not as agent for the charterers; that it would have been unreasonable for the charterers to attempt to get the board's decision reversed; and that there was sufficient wheat in the non-strike bound elevators to load full cargoes of wheat into the vessels.

Held: (i) the charterers were protected by the exceptions clause concerning strikes, etc. for the following reasons—

(a) the cause of the delay was (per WILLMER, L.J.) the strike (see p. 607, letter B, post), or (per DONOVAN, L.J.) twofold, first the strike and second the decision of the Canadian Wheat Board (see p. 622, letter F, post), or (per SELLERS, L.J.) was one or both of these causes (see p. 591, letter B, post).

Central Argentine Ry., Ltd. v. Marwood ([1915] A.C. 981) explained and distinguished (see p. 592, letter A, and p. 609, letters B to G, post).

(b) even if the strike was not the cause of the delay, the cause was within the exceptions clause as it was comprehended by the words "any other hindrance of whatsoever nature beyond the charterers' control" (see p. 590, letter A, p. 607, letter D, and p. 622, letter H, post).

(c) (per SELLERS and DONOVAN, L.JJ., WILLMER, L.J., expressing no concluded opinion) there was no settled rule of construction that a specific exception, such as a strike or war, could not be relied on if it were operative at the time when the contract was made or the vessel was ordered to the affected port (see p. 595, letter D, p. 623, letter B, and p. 610, letter D, post).

(d) (per WILLMER, L.J.) even if there were such a rule, it would not apply

in this case because at the times when Vancouver was nominated it was not possible for the parties, with the knowledge which they then had, to say that any of the ships was inevitably doomed to delay at Vancouver by reason of the strike, because, as regards the Queen City, no one could then say with certainty whether the strike would take place, and, as regards the other ships, the strike might have ended so quickly as to avoid delaying them (see p. 610, letters F to I, post; cf. p. 595, letter B, post).

(e) the charterers were not obliged to nominate other ports when delay became inevitable, because once a port had been properly nominated the charterparty was to be construed as if the nominated port had been the sole port of destination in the charterparty, and the charterer had neither the right nor the obligation to make a second nomination (see p. 599, letter H, p. 602, letter G, p. 614, letter I, to p. 615, letter B, and p. 623, letter D, post).

Tapscott v. Balfour ((1872), L.R. 8 C.P. 46) and *Anglo-Danubian Transport Co., Ltd. v. Ministry of Food* ([1949] 2 All E.R. 1068) approved.

The Teutonia ((1872), L.R. 4 P.C. 171) considered.

(f) the charterers were not obliged to seek and load an alternative cargo when delay in loading wheat became inevitable because (per SELLERS and DONOVAN, L.J.J., WILLMER, L.J., dissenting) the only obligation imposed on the charterers by the charterparties was to load a full and complete cargo of wheat, as the alternative options* in the Queen City, Cape Riverton and Rodney charterparties on their true construction were true unfettered options, imposing no obligation on the charterers (see p. 601, letter D, p. 602, letter D, and p. 624, letter A, post).

Brightman & Co. v. Bunge Y Born ([1924] 2 K.B. 619, *affd.* H.L., [1925] All E.R. Rep. 607) and *South African Despatch Line v. Panamanian S.S. Niki (Owners)* ([1958] 3 All E.R. 590, *affd.* C.A., [1960] 1 All E.R. 285) distinguished.

(g) (per SELLERS and WILLMER, L.J.J.) if, however, the charterers were under a duty to load an alternative cargo, they had on the facts discharged the burden (which would be on them) of showing that no time would have been saved had they tried to load alternative cargo (see p. 602, letters E and F, p. 619, letter D, and p. 620, letters D to G, post).

(ii) (WILLMER, L.J., dissenting) since Saturday was not a day on which wheat in bulk was normally loaded at Vancouver, it did not count as a whole or half weather working day for the purpose of computing lay time for loading (see p. 603, letters F and G, and p. 625, letter B, post).

Alvion Steamship Corpn. of Panama v. Galban Lobo Trading Co. S.A. of Havana ([1955] 1 All E.R. 457) explained.

Decision of McNAIR, J. ([1959] 3 All E.R. 434) affirmed.

[As to the charterers' obligation to nominate a safe port of loading, see 30 HALSBURY'S LAWS (2nd Edn.) 422, para. 591.

As to the charterers' duty to provide a cargo at the port of loading and the effect of exceptions on that duty, see 30 HALSBURY'S LAWS (2nd Edn.) 434-442, paras. 602-605; and as to the effect of specified exceptions on delay in loading, see *ibid.*, 449, para. 609.]

Cases referred to:

Agrimex Hungarian Trading Co. for Agricultural Products v. Sociedad Financiera de Bienes Raices S.A., [1958] 2 All E.R. 695; [1958] 2 Q.B. 385; [1958] 3 W.L.R. 152; *affd.* H.L. sub nom. *Sociedad Financiera de Bienes Raices S.A. v. Agrimex Hungarian Trading Co. for Agricultural Products*, [1960] 2 All E.R. 578; [1961] A.C. 135; [1960] 3 W.L.R. 145; 3rd Digest Supp.

* The wording of these options is set out at p. 582, letter D, post.

- Alvion Steamship Corpn. of Panama v. Galban Lobo Trading Co. S.A. of Havana*, [1955] 1 All E.R. 457; [1955] 1 Q.B. 430; [1955] 2 W.L.R. 543; 3rd Digest Supp. A
- Anglo-Danubian Transport Co., Ltd. v. Ministry of Food*, [1949] 2 All E.R. 1068; 83 Lloyd's Rep. 137; 2nd Digest Supp.
- Bank Line, Ltd. v. Capel (A.) & Co.*, [1919] A.C. 435; 88 L.J.K.B. 211; 120 L.T. 129; 14 Asp. M.L.C. 370; 12 Digest (Repl.) 443, 3365. B
- Brown v. Royal Insurance Co.*, (1859), 1 E. & E. 853; 28 L.J.Q.B. 275; 33 L.T.O.S. 134; 120 E.R. 1131; 12 Digest (Repl.) 432, 3316.
- Bulman & Dickson v. Fenwick & Co.*, [1894] 1 Q.B. 179; 63 L.J.Q.B. 123; 69 L.T. 651; 7 Asp. M.L.C. 388; 41 Digest 439, 2757.
- Bunge Y Born Co. v. Brightman (H. A.) & Co.*, [1925] All E.R. Rep. 607; [1925] A.C. 799; 94 L.J.K.B. 840; 133 L.T. 738; 16 Asp. M.L.C. 545; *affg.* S.C. sub nom. *Brightman & Co. v. Bunge Y Born*, [1924] 2 K.B. 619; 93 L.J.K.B. 1070; 132 L.T. 188; 16 Asp. M.L.C. 423; 41 Digest 442, 2776. C
- Canadian Pacific Ry. Co. v. Kelvin Shipping Co., Ltd.*, (1927), 138 L.T. 369; 17 Asp. M.L.C. 354; 41 Digest 776, 6352.
- Central Argentine Ry., Ltd. v. Marwood*, [1915] A.C. 981; 84 L.J.K.B. 1593; 113 L.T. 786; 13 Asp. M.L.C. 153; 41 Digest 439, 2762.
- Ciampa v. British India Steam Navigation Co., Ltd.*, [1915] 2 K.B. 774; 84 L.J.K.B. 1653; 20 Com. Cas. 247; 41 Digest 413, 2569.
- City of Lincoln, The*, (1889), 15 P.D. 15; 59 L.J.P. 1; 62 L.T. 49; 6 Asp. M.L.C. 475; 41 Digest 770, 6248.
- Dahl v. Nelson, Donkin & Co.*, (1881), 6 App. Cas. 38; 50 L.J.Ch. 411; 44 L.T. 381; 4 Asp. M.L.C. 392; *affg.* S.C. sub nom. *Nelson v. Dahl*, (1879), 12 Ch.D. 568; 4 Asp. M.L.C. 172; 41 Digest 518, 3471. E
- Dobell & Co. v. Green & Co.*, [1900] 1 Q.B. 526; 69 L.J.Q.B. 454; 82 L.T. 314; 9 Asp. M.L.C. 53; 5 Com. Cas. 161; 41 Digest 456, 2871.
- Dreyfus (Louis) et Cie. v. Parnaso Cia. Naviera S.A.*, [1959] 1 All E.R. 502; [1959] 1 Q.B. 498; [1959] 2 W.L.R. 405; *reversd.* C.A., [1960] 1 All E.R. 759; [1960] 2 Q.B. 49; [1960] 2 W.L.R. 637; 3rd Digest Supp. F
- Duncan v. Köster, The Teutonia*, (1872), L.R. 4 P.C. 171; 41 L.J. Adm. 57; 26 L.T. 48; 1 Asp. M.L.C. 214; *affg.*, (1871), L.R. 3 A. & E. 394; 41 Digest 484, 3165.
- Jackson v. Union Marine Insurance Co.*, (1874), L.R. 10 C.P. 125; 44 L.J.C.P. 27; 31 L.T. 789; 2 Asp. M.L.C. 435; 41 Digest 330, 1859. G
- Knutsford, S.S., Ltd. v. Tillmanns & Co.*, [1908] A.C. 406; 77 L.J.K.B. 977; 99 L.T. 399; 11 Asp. M.L.C. 105; 41 Digest 522, 3504.
- Leonis S.S. Co., Ltd. v. Rank, Ltd.*, [1908] 1 K.B. 499; 77 L.J.K.B. 224; 13 Com. Cas. 136; 41 Digest 569, 3937.
- Leonis S.S. Co., Ltd. v. Joseph Rank, Ltd. (No. 2)*, (1908), 13 Com. Cas. 295.
- Lewis v. Dreyfus (Louis) & Co.*, (1926), 31 Com. Cas. 239; 41 Digest 452, 2835. H
- Leyland Shipping Co. v. Norwich Union Fire Insurance Society*, [1918] A.C. 350; 87 L.J.K.B. 395; 118 L.T. 120; 14 Asp. M.L.C. 258; *affg.*, [1917] 1 K.B. 873; 14 Asp. M.L.C. 4; 29 Digest 229, 1858.
- Lord v. Pacific Steam Navigation Co., Ltd., The Oropesa*, [1943] 1 All E.R. 211; sub nom. *The Oropesa*, [1943] P. 32; 112 L.J.P. 91; 168 L.T. 364; 36 Digest (Repl.) 231, 1231. I
- Matheos (Owners) v. Dreyfus (Louis) & Co.*, [1925] All E.R. Rep. 422; [1925] A.C. 654; 94 L.J.K.B. 465; 133 L.T. 146; 16 Asp. M.L.C. 486; 30 Com. Cas. 241; 41 Digest 436, 2736.
- Metropolitan Water Board v. Dick, Kerr & Co., Ltd.*, [1918] A.C. 119; 87 L.J.K.B. 370; 117 L.T. 766; 82 J.P. 61; *affg.*, [1917] 2 K.B. 1; 12 Digest (Repl.) 456, 3410.

- A** *Ogden v. Graham*, (1861), 1 B. & S. 773; 31 L.J.Q.B. 26; 5 L.T. 396; 121 E.R. 901; 41 Digest 522, 3509.
- Olivebank (Akt.) v. Dansk Svovlsyre Fabrik*, [1919] 2 K.B. 162; 120 L.T. 629; 14 Asp. M.L.C. 426; sub nom. *Geyser (Akt.) v. Dansk Svovlsyre & Superphosphat Fabrik*, *Olivebank (Akt.) v. Same*, 88 L.J.K.B. 745; *affg.*, [1919] 1 K.B. 388; 41 Digest 335, 1885.
- B** *Penelope, The*, [1928] P. 180; 97 L.J.P. 127; 139 L.T. 355; 17 Asp. M.L.C. 486; 12 Digest (Repl.) 439, 3344.
- Richardsons & Samuel (M.) & Co., Re*, [1898] 1 Q.B. 261; 66 L.J.Q.B. 868; 77 L.T. 479; 8 Asp. M.L.C. 330; 3 Com. Cas. 79; 41 Digest 306, 1680.
- Ropner & Co. v. Ronnebeck*, (1914), 84 L.J.K.B. 392; 112 L.T. 723; 13 Asp. M.L.C. 47; 20 Com. Cas. 95; 41 Digest 439, 2759.
- C** *South African Despatch Line v. Panamanian S.S. Niki (Owners)*, [1958] 3 All E.R. 590; [1959] 1 Q.B. 238; [1958] 3 W.L.R. 718; *affd.* C.A., [1960] 1 All E.R. 285; [1960] 1 Q.B. 518; [1960] 2 W.L.R. 294; 3rd Digest Supp.
- Steamship "Induna" Co., Ltd. v. British Phosphate Comrs.*, [1949] 1 All E.R. 522; [1949] 2 K.B. 430; [1949] L.J.R. 1058; 2nd Digest Supp.
- D** *Tapscott v. Balfour*, (1872), L.R. 8 C.P. 46; 42 L.J.C.P. 16; 27 L.T. 710; 1 Asp. M.L.C. 501; 41 Digest 559, 3851.
- Tennants (Lancashire), Ltd. v. Wilson (C. S.) & Co., Ltd.*, [1917] A.C. 495; 86 L.J.K.B. 1191; 116 L.T. 780; 23 Com. Cas. 41; *revsg.* S.C. sub nom. *Wilson & Co. v. Tennants (Lancashire), Ltd.*, [1917] 1 K.B. 208; 12 Digest (Repl.) 449, 3387.
- E** *Tharsis Sulphur and Copper Co. v. Morel Brothers & Co.*, [1891] 2 Q.B. 647; 61 L.J.Q.B. 11; 65 L.T. 659; 7 Asp. M.L.C. 106; 41 Digest 525, 3543.
- Universal Cargo Carriers Corpn. v. Citati*, [1957] 2 All E.R. 70; [1957] 2 Q.B. 401; [1957] 2 W.L.R. 713; *affd.* C.A., [1957] 3 All E.R. 234; [1958] 2 Q.B. 254; [1958] 3 W.L.R. 109; 3rd Digest Supp.
- Z. Steamship Co., Ltd. v. Amtorg New York*, (1938), 54 T.L.R. 849; 61 Lloyd's Rep. 97; Digest Supp.
- F**

Appeals.

These were appeals by shipowners, plaintiffs in four actions, from the decision of McNAIR, J., reported [1959] 3 All E.R. 434, who gave judgment for the defendants, the charterers, on July 30, 1959. By consent of the parties these four actions had been tried together with a fifth action (*Miramar Compania Naviera S.A. v. Government of the Union of South Africa*), but the plaintiffs in that action did not appeal from the decision of McNAIR, J.

G In these five actions the shipowners claimed demurrage and damages for breach of the charterparties arising out of serious delay in loading the shipowners' vessels at Vancouver, British Columbia; the charterers counterclaimed for declarations that they were entitled to despatch money. The delay in loading was caused by a strike of elevator men at five out of the seven grain elevators at Vancouver and at the single grain elevator at the neighbouring port of New Westminster. The appellant shipowners were Reardon Smith Line, Ltd., owners of the m.v. *Queen City*, Carlton Steamship Co., Ltd., owners of the s.s. *Riverton*, Cape of Good Hope Motorship Co., Ltd., owners of the m.v. *Cape Rodney*, and Garibaldi Societa Co-operativa Di Navigazione A.R.L., owners of the m.v. *Agostino Bertani*. The strike of elevator men at Vancouver and New Westminster broke out at midnight on Feb. 16/17, 1953, and continued without interruption until May 7, 1953, a period of eighty days. The vessels *Queen City*, *Riverton* and *Cape Rodney* were chartered by the Ministry of Food* respectively, on Nov. 12, 1952, Nov. 28, 1952, and Jan. 19, 1953, before the strike had begun. The vessel *Agostino Bertani* was chartered by the President of India on Mar. 12, 1953,

* Now the Ministry of Agriculture, Fisheries and Food; see Transfer of Functions (Ministry of Food) Order, 1955 (S.I. 1955 No. 554).

the charter being made during the continuance of the strike. The vessels were chartered on the terms of the Pacific Coast Grain Charter and the relevant clauses of these charters were in identical terms apart from certain variations in the options as to the cargoes to be shipped. The relevant terms of the charterparties for the vessels, Queen City, Riverton, Cape Rodney and Agostino Bertani were as follows (the words printed in *italics* being inserted in the printed form in type) except where otherwise stated:

"This charterparty . . . witnesseth, that the said vessel . . . shall proceed in ballast and, upon arrival be made ready, and shall receive on board at *Tacoma and/or Seattle or Portland, Oregon, Vancouver, B.C., or New Westminster, or Victoria, B.C., or other loading places, as hereinafter provided . . . a full and complete cargo . . . of [in the case of the Queen City, Riverton and Cape Rodney] wheat in bulk, any bags and/or bagging required for safe stowage to be supplied and paid for by the shipowners, and/or barley in bulk, and/or flour in sacks as below [in the case of the Agostino Bertani wheat in bulk only] which the [charterers] bind themselves shall be shipped, and being so loaded, shall therewith proceed to one safe port in the United Kingdom . . . or on the Continent between Antwerp and Hamburg . . . or as near thereunto as she may safely get, and there deliver the same and be paid freight as hereinafter provided: [in the case of the Queen City] 80s. per ton wheat . . . Charterer has the option of loading up to one-third cargo of barley in bulk, in which case the above rate of freight to be increased by 2s. 6d. per ton on the quantity of barley loaded. Charterer has the option of loading up to one-third cargo of flour in bags at 10s. per ton extra over the rate for wheat, on the quantity of flour loaded, if loaded at British Columbia, and 12s. 6d. per ton extra if loaded at U.S. Pacific."*

The Cape Rodney's commodity options were the same. The Riverton's barley options were also the same but the flour option was to load a full cargo of flour in bags at 10s. per ton extra over the freight rate for wheat if loaded at British Columbia, and 12s. 6d. per ton extra if loaded at ports in the United States. Under the charter of the Agostino Bertani there was no alternative cargo option. The charterparties continued:

"11. Readiness. The captain shall give charterers usual written notice of readiness, accompanied by certificate of charterers' competent surveyor, that vessel is ready to take in cargo and the quantity required . . . Upon receipt of said written notice and certificate . . . charterers shall furnish the vessel with the required cargo . . . 14. Loading Places. Vessel to proceed to such usual loading place or places where she can safely load, always afloat, as may be ordered by the charterers, at Vancouver, B.C., or New Westminster, or Victoria, B.C., or *Tacoma and/or Seattle or Portland and/or Astoria and/or loading places on the Columbia and/or Willamette Rivers*, and there receive the cargo in manner customary alongside, afloat and/or from the wharf and/or elevators. Should the vessel be required by charterers to move more than twice after being in her loading berth, extra cost of towage to be paid by them . . . 15. Lay Days. *Six weather working* lay days (Sundays, holidays, and rainy days not to be counted as lay or working days . . .), to commence twenty-four hours after the receipt by charterers' agents at loading port of the captain's written notice of readiness, accompanied by surveyor's certificate that his vessel is fitted with shifting boards and dunnage according to underwriters' requirements and is ready to receive cargo, *whether in berth or not*, are to be allowed the charterers for loading at places as hereinbefore provided, but should the loading be completed in less time the charterers have the privilege of detaining the vessel until the expiry of said lay days . . . 16. Despatch Money. Despatch money (which is to be paid to charterers before vessel sails) shall be payable for all *working time saved* in loading at the rate of *one half of demurrage*

rate per day or pro rata . . . 30. Demurrage and Lien, etc. It is agreed that for each and every day's detention or demurrage at the port of loading, by default of [the charterers] or their agents 8d. per G.R.T. per day, or pro rata, shall be paid . . ."

In the case of the Queen City, the rates of demurrage and despatch respectively were subsequently altered to 10d. and 5d. by an addendum, dated July 22, 1953, to the charter of that vessel:

"31. Act of God, War etc. Lay or working days shall not count at ports of loading during any time when the supply or loading of stiffening, or the supply or bringing by rail, craft, or otherwise, to port of loading or alongside the vessel, or the loading of the cargo, or intended cargo, or any part thereof, is delayed by the Act of God, war, restraint of princes, rulers, or people, force majeure . . . strikes, lock-outs, civil commotions, political disturbances or impediments, holidays (ecclesiastical or civil), cessations or stoppages of labour . . . railway accidents or impediments, or any other hindrance of whatsoever nature beyond the charterers' control . . ."

The following typed clauses were added to the printed charterparties:

"37. Overtime at loading or discharging port to be for account of the party ordering it. If ordered by the port controller or his representative, charterer to pay all extra expenses incurred. 38. Despatch money and/or demurrage at loading and/or discharging ports to be adjusted on completion of discharge . . . 42. Where charter calls for loading port orders, master to make application to Messrs. Thomson & Earle, Vancouver . . . by wireless, ninety-six hours before vessel is due to arrive off Pacific coast. Orders for loading port are to be given, by wireless, within forty-eight hours of receipt of master's application, unless given earlier."

Under the Agostino Bertani charterparty application for loading port orders had to be made to the India Supply Mission, Washington.

The following facts were found by McNAIR, J. On Sept. 19, 1952, the Ministry of Food entered into a master agreement with the Canadian Wheat Board (hereinafter referred to as "the board") for the purchase of wheat and flour, for shipment from Canadian ports between Aug. 1, 1952, and July 31, 1953. By this agreement the board undertook to make available through its agents, for sale to the ministry between the above dates, 2,614,000 tons of wheat and 350,000 tons of flour at the current selling price for each grade, such purchases to be registered under the International Wheat Agreement, 1949. Of the 2,614,000 tons of wheat, 1,422,000 tons were to be made available for shipment from the St. Lawrence and Atlantic winter ports and 850,000 tons from Canadian Pacific coast ports; approximately 100,000 tons were to be made available for each of the months January, February and March, 1953, and 90,000 tons in each of the months April and May, 1953. Shipment and delivery of the total quantity of flour to be purchased from the mills was to be a matter of arrangement between the ministry and the mills concerned. The master agreement further provided:

"To facilitate the carrying out of this agreement each party undertakes to advise the other party from time to time of its progress in meeting supply requirements or in securing tonnage as the case may be. While it is the intent of this agreement that the respective parties will endeavour, to the best of their ability, to make available the supplies, it is agreed that failure to carry out their respective obligations in that regard will not result in the charging by the ministry of demurrage charges to the board or its agents, or the charging by the board of any additional carrying charge to the ministry or its agents."

A similar master agreement was entered into between the India Supply Mission, on behalf of the Government of India, and the board, dated Oct. 11, 1952, covering

300,000 tons of wheat to be shipped from Pacific coast ports over the months January to July, 1953. In these agreements the respective charterers made reasonable and proper arrangements for securing delivery of cargoes to the vessels in due time, and all charterers notified the board in due time of the quantities of bulk wheat required for each of the ships concerned. A

The board was established under the Canadian Wheat Board Act, 1935. By s. 4 (1) of that Act the board could sue and be sued in its own name, but by sub-s. (2) of s. 4, B

“ the board is for all purposes, an agent of Her Majesty in right of Canada, and its powers under this Act may be exercised by it only as an agent of Her Majesty in the said right.”

Section 4 (4) provided:

“ The board is incorporated with the object of marketing in an orderly manner, in inter-provincial and export trade, grain grown in Canada, and possesses the following powers: (a) to buy, take delivery of, store, transfer, sell, ship or otherwise dispose of grain . . . (i) to authorise any officer or employee of the board or any other person to act on behalf of the board in the conduct of its operations under this Act; (j) to act as agent for or on behalf of any minister or agent of Her Majesty in right of Canada in respect of any operations that it may be directed to carry out by the Governor in Council; and (k) generally to do all such acts and things as may be necessary or incidental to carrying on its operations under this Act.” C D

The board had the monopoly of exporting wheat and barley from “ the designated areas ” of Canada which produced ninety-five per cent. of the grain fit for export. By s. 10 of the Act, E

“ the Governor in Council may by order not inconsistent with the provisions of this Act direct the board as to the manner in which any of its operations, powers and duties under this Act shall be conducted, exercised or performed.” F

Though without express statutory power to do so, the board did in fact control loading berths at ports of shipment since the property in the grain for export remained in the board from the time the grain reached the up-country elevators, situated by the railways, until it was discharged from the terminal elevators into the vessel at the port of shipment; the flow of grain by rail from the up-country to the terminal elevators was controlled by the board. At the port of shipment the terminal elevators were instructed by the board as to the quantities and grades to be loaded into each vessel and the board also gave instructions as to the loading berths for ships. G

At all material times there were seven terminal elevators at Vancouver of which two were operating throughout the strike, the rest being strike-bound. There was a single elevator at the neighbouring port of New Westminster which was strike-bound throughout the strike, and there was also a single elevator at Victoria which, at the outbreak of the strike, was being used only as a storage elevator for maize; by the middle of March, 1953, the maize had been removed and one vessel which had arrived at Vancouver before the strike and also before any of the five vessels in the present case, was loaded from the Victoria elevator with a full cargo of wheat. There was evidence that smaller parcel shipments of wheat on to liners were also made from Victoria but that there was never sufficient wheat at this elevator to make up a full cargo, with the exception of the above vessel. The normal output of the elevators at Vancouver and New Westminster was about 20,000 tons per day of which the two non-strike bound elevators handled between them some eighteen per cent. On Feb. 17, 1953, when the strike began, there were 1,500,000 tons of wheat in the eight elevators at Vancouver and New Westminster, of which about 16,900 tons were in the two non-strike bound elevators, set aside for completion of contracts for bagged wheat. H I

A The elevator men, other than those who worked at the two non-strike bound elevators (hereafter referred to as the "non-union elevators") were organised in a local branch of the International Union of Brewery, Flour, Soft Drinks and Distillery Workers of America (hereafter referred to as "the union"). In October, 1952, with a view to negotiating a new agreement for the elevator men, the union gave notice of intention to terminate the working agreement which then existed between the men and their employers. Negotiations then took place between the union and the employers and later continued through the medium of a conciliation board, until the end of January, 1953. On Feb. 3, 1953, the union rejected the terms set out in a report made by the conciliation board; on Feb. 4 these terms were also rejected by the employers. A strike vote was then taken and on or about Feb. 10 notice was given that the strike of elevator men would be effective from midnight Feb. 16/17. On Feb. 12 the Queen City was ordered by her charterers (the Ministry of Food) to load at Vancouver. Work stopped at all the elevators at Vancouver and New Westminster, other than at the two non-union elevators, as from midnight Feb. 16/17. The evidence showed that at this stage of the strike there was a confused picture as to the generally accepted view of the strike's duration. On Feb. 18 an embargo was placed by the railways on any movement of grain from the up-country elevators to the strike-bound terminal elevators, and the men at the two non-union elevators agreed with the union that they would handle only wheat coming from their own regular suppliers and would notify the union if wheat from any other source was offered to them; no such wheat was offered but had it been, it was clear that the men at these two elevators would have come out on strike. At 9.45 a.m. on Feb. 18 the Queen City, having arrived at Vancouver, gave notice of readiness to load. By a cable dated Feb. 26/27, Thomson & Earle, Ltd. (the Ministry of Food's Vancouver agents) reported to the ministry "Vancouver strike situation obscure. No negotiations; anybody's guess duration: local opinion settlement may still be two three weeks away or longer". Meanwhile an offer was made by the Prairie Farmers Union to mediate in the strike but the offer was turned down by the employers on Mar. 6; that union then asked the Federal Government to intervene. By this time, the Canadian Wheat Board, acting through their manager at Vancouver, had decided as a matter of policy, in order to make the best use of the port of Vancouver and of available supplies of wheat, to confine the use of the two non-union elevators to the supply of parcels to "liners" or "F.I.C. bottoms", viz., vessels plying in and out of Vancouver on more or less regular schedules for passengers and goods and loading on berth terms, and not to use these elevators for loading full cargoes of wheat on chartered tramps (as were the vessels concerned here) but to load these vessels after the strike in the order of their arrival in port. In fact, wheat in bulk amounting to 63,435 tons was loaded as parcel cargoes into liners from the non-union elevators; of this quantity, 17,000 tons went into liners chartered by persons other than the defendant charterers. This policy decision of the board was accepted by the Vancouver chamber of shipping on Mar. 2 as being in the best interest of the community. The trial judge found that the board's decision was a reasonable policy to adopt in the discharge of their duties. The policy was pursued throughout the strike and no tramp (except the vessel which was diverted to Victoria) was loaded with either a full or part cargo of wheat; the decision affected about one hundred liners and tramps arriving at Vancouver to load grain between Feb. 17 and May 7 (when the strike ended). Government intervention having been asked for, an official of the Federal Conciliation Service arrived at Vancouver on Mar. 9, and put up six proposals for the parties' consideration, the most important being a wage increase of three cents per hour retrospective to Dec. 1, 1952. The union rejected all six proposals, while the employers, rejecting the proposed wage increase, were prepared to accept part of the remaining proposals. The official returned to Ottawa on Mar. 20 having put forward new proposals which involved, for the first time, submission to

arbitration. Before either party had replied to the suggestion for arbitration, the Riverton on Mar. 22 and the Cape Rodney on Mar. 27 had been ordered by the Ministry of Food to Vancouver to load; the Riverton gave notice of readiness to load on Mar. 25 and the Cape Rodney on Apr. 2. On Apr. 10 the employers agreed to accept arbitration but on Apr. 11 the union refused. On Apr. 15 the Canadian Prime Minister indicated that the government might take over the elevators, but in an open letter to the union dated Apr. 22, the employers offered to submit all outstanding issues to arbitration, and on Apr. 23 the union offered to cut their wage demands. On Apr. 23 the Agostino Bertani was ordered to Vancouver and gave notice of readiness to load on Apr. 29. On Apr. 30 a meeting took place between the union and the operators, and on May 7 the strike was settled. The extent of the congestion at Vancouver caused by the strike, and continuing after the strike ended, was shown by the fact that nineteen tramp vessels, chartered by the defendant charterers and arriving at Vancouver between Feb. 16 and the end of April, and six more tramps arriving in May, waited and ultimately loaded full cargoes of bulk wheat at New Westminster and Vancouver, in order of their arrival (in addition to an unspecified number of tramps chartered by other persons); and after the strike ended on May 7 seven tramps chartered by persons other than the defendant charterers loaded full cargoes of bulk wheat before the Moderator [the ship whose owner did not appeal from the decision of McNAIR, J., which gave notice of readiness to load on June 6], being on turn before her. In addition, parcel shipments of bulk wheat were being made on to liners. The relevant dates in connexion with the appellants' four ships were as follows:

	Queen City	Riverton	Cape Rodney	Agostino Bertani
Charterparty	Nov. 12, 1952	Nov. 28, 1952	Jan. 19, 1953	Mar. 12, 1953
Order to Vancouver	Feb. 12, 1953	Mar. 22, 1953	Mar. 27, 1953	Apr. 23, 1953
Notice of readiness	Feb. 18, 1953	Mar. 25, 1953	Apr. 2, 1953	Apr. 29, 1953
Loading commenced	May 7, 1953	May 7, 1953	May 13, 1953	May 20, 1953
Loading finished	May 12, 1953	May 12, 1953	May 15, 1953	May 27, 1953

On the evidence before him the judge reached the conclusions (a) that at no time before the strike began or at any stage during its continuance was the position such that a well-informed shipowner or charterer, making use of the facilities for inquiry open to him, could have formed any really reliable appreciation as to the likely duration of the strike, and (b) in fact, at no time before the strike began or at any stage during its continuance was it on balance of probabilities likely that the strike would last more than two or three weeks, or more than a further two or three weeks. The fact that only a small number of men, 250 to 260 in all, were on strike was no reason for thinking that the strike would be a long one; further there was no history of embittered industrial relations in the industry concerned and the strike never affected more than part of the industry.

In each case it was agreed that the ship was an "arrived ship" when she gave notice of readiness in view of the inclusion in the lay days clause of the charters of the words "whether in berth or not". The shipowners claimed that they were entitled to demurrage in respect of these delays in loading the vessels. They further contended that by ordering the vessels to Vancouver the charterers were in breach of an implied condition of the charterparties that the port of loading nominated by them would be, at the time when the order was given and/or at the time when the vessel arrived at the port and/or at the time of her readiness to load, a port which was reasonably fit for the purpose of loading the contractual cargo or would be fit to load the cargo within a reasonable time or within such time as would not frustrate the commercial venture; alternatively, the shipowners contended that the charterers warranted that Vancouver was a fit port in the manner set out. The shipowners also contended that the charterers were in breach

of a further implied condition, namely, that if it was impossible to load the vessels at Vancouver without such delay as would frustrate the commercial venture, the charterers, within a reasonable time, would order the vessels to another non-strike bound loading port within the range set out in the charterparties. Finally, the shipowners contended that the charterers were in breach of their obligation to provide a cargo for loading the vessels. The charterers contended that they were protected from the claims for demurrage by the exceptions clause contained in each of the charterparties (cl. 31) since the clause prevented the running of lay days during the continuance of the strike; further, they were not precluded from relying on the clause merely because the strike was in existence or was about to begin when the nomination of the port of Vancouver was made. In this connexion, the charterers also contended that the decision of the Canadian Wheat Board to withhold wheat for bulk cargoes for tramps came within the meaning of "force majeure . . . or any other hindrance of whatsoever nature beyond the charterers' control", and that the existence in the non-union elevators of sufficient wheat to load a particular ship did not debar the charterers from relying on the wide exceptions clause. As to the suggested obligations regarding nomination of a loading port and the suggested warranty, the charterers submitted that in nominating a loading port, they were not obliged to take into account the convenience of the shipowners, and that the only implied limitations were that, at the time of the nomination, the port must be a safe port in the physical or political sense and it must be possible for the ship to get in and load; the test was whether any obstacle, impediment or prohibition was likely to be operative for so long as to frustrate the commercial object of the venture. On the facts the charterers submitted that at no time could it have been said with any certainty that the strike would continue for so long as to make the port an impossible port, and that the law had always treated strikes as subject to such unexpected termination that their existence would not abrogate contracts or involve substituted obligations. The charterers further contended that once a proper nomination was made the charter must be construed as if the nominated port had been originally written into the charter as the loading port. Finally, the charterers of the *Queen City*, *Riverton* and *Cape Rodney* submitted that they were not obliged to ship alternative cargoes when it became impossible to ship the intended cargo of wheat in bulk.

In all the cases controversy arose, in calculating lay days, as to the proper treatment of Saturdays and as to the proper calculation of "working days".

McNAIR, J., held, in a reserved written judgment delivered on July 30, 1959, and reported [1959] 3 All E.R. 434; (i) that the charterers were protected by cl. 31 (the exceptions clause) because (a) the cause of the delay to the ships was the strike, (b) there was no settled rule of construction that a specific exception, such as a strike or war, could not be relied on if it were operative when the contract was made or when the vessel was ordered to the affected port; (c) cl. 31 qualified the obligation of the charterers to have the cargo ready at the port of loading and, the action of the board in using the elevators that were not strike-bound for loading only into liners being reasonable and done on behalf of Her Majesty (not as agent of the charterers), the delay in loading cargo was caused by "force majeure" or "other hindrance . . . beyond the charterers' control" within the exceptions clause; moreover, even if the board were to be regarded as the agent of the charterers, the charterers were protected by the words last quoted; (d) it being admitted that the charterers intended to load wheat in bulk, no obligation to exercise any of the options to ship an alternative cargo arose when it became impossible to ship the intended cargo; (e) even if the charterparty did impose an obligation on the charterers to load alternative cargo to avoid delay, the charterers, on the facts, had shown that loading alternative cargo would not have lessened the delay to the ships: (ii) that since Saturday was not part of the usual working week of elevator men, it did not count in computing lay time for loading.

McNAIR, J., accordingly, gave judgment for the charterers. The shipowners A
now appealed.

Eustace Roskill, Q.C., T. G. Roche, Q.C., and A. J. Bateson for the plaintiff
shipowners (the appellants).

A. A. Mocatta, Q.C., and M. R. E. Kerr for the defendant charterers (the
respondents).

Cur. adv. vult. B

Mar. 28. The following judgments were read.

SELLERS, L.J.: Only four of the five separate actions (1) which were
tried together before McNAIR, J., in the Summer Term of 1959 are under appeal
to this court. The case of the *Moderator*, a vessel chartered by the Government
of South Africa, has not been further pursued. C

The four cases were selected and have been retained on appeal in order to
raise in their varying circumstances, including slightly varying provisions in a
common form of charterparty, a number of important and disputed questions
which arose between tramp shipowners and the charterers, the Ministry of
Agriculture, Fisheries and Food in three cases and the President of India in the
latest dated charterparty concerning the s.s. *Agostino Bertani*, during and D
following the strike of no more than some two hundred and sixty men who
worked the grain elevators at Vancouver. The strike commenced on Feb. 17,
1953, in respect of five out of the seven elevators normally available for loading
grain in bulk in that port and it lasted until May 7, 1953. All the four plaintiff
shipowners claim demurrage and damages against the charterers for the wrong-
ful detention of their ships by them and the fundamental question is, who is to E
bear the loss which undoubtedly arose because the ships awaiting cargo were
idle for many weeks? Does the loss remain on the shipowners concerned or are
the charterers liable in whole or in part? The loading facilities for bulk grain
were not entirely closed by the strike as two of the elevators were not affected
and continued working. The fact, therefore, that the inability to load at the
port was not total and that some cargo was more or less regularly loaded during F
the strike through the two working elevators played a prominent part in the
argument for the appellant shipowners. Such bulk wheat as was loaded during
the strike period, no more than fifteen per cent. of the total capacity of all the
seven elevators when working, was directed by the Canadian Wheat Board's
representative in Vancouver, Mr. Smith, to be loaded in small quantities or
parcels on to liners, that is ships trading regularly to time schedules and carrying G
mixed cargoes, and none at all on to "tramps", that is ships chartered to carry
full and complete cargoes such as the plaintiffs' ships were, each with a carrying
capacity of roughly nine thousand tons.

The judgment of McNAIR, J., sets out clearly and conveniently the relevant
provisions of the charterparties (2) between the parties and the material dates
relevant to the respective parties and the fulfilment of their obligations there- H
under. The judgment also deals in detail with the facts relating to the strike
and these findings of fact (3), as distinct from the inferences to be drawn from
them, have not been challenged before this court. I therefore refer to the judg-
ment for these matters and for the summary of the respective arguments (4)
which were somewhat modified but not, I think, enlarged in the submissions
made to us and I do not formally repeat them. I

At the times when the lay or working days would have commenced to run and
to count in respect of each of the four ships and when in the ordinary course the
intended cargo of wheat in bulk would have begun to be loaded in each ship or at
least when each ship would have come under an elevator in its turn if all the

(1) Reported [1959] 3 All E.R. 434; [1960] 1 Q.B. 439.

(2) These provisions are set out at pp. 582, 583, ante.

(3) The findings of fact are set out at pp. 584 to 586, ante.

(4) This summary is set out at p. 586, letter H, to p. 587, letter F, ante.

elevators had been working, the strike was on. In the circumstances the charterers loaded nothing on to these four ships until the strike was over and have throughout relied on cl. 31 of the charterparty to relieve them from demurrage in each case—

“Lay or working days shall not count at ports of loading during any time when . . . the loading of the cargo, or intended cargo, or any part thereof, is delayed by . . . force majeure . . . strikes . . . or any other hindrance of whatsoever nature beyond the charterers' control . . .”

As the learned judge pointed out (5), the whole clause is a wide one. It covers delay in the supply or bringing down of cargo as well as delay in loading. It brings in many causes of delay and it is not disputed that the provision “any other hindrance of whatsoever nature beyond the charterers' control” is not limited to causes ejusdem generis with the earlier specified causes and that the words must be given their literal meaning.

If the charterers were justified in ordering the ships to Vancouver in the first place and in not removing them to any other port so that Vancouver was and remained a properly nominated port, or were not required to provide at Vancouver or elsewhere within the range of ports specified in the charterparty any other cargo but wheat in bulk, all of which matters call for consideration later, then in my opinion the clause amply protects the charterers against the claims in these cases. The learned judge made a finding early in his judgment that the respective charterers had made reasonable and proper arrangements for securing the delivery of the cargoes to the ships in due time and it was not disputed that the quantities of bulk wheat required from the board for each of the ships were properly notified in due time by each of the charterers. What did cause the delay? When the strike came on Feb. 17 as it was not complete it involved of necessity and in the ordinary course of events that all the tonnage which was available for loading could not be loaded as it normally would be and that some arrangement would have to be made in respect of the limited loading capacity which alone remained available. In so far as only a small percentage could be loaded and no more, it would clearly be right to say that the balance of about eighty-five per cent. could not be loaded from Vancouver because of the strike. That would be so from the point of view of the shippers or of one consignee for the whole of the shipments if such had been the case. Is the matter to be viewed differently when many ships awaited cargo and in respect of each ship? It is true that some wheat in bulk up to 63,435 tons was loaded in parcels on a number of liner vessels (all except seventeen thousand tons, into cargo space reserved by the defendant charterers), and if it had not been so loaded, and if it could have been loaded on some of the tramps, would it have made any difference? In quantity it would have filled perhaps five or six of them. Then the other available tramps could have complained that if some had been filled so could any other of them have been loaded instead and the liners could have complained that no parcels were received by them. In such circumstances, when a reasonable and sensible arrangement was made for loading what could be loaded by distributing small parcels between the liners I think those who are shut out from receiving cargo can properly be said to be shut out by the strike.

The passages quoted by the learned judge (6) from *FLETCHER MOULTON, L.J.*, in *Leonis S.S. Co., Ltd. v. Joseph Rank, Ltd.* (No. 2) (7), and from *LORD DUNEDIN's* speech in *Leyland Shipping Co. v. Norwich Union Fire Insurance Society* (8) serve as guides and, I think, justify his conclusion that there is insufficient ground to differentiate between the strike and the emergency action taken in view of the strike. But if this view is to be rejected I feel no doubt that the

(5) [1959] 3 All E.R. at p. 454; [1960] 1 Q.B. at p. 491.

(6) [1959] 3 All E.R. at pp. 454, 455; [1960] 1 Q.B. at p. 492.

(7) (1908), 13 Com. Cas. at p. 297.

(8) [1918] A.C. at p. 362; 14 Asp. M.L.C. at p. 261.

charterers could rely on the loading having been delayed by a hindrance beyond their control, especially as they can rely on a hindrance of whatsoever nature. A

The shipowners' submission that the charterers are to be held responsible for what Mr. Smith (9) did is quite untenable. The argument was based on the fact that the charterers had bought wheat in bulk from the Canadian Wheat Board f.o.b. Vancouver and therefore in fulfilling their obligation to the charterers, as the buyers, they were at the same time fulfilling the charterers' obligation to put on board a full and complete cargo on each of the ships concerned. Apart from that, no contract of agency was established between the Canadian Wheat Board or Mr. Smith, its representative, and the charterers. [His LORDSHIP then discussed the provisions of the Canadian Wheat Board Act, 1935, and the organisation and actions of the board and of Mr. Smith, which are set out ante, p. 584, letter B, and p. 585, letter F, and concluded thereon:] Mr. Smith acted in the capacity of controller of the wheat to be exported and incidental to that he directed the vessels to the appropriate berth for loading, in this way exercising also the duties of a harbour master. These were duties and directions as the representative of the Canadian Wheat Board and in no way as agent of the charterers, who were not consulted, who had not authorised him and who cannot be held responsible for what he did. The situation called for some direction. This was a reasonable and practical one. It was an effective "hindrance" to the loading of the cargoes in all the four ships and was a hindrance beyond the charterers' control. It may be that Mr. Smith's policy decision was not an executive act directed by the governor or council, but Mr. Smith was sufficiently empowered otherwise. The ordinary conduct of human affairs and dealings which situations bring about and demand cannot be disregarded and treated as if the ordinary conduct had not occurred and played its part. See, for instance, *Lord v. Pacific Steam Navigation Co., Ltd., The Oropesa* (10) in which LORD WRIGHT cited observations of LINDLEY, L.J., in *The City of Lincoln* (11), accepted by LORD HALDANE in *Canadian Pacific Ry. Co. v. Kelvin Shipping Co., Ltd.* (12). B C D E

In the circumstances which arose I would not hold the charterers in fault towards the shipowners for not challenging Mr. Smith's decision and there is nothing to indicate that it would have made any difference if they had done so. The policy adopted commends itself even in this remote period of time and after all the criticism made on it. F

I would add further that Mr. Whittle, the manager of the Midland Pacific Elevator (one of the two elevators which remained working, the other being Richardsons) at the outbreak of the strike gave Mr. Sims, the trade union official directing the strike, a guarantee that his company would only handle wheat from its own suppliers. I need not detail the various interests in the elevators and how supplies reached the elevators normally. The elevator companies in the interior who received the grain were tied to a terminal in Vancouver. It was not customary for Midland Pacific to load full cargoes, and Richardsons never did so. Mr. Wilkins of Richardsons said that if they had attempted to enlarge their supplies beyond their regular shippers their elevator would have been closed down by the strikers. Mr. Smith, when asked whether these two elevators could have increased their wheat supplies by getting wheat from country elevator companies who had not been supplying them prior to the beginning of the strike said that "if they attempted to load anybody else's cars the men would come out. They would go on strike also". As far as tramp steamers were concerned it would appear that the strike effectively closed all the elevators to them and that if Mr. Smith had ordered the Queen City or any other G H I

(9) Mr. Smith was the manager of the Canadian Wheat Board at Vancouver who decided to confine the use of the two elevators which continued working during the strike to liners, etc., and not to use them for tramps. See p. 585, letter F, ante.

(10) [1943] 1 All E.R. 211; [1943] P. 32.

(11) (1889), 15 P.D. at p. 18; 6 Asp. M.L.C. at p. 477.

(12) (1927), 138 L.T. at p. 370; 17 Asp. M.L.C. at p. 355.

of the shipowners' ships instead of the liners to the available loading berths to load wheat (or barley) no cargo could have been loaded. The strike had an effective grip on all the Vancouver loading facilities for bulk wheat (or barley) into tramps.

The facts of the case and the nature and extent of cl. 31 distinguish this case from the many authorities which were cited in support of the shipowners' argument and I only make a brief reference to them out of deference to the sustained arguments of both leading counsel for the shipowners. This is not a case where the charterers over-committed themselves and chartered too many ships for too little cargo. The temporary, though prolonged, ill-adjustment of cargo to ships was due to the strike or to Mr. Smith's order or both and to nothing else. It is irrelevant that the charterparties make no reference to other commitments.

Re Richardsons & M. Samuel & Co. (13) was in my view rightly rejected by the learned judge (14) as giving any support to the shipowners' argument, once the exception "other causes beyond the charterers' control" was construed, as it was, as ejusdem generis with the other stipulated exceptions. The shortage of labour which prevented the loading of oil had arisen because during a hold-up by flood damage to a railway which had subsequently been repaired, the shippers for their own purposes and in some disregard to their future trading had dismissed workmen, who had dispersed and could not readily be reassembled.

The shipowners also placed reliance on *Central Argentine Ry., Ltd. v. Marwood* (15) in support of their argument that each ship individually was entitled to have its contract regarded separately and not in association with others and that that case, at least, required some benefit to be given to each of the plaintiff shipowners on a basis of some apportionment of the actual loading periods between the awaiting vessels as days not lost by the strike. Mr. Roche, who developed the apportionment argument with much ingenuity, sought a credit of one-seventh of each working day during the strike, so that each ship would get one-seventh of the daily demurrage. The argument further stated somewhat axiomatically that a partial strike does not produce a total delay. On the evidence, it seems clear that the strikers would not have permitted any grain, wheat or barley, to be loaded into tramps through the two working elevators, but even if that were not so I do not think the *Marwood* case (15) can be effectively called in aid in the present case. If it was decided, as I am inclined to think it was, on the ground that in the circumstances the s.s. *Goathland* would have been delayed in her discharging by the vessels in priority ahead of her, strike or no strike, then the case presents no difficulty, but much more has been extracted from it in argument than that. The action was tried without pleadings on an agreed statement of facts. Mr. Adair Roche, K.C., in his argument for the shipowner, pointed out that there was no admission that the ship could have got into berth on Jan. 12 (the date she was ready to do so) apart from the strike and the time was to run whether the ship was berthed or not. LORD PARKER OF WADDINGTON said (16):

"The period of delay due to the occupancy of the four berths would in any case be counted in reckoning the lay days, and there is nothing in the statement of facts to show that this period was increased by reason of the strike beyond the period which the respondent has already allowed between Jan. 12 and Feb. 15."

LORD WRENBURY said (17):

"There is nothing to show that if there had been no strike she would have been able to get a berth at once upon arrival on Jan. 12."

(13) [1898] 1 Q.B. 261; 8 Asp. M.L.C. 330.

(14) [1959] 3 All E.R. at p. 458; [1960] 1 Q.B. at p. 498.

(15) [1915] A.C. 981; 13 Asp. M.L.C. 153.

(16) [1915] A.C. at p. 988; 13 Asp. M.L.C. at p. 155.

(17) [1915] A.C. at p. 992; 13 Asp. M.L.C. at p. 156.

I would agree with McNAIR, J. (18), that the decision establishes and applies the principle that the mere existence of a strike is not sufficient; it must have some causative effect on the operations of the particular ship concerned. The decision was based on the different facts and a different and less wide exceptions clause and it is in no sense a decision which binds this court in this case. It has provided abundant argument, especially the passage in the speech of LORD SUMNER (19) where he says:

“ I think the words ‘ which prevents or delays the discharging ’ mean strikes which in themselves prevent or delay the discharging of the chartered ship herself, and do not extend to the case of strikes which only prevent the chartered ship from getting into a berth because they prevent some other ship from getting out of that berth.”

LORD WRENBURY would seem to support this view (19a). It was expressed in the setting of the *Marwood* (19b) facts, and with all deference to authorities of such distinction I would venture to question whether a jury of business men would arrive at a similar conclusion on what is substantially if not entirely a question of fact.

In contrast to these two cases on which the shipowners so strongly relied, the decision in *Leonis v. Rank* (No. 2) (20) more closely resembles the present case under review and tends more to support the charterers' argument. At the port of loading a strike among railwaymen had occurred shortly before the arrival of the chartered vessel and had caused a congestion of traffic on the railway and in the harbour and there had been delay consequent on the strike in the transit of the cargo intended to be shipped in the chartered vessel. There was a clause which provided that time lost was not to be counted as part of the lay days if the cargo could not be loaded by reason of any dispute between masters and men, occasioning a strike of railway employees or other labour connected with the working and loading or delivery of the cargo proved to be intended for the steamer. BIGHAM, J., and the Court of Appeal were clearly of the opinion that the charterers brought themselves within the strike clause. VAUGHAN WILLIAMS, L.J., said (21):

“ the question of fact which arose for BIGHAM, J., to decide was this, is it true to say that, by reason of that strike, the cargo proved to be intended for the steamer could not be loaded within the lay days.”

The court answered yes, and the “ subtle argument ” of Mr. Hamilton, K.C., was rejected. His efforts were emulated by learned counsel for the shipowners in the present cases, but I remain unconvinced that McNAIR, J., was wrong. Both the learned judge and the charterers cited further authorities in support of the view which the judgment expresses but I find it unnecessary to deal with them in the light of the facts of the present case and the strength of the exceptions clause embracing, as it does, delay in loading of the cargo or intended cargo not only by strikes but also by “ any other hindrance of whatsoever nature beyond the charterers' control ”.

That concludes my consideration of the shipowners' first submission. On the basis that the submission should fail and that the charterers should be held covered by cl. 31 on its construction and application to the circumstances existing in Vancouver as the judgment holds, the shipowners formulated and argued the following submissions:

(ii) The charterers cannot rely on cl. 31 because the delay due to the strike was delay to which the ships were inevitably doomed and the clause covered only exceptional circumstances intervening.

(18) [1959] 3 All E.R. at p. 459; [1960] 1 Q.B. at p. 499.

(19) [1915] A.C. at p. 989; 13 Asp. M.L.C. at p. 155.

(19a) [1915] A.C. at p. 992; 13 Asp. M.L.C. at p. 156.

(19b) [1915] A.C. 981; 13 Asp. M.L.C. 153.

(20) (1908), 13 Com. Cas. 295, *affg.* 13 Com. Cas. 161.

(21) (1908), 13 Com. Cas. at pp. 295, 296.

(iii) The charterers could not rely on the clause in respect of the Riverton and Cape Rodney because Vancouver was not a proper port to have nominated at the time of their nomination and in the case of the *Agostino Bertani* was an improper port at the date of the charterparty and also at nomination.

(iv) If Vancouver was originally a good nomination, as the strike continued the charterers of each of the vessels had a duty to nominate another port within the contractual ports and in so far as delay resulted from their failure to do so the clause gave no protection.

(v) The charterers were in the circumstances under a contractual duty in respect of all the ships except the *Agostino Bertani* (whose charterparty provided for a cargo of wheat only) to have loaded alternative cargo or cargoes in order to fulfil their obligations and to reduce the delay.

There was a further and wholly distinct submission which I will leave to the end.

These four points—(ii) to (v)—call for consideration of the nature and extent of the strike and its effect on the respective charterparties. The judgment deals fully with the facts of the strike and the effect of it on the elevators (22). [His LORDSHIP referred in detail to some of these facts, and continued:] The learned judge, who had the witnesses' evidence on the progress of the strike and read contemporary comments on it in letters, cables and the newspapers, came to these conclusions (23):

“(a) that at no time before the strike began or at any stage during its continuance was the position such that a well-informed shipowner or charterer, making use of the facilities for inquiry open to him, could have formed any really reliable appreciation as to the likely duration of the strike, and (b) in fact, at no time before the strike began or at any stage during its continuance was it on balance of probabilities likely [still less was it certain] that the strike would last more than two or three weeks, or more than a further two or three weeks.”

The judge held that although the strike turned out to be a long one it did not differ in its essentials from other strikes.

I do not think that it has been shown that he was wrong. The circumstances which brought about and prolonged the strike might have changed overnight however unfavourable the chances may have appeared shortly before. If a harbour entrance is obstructed by demolition or by a sunken wreck or if a dock is crowded with vessels awaiting discharge with little likelihood of any of the vessels leaving before discharge, an informed observer could no doubt calculate with approximate accuracy the minimum time the blockage would be likely to last. No such factor arises in a strike. The chance of change is unpredictable, or at least I think it was in this case.

The judgment quotes (24) abundant views in the cases of the uncertainty of the duration of strikes, which are aptly embodied in the statement of SCRUTTON, L.J., in *Metropolitan Water Board v. Dick, Kerr & Co., Ltd.* (25):

“... strikes have always been treated by the courts as subject to such unexpected termination that they cannot without more be treated as abrogating contracts.”

See also *Bulman & Dickson v. Fenwick & Co.* (26); *Dobell & Co. v. Green & Co.* (27); *Ropner & Co. v. Ronnebeck* (28); and *South African Despatch Line v. Panamanian S.S. Niki (Owners)* (29).

(22) See p. 584, letter H, to p. 586, letter G. ante.

(23) [1959] 3 All E.R. at p. 444; [1960] 1 Q.B. at p. 479.

(24) [1959] 3 All E.R. at pp. 446, 447; [1960] 1 Q.B. at pp. 479, 480.

(25) [1917] 2 K.B. at p. 35.

(26) [1894] 1 Q.B. 179; 7 Asp. M.L.C. 388.

(27) [1900] 1 Q.B. 526; 9 Asp. M.L.C. 53.

(28) (1914), 13 Asp. M.L.C. 47; 20 Com. Cas. 95.

(29) [1958] 3 All E.R. 590; [1959] 1 Q.B. 238.

The shipowners relied, in the face of these authorities, on *The Penelope* (30), A and since the hearing before us the shipowners with the full concurrence of the charterers have referred us to observations of BRAMWELL, B., in *Jackson v. Union Marine Insurance Co.* (31) in the Exchequer Chamber. The charterers had in that case thrown up the charterparty when the chartered ship had got on to the rocks on a voyage from Liverpool to Newport to load a cargo. The shipowner claimed from underwriters the freight lost and the issue was whether the contract had been frustrated as the charterers had treated it to be. BRAMWELL, B., illustrated his views in the interaction of an exceptions clause and the impossibility of performance of the contract in this way (32): B

"The condition precedent has not been performed, but by default of neither. It is as though the charter were conditional on peace being made between countries A. and B., and it was not; or as though the charterer agreed to load a cargo of coals, strike of pitmen excepted. If a strike of probably long duration began, he would be excused from putting the coals on board, and would have no right to call on the shipowner to wait till the strike was over. The shipowner would be excused from keeping his ship waiting, and have no right to call on the charterer to load at a future time. This seems in accordance with general principles. [and later he added:] . . . the principle being, that, though non-performance of a condition may be excused, it does not take away the right to rescind from him for whose benefit the condition was introduced." C D

As an illustration it may be said that it suggests that a strike can frustrate but it is based on a strike of probably long duration. The situation of a vessel on rocks with presumably bottom damage permits of no "overnight" reinstatement on her contractual task and lacks the element of uncertainty of duration and possible rapid termination which are inherent factors in a strike. E

The Penelope (30) was an unusual case where a time charter for twelve months for carrying successive cargoes of coal from one of the South Wales ports to Italian ports was affected by the general coal strike of May 1, 1926. No coal could be exported from any of the ports named in the charterparty until towards the end of December of that year, by which time at least half of the twelve months had gone by. In the meantime the *Penelope* had performed two voyages quite outside the charterparty with the charterers' consent and one to which they did not assent. After the strike had ended, substantially in November, a governmental embargo on coal export remained operative, until Dec. 17. LORD MERRIVALE, P., said (33): F G

"What was unforeseen . . . was the total impossibility of any export of coal from the South Wales ports for a period of half a year and upwards."

The shipowner after the long delay refused to load under the charterparty towards the end of December, and the learned President found that he was entitled to treat the contract as at an end in all the circumstances, including the plaintiffs not being ready and willing to perform their obligations at all material times. H

I do not regard the illustration or reasoning of BRAMWELL, B. (32) or the decision in *The Penelope* (30) as aiding greatly the argument for the shipowners in face of the other authorities and the facts found by the learned judge in the present case. The shipowners did not remove their ships in the course of the long delay but left them to be loaded and the contract to load a full and complete cargo to be performed. I

I turn now to the shipowners' second argument. *Ciampa v. British India*

(30) [1928] P. 180; 17 Asp. M.L.C. 486.

(31) (1874), L.R. 10 C.P. 125; 2 Asp. M.L.C. 435.

(32) (1874), L.R. 10 C.P. at p. 144; 2 Asp. M.L.C. at p. 442.

(33) [1928] P. at pp. 196, 197; 17 Asp. M.L.C. at p. 492.

Steam Navigation Co., Ltd. (34) is said to establish a doctrine or apply an established doctrine that neither party can rely on an exceptions clause in a charterparty if the specified cause is one to which the ship is doomed inevitably to be subjected. At the date of the charterparty in the case of the *Agostino Bertani* and at the respective dates of the orders of the other ships, it is said, the strike was bound to delay the ships.

As on the facts here I think it is impossible to say that the venture, the loading and the receiving of the wheat cargo, was doomed inevitably to be subjected to a prolonged strike, I do not think that any such doctrine could be applied here or that the submission calls for any lengthy examination. If a strike were not an exceptional and temporary matter trade could cease and parties would not contract within the sphere of its operations. If a strike is in operation or contemplated, contracts if made and orders if given arise from the hope and expectation that the contract can and will be performed when it ends. A strike exceptions clause safeguards one party in the meantime during the strike's duration. The judgment traces the history of the argument. I see nothing wrong with the decision in *Ciampa* (34) itself. I agree with the conclusion of McNAIR, J. (35), that there is no settled rule of construction that a specific exception such as strikes or war, cannot be relied on if the strike or war was operative at the time when the contract was made or the ship ordered to the affected port. It must depend on the proper construction of the contract. That was a view I expressed in *Steamship "Induna" Co., Ltd. v. British Phosphate Comrs.* (36). I would not myself find anything I said there to support the shipowners' argument here. I do not think that any of the parties to these charterparties were contracting on the basis of or were prepared to accept a prolonged strike. If at the time of contracting they could have foreseen a strike of eighty days coming at the time it did I do not doubt that they would have contracted differently or not at all. The shipowners, however, agreed to relieve the charterers from their obligations during delay due to strikes and all parties in the present cases hoped and expected, I might say believed, that the strike would be over in a reasonable time from any moment when its duration or further duration called for assessment. The past would not help the prognosis of the future except perhaps to forecast that the longer it had endured the sooner would it end.

In my view in all matters of controversy in this case the strike has to be judged not as we now know it to have been in its extent and its duration but how it would have appeared from day to day to those interested and anxious to assess its duration.

The third submission was regarded by the parties as the point of the greatest general importance. It does not arise in the case of the *Queen City*, which was ordered to Vancouver on Feb. 12, 1953, some five days before the strike commenced, but the *Riverton* was ordered to Vancouver on Mar. 22, the *Cape Rodney* on Mar. 27, and the *Agostino Bertani* on Apr. 23. On all these dates the strike had been running since Feb. 17, and the allegation is that the last three nominations were bad as Vancouver was at the time, it was said, a strikebound port and that the charterers were in breach of contract in so ordering the ships.

The charterparty in the case of the *Queen City* provided (so far as is material) as follows (the words italicised being inserted in the printed form in type):

"... vessel ... shall proceed in ballast and, upon arrival, be made ready, and shall receive on board at *Tacoma and/or Seattle or Portland, Oregon, Vancouver, B.C., or New Westminster, or Victoria, B.C., or other loading places, as hereinafter provided ... a full and complete cargo ... of wheat in bulk ...*; [etc.]

"Cl. 14. Loading places. Vessel to proceed to such usual loading place or places where she can safely load, always afloat, as may be ordered by the

(34) [1915] 2 K.B. 774. (35) [1959] 3 All E.R. at p. 457; [1960] 1 Q.B. at p. 495.
(36) [1949] 1 All E.R. 522; [1949] 2 K.B. 430.

charterers, at Vancouver, B.C., or New Westminster, or Victoria, B.C., or Tacoma and/or Seattle or Portland and/or Astoria and/or loading places on the Columbia and/or Willamette Rivers, and there receive the cargo in manner customary alongside, afloat and/or from the wharf and/or elevators. Should the vessel be required by charterers to move more than twice after being in her loading berth, extra cost of towage to be paid by them . . .”

The shipowners submit that a port is “strikebound” if the commercial operations which the ship was contracted to perform there cannot be carried out without inordinate delay; whether such conditions exist has to be decided at the time of the nomination of the port to which the ship has to go; the conditions have to be judged in the light of the facts as they were at the time of nomination—known or unknown—just as with a nomination to a “safe port” or alternatively in the light of the conditions as they would then appear to a reasonable man who has to assess them. I think that on any view the argument goes too far in submitting that a charterer would have to be judged by facts unknown to him and if it has any substance at all I would prefer the alternative of the view a reasonable man ought to have held of the situation.

The charterparty specifies the ports without any restriction on the selection by the charterer. It must have been in the contemplation of the parties at the time of contracting that a strike might arise at any of the ports in question when the time came for nomination or after nomination but the shipowners accepted cl. 31 as drawn. In the case of the *Agostino Bertani* the parties were prepared to contract on Mar. 13, 1953, on substantially similar terms to the other ships (except as to alternative cargo) with all the knowledge the parties then had of the existing strike and the parties left the strike clause unamended.

The argument for the shipowners involves implying a term into this detailed contract of a nature which has not so far, it seems, been implied into any charterparty. I share the judge's reluctance to do so when the parties make no express agreement with regard to the duration of a strike, well knowing that some strikes might involve much longer delay than others, and where they do agree as to who is to bear the burden of a strike in the terms of cl. 31. The parties to the charterparties had a common interest in having the cargo loaded without delay and the shipowners might with reason rely on the charterers' desire to receive the intended cargo in England and India respectively without wishing to place fetters on the right to select the port of loading merely because some delay was foreseeable. The main object of the engagement of the ships was to convey the cargo which the charterers had purchased or wished to ship to its desired destination. The intended cargo was in Vancouver. The main object was not the finding by the charterers of a full and complete cargo for the ships hired although within the terms of the charterparty that became their obligation. What would the parties at the time of contract have regarded as “inordinate delay”? If an outsider had suggested a clause that a probable delay of say three weeks owing to strike could bring the contract to an end I can find no evidence to support a conclusion that each side would have agreed as a matter of course, and I am strongly inclined to think that neither would have accepted it. Both would; I think, have said “The cargo will be in Vancouver and the ship will be only a short journey from Vancouver and the strike might end by the twenty-second day; we will take our chances.”

Turning to the authorities, *Tharsis Sulphur and Copper Co. v. Morel Brothers & Co.* (37) was relied on by the charterers. The charterparty provided that the ships after loading should proceed

“to the Mersey (or so near thereto as they may safely get), and deliver . . . at any safe berth as ordered on arrival in the dock at Garston.”

A LORD ESHER, M.R., said (38):

"The contract does not express any particular berth, but it does express the equivalent to that in using the words 'as ordered', which I take to mean as ordered by the charterers. Does that give the charterers the right to fix the place where the carrying voyage is to end? Even without authority I should say that it did, but *Tapscott v. Balfour* (39) has dealt with a charterparty in a similar form, where a particular dock has to be named, the necessary result of the agreement being that when the charterer exercises that power, the result is the same as if the dock had been named in the charterparty. That was decided nineteen years ago, and as it was a decision on a question of frequent mercantile interest, we should not interfere with the decision unless we were fully convinced that it was wrong. So far from entertaining that opinion I think the decision was quite right, and that when the charterer has to name a dock or a place in a dock, when he does so, it is as though it had been named in the charterparty, and indicates the termination of the voyage. To hold otherwise would be to give no effect to the words 'as ordered'."

BOWEN, L.J., expressed the view (40) that

"*Tapscott v. Balfour* (39) laid down clearly that where the place at which the carrying voyage is to end is not stated in the charterparty, but is to be named by the charterer, the selection of a dock has precisely the same effect as if that dock had been originally named in the charterparty . . ."

The principle would appear to be the same whether the selection of the charterer is the berth or the dock or, as here, the port and such usual loading place or places therein as the charterers should order.

The main argument for the shipowners was that the court must imply a term that the port nominated must be one at which loading can take place within a reasonable time or without such delay as would frustrate the adventure. There was no material difference, it was said, between the physical unsafety of a port and its commercial unsafety and that if there was to be (I suppose in all probability) inordinate delay at a port it would be barred from nomination in proper performance of the charterparty as if it were physically unsafe. It has been held, it was submitted, that a safe port includes a port without danger from political causes as well as free from danger from physical causes (*Ogden v. Graham* (41)). Physical damage likely to accrue to a ship by the dangers of a port or berth or risk of a ship's confiscation are both matters from which a shipowner might properly wish to protect himself. A strike (at least one which does not involve likelihood of physical damage by the strikers to the ship) is quite different in its nature. The ship may be delayed without earning but this is a risk the shipowner has agreed to run and so agreed without any limitation of the duration of any delay which might arise. As I have said, if the parties had sought to negotiate the period of time of a strike, either already accrued or likely to ensue, which would make a given port a bad nomination, I can find nothing to indicate that they would have reached agreement. I do not find it a satisfactory or helpful analogy.

The shipowners further relied on *Nelson v. Dahl*, in the Court of Appeal (42) and in the House of Lords (43). There was a congestion of vessels awaiting discharge at the Surrey Commercial Docks which was likely to involve a delay of some months before the ships could be discharged and as she had been chartered to proceed to those docks "or so near thereunto as she may safely get . . . and deliver [her cargo]" the shipowners were held entitled to deliver the cargo at

(38) [1891] 2 Q.B. at p. 649; 7 Asp. M.L.C. at p. 107.

(39) (1872), L.R. 8 C.P. 46; 1 Asp. M.L.C. 501.

(40) [1891] 2 Q.B. at p. 652; 7 Asp. M.L.C. at p. 108.

(41) (1861), 1 B. & S. 773.

(42) (1879), 12 Ch.D. 568; 4 Asp. M.L.C. 172.

(43) Sub nom. *Dahl v. Nelson, Donkin & Co.*, (1881), 6 App. Cas. 38; 4 Asp. M.L.C. 392.

Deptford Buoys outside the docks. I agree with McNAIR, J. (44), that the case and the judgment and speeches lend little support to the shipowners' argument. There was an element of certainty of prolonged delay of such a duration that it was thought to be unreasonable having regard to the object of the common adventure. No such circumstance was present here.

It has been decided in this court in *Akt. Olivebank v. Dansk Svovlsyre Fabrik* (45) that a charterer may be in breach of contract in nominating an impossible port, that is that there was to be implied into the charterparty in that case an implied restriction on the charterers' choice of ports. The charterers had nominated Aalborg in Denmark for the discharge of nitrate when the charterers knew that the importation of nitrate into Denmark was prohibited. In *Tharsis v. Morel* (46) BOWEN, L.J., recognised that such a restriction as a blocked entrance to a dock might be regarded as entailing such a delay in entering the dock that to nominate such a dock "would be practically no exercise at all of the option . . .".

The difficulty of the shipowners is not to establish a general principle but to apply it to a strike and in particular to the circumstances of this case. A temporary delay while a port is cleared of its danger will not render a port unsafe (*S.S. Knutsford, Ltd. v. Tillmanns & Co.* (47)), and a strike—or at least this strike—had not that degree of certainty of long duration which would make the delay such as to frustrate the contract. *Dobell & Co. v. Green & Co.* (48) is a strong case against the shipowners and in favour of the charterers but perhaps the best support the shipowners receive is from ROMER, L.J., who states briefly (49):

"I agree thus far with the appellants that the charterers were bound to act reasonably in selecting the colliery from which to load coals for this charterparty. I will assume, though I do not decide, for any decision on the point is unnecessary, that the time to see whether a reasonable selection had been made by the charterers was the time when they notified their selection to the shipowners. But assuming that that was the time, still, looking at the terms of the charterparty, especially the clause as to strikes, I think the selection of the colliery was not unreasonable merely because at the time of notification the colliery was on strike, for the strike might have ended at any moment."

But those observations have to be read in the light of *Bulman & Dickson v. Fenwick & Co.* (50) which held that the charterer is free to choose as a matter of contract, without considering the convenience of the shipowner. I would refer also to the passages in the judgment of BOWEN, L.J., in *Tharsis v. Morel* (46) cited by McNAIR, J. (51).

I am not prepared to consider hypothetically "inordinate delay", "unreasonable delay" or "frustrating delay", as I think we were invited to do.

The essential element of "impossibility" must, I think, be the certainty of the conditions which will, in all probability, defeat the object of the adventure. But here neither side "threw up the charterparty". They performed it. After all the argument I think the observations by SCRUTTON, L.J. (52), already cited meet the case—

"strikes have always been treated by the courts as subject to such unexpected termination that they cannot without more be treated as abrogating contracts."

(44) [1959] 3 All E.R. at pp. 450, 451; [1960] 1 Q.B. at p. 486.

(45) [1919] 1 K.B. 388; *affd.*, [1919] 2 K.B. 162; 14 Asp. M.L.C. 426.

(46) [1891] 2 Q.B. at p. 652; 7 Asp. M.L.C. at p. 107.

(47) [1908] A.C. 406; 11 Asp. M.L.C. 105.

(48) [1900] 1 Q.B. 526; 9 Asp. M.L.C. 53; 5 Com. Cas. 161.

(49) (1900), 5 Com. Cas. at p. 166; 9 Asp. M.L.C. at p. 55.

(50) [1894] 1 Q.B. 179; 7 Asp. M.L.C. 388.

(51) [1959] 3 All E.R. at p. 452; [1960] 1 Q.B. at p. 488.

(52) In *Metropolitan Water Board v. Dick, Kerr & Co., Ltd.*, [1917] 2 K.B. at p. 35.

The fourth submission of the shipowners derived, if not its origin, its impetus from *Duncan v. Köster, The Teutonia* (53), a decision by the Privy Council, on appeal from the judgment of SIR ROBERT PHILLIMORE (54) in the High Court of Admiralty. If that case had decided clearly, either directly or by implication, that the charterer or his assignee was bound to select another port from those named in the charterparty when Dunkirk, to which the *Teutonia* had been ordered, was not available when the ship arrived there because war was threatened and soon broke out, it would, at least, have been a helpful guide and the court would have had to consider whether it was a binding authority. When Dunkirk was not available the master took his ship to the Downs and then on the order of the owners to Dover with the cargo on board. Dover was in fact within the range of ports "any one safe port in Great Britain or on the Continent between Havre and Hamburg". The cargo owners demanded their cargo at Dover without payment of the freight as they had wanted the cargo at Dunkirk. There was no nomination by the charterer of Dover as an alternative port but the court held that the freight attributable in the charterparty to a voyage to Dover should be paid and the cargo delivered there. The facts made this an equitable solution and on the whole that would seem to be the basis of the decision. In the Privy Council the charterparty was treated as subsisting with neither party in breach, it being stated that an effort should be made to give effect to the contract. The shipowner was therefore entitled to his lien for freight. The judgment did not say that the charterers had to nominate another port and were either in breach for not doing so or were to be treated as if they had done so. Whatever may be the true reasoning of the decision it is not sufficiently clear and certain, in my view, to support the shipowners' submission on it.

The argument for the shipowners was advanced in face of the authorities that once a nomination has been made the place selected becomes the contractual port (or dock or berth) as if that were the only port (or dock or berth) named. The shipowner might well be disadvantaged if the charterer could change his mind and make a further nomination or further nominations in substitution to suit his purposes or at his estimate of the situation which called for the selection of and departure to an alternative port. No provision seems to be made for this in the charterparty. It may be that a nomination could be bad—that is, of such a character that it could be treated as no nomination. If a stipulated port had been destroyed by earthquake or, I suppose, by a nuclear explosion so that it could no longer be said to be a port and could not be used as such in any foreseeable and practical period, then the charterers' obligation to nominate an existing port under the charterparty would appear to remain. This would be quite independent of any exceptions clause. If the shipowner sought to treat a bad nomination as an anticipatory breach of contract and to accept it as a repudiation other considerations would arise but I do not think they call for consideration here. That Vancouver was not, as it is said, an impossible port is clear from the fact that all the ships were in fact loaded. Each ship with which we are concerned went there, none of them sailed away empty. The venture was adhered to by all the parties and eventually completed.

Tapscott v. Balfour (55) was decided in the same year as *The Teutonia* (53) and the judgment of BOVILL, C.J., commences the long line of settled authority that once a port has been properly nominated the charterparty is to be construed as if the nominated port had been the sole port of destination in the charterparty. I would agree with DEVLIN, J., in *Anglo-Danubian Transport Co., Ltd. v. Ministry of Food* (56), that once a proper nomination has been made the charterer has neither the right nor the obligation to make a second nomination. The basis of these authorities would appear to be that on nomination a binding election

(53) (1872), L.R. 4 P.C. 171; 1 Asp. M.L.C. 214.

(54) (1871), L.R. 3 A. & E. 394.

(55) (1872), L.R. 8 C.P. 46; 1 Asp. M.L.C. 501.

(56) [1949] 2 All E.R. at p. 1069; 83 Lloyd's Rep. at p. 139.

has been made, and we were referred to *Brown v. Royal Insurance Co.* (57) A and to the observations of HARMAN, L.J., in *Louis Dreyfus et Cie. v. Parnaso Cia. Naviera S.A.* (58).

Although commercial men are accustomed to entering into contracts there is often a considerable reluctance amongst them to agree to replace a contract which has produced difficulties and has not worked as expected. They tend to keep tenaciously to the original bargain, however doubtful its interpretation may be. I do not know whether there was scope during the long delay at Vancouver for the parties to have agreed afresh or varied their bargain but it does seem that if an alternative port had been available the parties might have sought an agreement. This was apparently done in *Bulman v. Fenwick* (59); and in *Tapscott v. Balfour* (60) the ship, in order to avoid being neaped, moved across the River Mersey to Birkenhead to complete her loading, apparently by agreement between the parties. If such a course had been attempted at Vancouver it might well have revealed the difficulties or even the emptiness of the shipowners' argument under this head. When, for instance, should the change-over have been decided on and made? In the absence of an agreement, what would have been the charterers' position if, having ordered the ship to another port, the strike had ended as soon as she had cast off on the new voyage (compare *S.S. Knutsford, Ltd. v. Tillmanns & Co.* (61), where ice quickly cleared). B

The shipowners also relied generally by way of analogy, as they did under the third submission, that if wheat was not available in Vancouver the charterers should have loaded an alternative cargo or cargoes, on what was said to be the effect of the principle of *Brightman & Co. v. Bunge Y Born* (62); and also on *Lewis v. Louis Dreyfus & Co.* (63), where a choice of methods of loading was given and if one was not available one of the others, it was held by ROWLATT, J., should have been used. On appeal (64) the decision was reversed, as the obstruction to the method of loading was only temporary, but the position where there are alternative loading methods was discussed, particularly by SCRUTTON, L.J. (65). These call for consideration more particularly under the next heading. The nature and extent of both such obligations depend on the contract in each case. In my view this line of argument fails. It in no way affects the selection of a port. D

The fifth submission raises the question in respect of the first three ships (but not the *Agostino Bertani*, whose charterparty provided for a cargo of wheat only) whether the charterers were under a contractual duty to have sought and loaded alternative cargo or cargoes in order to fulfil their obligations, to load a full and complete cargo, and to reduce the delay. The options given by the charterers were to load up to one-third cargo of barley in bulk and one-third cargo of flour in bags in the case of the *Queen City* and the *Cape Rodney*. In the case of the *Riverton* the options were a full cargo of flour in bags or up to one-third cargo of barley in bulk. It was accepted that the charterers did not take any steps at any material time to load any alternative cargo and they maintained that they were under no obligation to do so. On the other hand the shipowners alleged that if cl. 31 gives any protection it only protects for such time as was reasonably required by the charterers so as to enable them to obtain and make ready to load an alternative cargo of flour or barley. Strong reliance was placed on *Brightman & Co. v. Bunge Y Born* (66), the principle of which has recently been re-stated by G

(57) (1859), 1 E. & E. 853.

(58) [1960] 1 All E.R. at p. 763; [1960] 2 Q.B. at p. 59.

(59) [1894] 1 Q.B. 179; 7 Asp. M.L.C. 388.

(60) (1872), L.R. 8 C.P. 46; 1 Asp. M.L.C. 501.

(61) [1908] A.C. 406; 11 Asp. M.L.C. 105.

(62) [1924] 2 K.B. 619; 16 Asp. M.L.C. 423; *affd.* H.L., [1925] All E.R. Rep. 607; [1925] A.C. 799; 16 Asp. M.L.C. 545.

(63) Unreported decision of ROWLATT, J., Nov. 9, 1923, *affd.* C.A., (1926), 31 Com. Cas. 239. (64) (1926), 31 Com. Cas. 239. (65) (1926), 31 Com. Cas. at pp. 247-250.

(66) [1924] 2 K.B. 619; 16 Asp. M.L.C. 423; *affd.* H.L., [1925] All E.R. Rep. 607; [1925] A.C. 799; 16 Asp. M.L.C. 545.

A DIPLOCK, J. (67), and in the Court of Appeal (68), in *South African Despatch Line v. Panamanian S.S. Niki (Owners)*.

As the terms of the charterparties and the exceptions clauses in those two cases and in the present appeals were different it is necessary first to construe the charterparty here; and I continue the citation from where I left off earlier in this judgment:

B "... a full and complete cargo . . . of wheat in bulk, any bags and/or bagging required for safe stowage to be supplied and paid for by the shipowners, and/or barley in bulk, and/or flour in sacks *as below* which the said parties of the second part [namely, the charterers] bind themselves shall be shipped, and being so loaded, shall therewith proceed to *one safe port* in the United Kingdom . . . or on the Continent between *Antwerp* and Hamburg . . . or as near thereunto as she may safely get, and there deliver the same and be paid freight as hereinafter provided: 80s. per ton wheat . . . Charterer has the option of loading up to one-third cargo of barley in bulk, in which case the above rate of freight to be increased by 2s. 6d. per ton on the quantity of barley loaded. Charterer has the option of loading up to one-third cargo of flour in bags at 10s. per ton extra over the rate for wheat, on the quantity of flour loaded, if loaded at British Columbia, and 12s. 6d. per ton extra if loaded at U.S. Pacific."

I would read those provisions as a contract to load a full and complete cargo of wheat in bulk at 80s. per ton with express options to the charterers to load up to one-third of barley and one-third cargo of flour in bags each at an additional rate of freight. They are true options and unfettered, and I see no reason why in this charterparty the charterers were not free to exercise them or not as they found convenient. Apart from the effect of the strike on the loading of wheat (or barley) the shipowners had no concern with the cargo the charterers might wish to select. There is nothing to indicate, any more than in the selection of a port, that the charterers were bound to regard the convenience of the shipowners. But for the words "as below" and the express options given, it would appear that the shipowners' reliance on *Brightman v. Bunge Y Born* (69) would be justified, as in that case the obligation was to load a full and complete cargo of wheat and/or maize and/or rye in bags and/or in bulk and the freight was the same for whatever commodity or mixture of commodities was loaded. By cl. 6 of that charterparty (other cargo) it was provided

G "the charterers shall have the option of supplying other lawful merchandise . . . in which case freight to be paid on steamer dead-weight capacity for wheat in bags."

H Clause 6 there gives the option. The obligation, in contrast to the cases under appeal, was to load a full and complete cargo of the commodities enumerated and unless an exception covered them all (which it did not) the charterers had failed to fulfil the contract but were given time to obtain one of the alternative cargoes in place of their selected one which had become unavailable. If all the grain cargoes had been protected by an exceptions clause there is no reason to think that the court would have held the charterers liable to load a full and complete cargo of "other lawful merchandise" by treating the exercise of the option under cl. 6 as obligatory. It is different in form and substance from the obligation to load a full cargo from the various grain cargoes specified in the charterparty. I Those who deal in grain and are familiar with the grain trade would, I apprehend, find themselves in grave trading difficulties if, merely because a strike delayed the loading of an intended cargo of grain, they were called on in order to fulfil their contract with the shipowner to load motor cars, coal, timber or any other lawful merchandise which might be at hand and available. An option is one thing but

(67) [1958] 3 All E.R. 590; [1959] 1 Q.B. 238.

(68) [1960] 1 All E.R. 285; [1960] 1 Q.B. 518.

(69) [1924] 2 K.B. 619; 16 Asp. M.L.C. 423; *affd.* H.L., [1925] All E.R. Rep. 607; [1925] A.C. 799; 16 Asp. M.L.C. 545.

an obligation of such a character would make the charterparty more favourable to the shipowner than would appear to be intended. It would be a contract to fill the ship with anything which was lawful merchandise or pay demurrage. A

South African Despatch Line v. S.S. Niki (Owners) (70) was also relied on by the shipowners but that case is similarly distinguishable, in my view, from the present charterparties. It fell within the decision of *Brightman's* case (71).

The question is, a full and complete cargo of what? In the present cases it was as there is no evidence of any of the options being exercised. In the *Brightman* case (71) and in the *Niki* case (70) the obligation was to load not a full and complete cargo of one commodity, whether the selected or intended cargo of the charterers' choice, but of the variety enumerated. The charterers might select so long as the cargo was a full and complete one. In my opinion this vital distinction in the contractual terms relating to the cargo to be loaded differentiates the present cases from the cases of *Brightman* (71) and the *Niki* (70). The learned judge points out (72) other distinctions in the extent of the exceptions clause but I doubt if these in themselves would be sufficient and I would prefer to rely on the fundamental difference in the contractual obligation as I have stated above. If that is the right construction of the express terms of the charterparty I see no reason to imply any obligation on the charterers to load an alternative cargo. It might well impose a burden on them which they would not have undertaken by express contract and which no reasonable man would have said was the undoubted intention of the parties in the circumstances. B C D

On this point WILLMER, L.J., whose judgment I have already read, takes a different view but he finds in favour of the charterers on the facts. I agree with him and the learned judge that if there was a duty on the charterers to load an alternative cargo the burden of proof would be on them to establish that no time would have been saved and the same delay would have occurred. I have already stated that the evidence seems to make it clear that the strikers would not have allowed any wheat (or barley) to be loaded into tramps through the two working elevators at Vancouver and therefore there would have been no point in either the Queen City or the Cape Rodney seeking a one-third cargo of flour in bags. It would not have turned them into "liners" or bluffed the strikers. I agree with what is said by WILLMER, L.J., in respect of both flour and barley and with his conclusion that on the facts of the availability of any alternative cargoes the shipowners' contention fails and that if, contrary to my own view, the charterers ought to have exercised, or endeavoured to exercise, the options, they are still not precluded from relying on cl. 31. They could not in the circumstances have overcome the effect of the strike. E F G

The result in my judgment is that on these charterparties the nomination of Vancouver was a proper nomination and the charterparties were to be treated as if Vancouver were the sole port available in the written contract, all the others being treated as struck out; that the charterparties were to be read as if wheat in bulk were the sole commodity to be loaded and carried from Vancouver, as no option was exercised by the charterers and there was no obligation on them to exercise an option; that once Vancouver had been, as it was, properly nominated there was no right or duty on the charterers to change it and therefore cl. 31 can properly be invoked and the lay days did not count during any time when the loading was delayed by the strike. H

The argument for the shipowners which ran through the various heads of submissions that just as alternative cargoes had to be selected, so had alternative ports, on these findings fails. The argument based on an obligation to seek an alternative method of loading if one became unavailable, equally fails, for the I

(70) [1958] 3 All E.R. 590; [1959] 1 Q.B. 238; *affd.* C.A., [1960] 1 All E.R. 285; [1960] 1 Q.B. 518.

(71) [1925] All E.R. Rep. 607; [1925] A.C. 799; 16 Asp. M.L.C. 545; *affg.*, [1924] 2 K.B. 619; 16 Asp. M.L.C. 423.

(72) [1959] 3 All E.R. at p. 462; [1960] 1 Q.B. at p. 503.

A unavailability would have to be of a permanent and not a temporary nature and methods of loading are normally open to selection—as with the named grain cargoes in *Brightman* (73)—and not in the nature of an option which would exclude the obligation to load in one of the ways available at the port.

B Having regard to the facts of this case, especially that all the loading facilities at Vancouver were effectively barred to “tramps”, it may be that the court has been led to consider and to express views on matters which are not vital to the case. I would not wish to depart from what LORD GODDARD, C.J., said in *Agrimpey Hungarian Trading Co. for Agricultural Products v. Sociedad Financiera de Bienes Raices S.A. (The Aello)* (74) in an interlocutory observation (75):

C “The court must adhere to the well-settled rule that if parties want a decision on points other than those on which the court reaches its decision in a particular case, they must raise them in other cases on their own facts. The court is not prepared to clear up a lot of points for the convenience of the parties.”

D With that in mind, although I may have infringed too far, I have not discussed the respective arguments in all their detail or referred to or expressed views on many of the cases cited.

E I have found myself in complete agreement with McNAIR, J., in rejecting the shipowners’ claims for demurrage or damages in the circumstances which arose in respect of each of the ships concerned in Vancouver in 1953.

There is a final point which arises on the charterers’ claim against the shipowners for despatch money. This is perhaps a hard burden for the shipowners to bear after the losses they have suffered but the charterparty provides as follows [HIS LORDSHIP read cl. 15, which is printed at p. 582, letter H, ante, and continued:] The sole question is whether Saturday is to be regarded as a working day under cl. 15 and if it is whether it counts as a full day or half a day. McNAIR, J., found as follows (76):

F “In my judgment on the facts here proved and admitted, Saturday does not count either as a whole or half a working day. The issue must be determined with reference to the particular trade involved—in this case the loading of bulk grain from elevators. In that trade for one essential class, viz., the elevator men, Saturday did not form any part of their usual working hours any more than night work, for which time and a half was paid, or Sunday work, for which double time was paid, and the fact that, if required, they did in fact work on Saturday at time and a half rates, did not make Saturday part of their normal working week. I decide this point not by reason of the fact that Saturday is a holiday but on the ground that it is not a day which formed part of the usual working week of forty hours.”

G The facts were agreed between the parties. Is then the learned judge’s conclusion wrong? I think not. Sundays, holidays and rainy days are expressly stated not to count as working days and that would apply at whichever port the loading took place under the charterparty, but weather-working lay days would not necessarily be all other days than those expressly excepted. What is a working day in any stipulated port has still to be ascertained. Within a port the days of work may vary, as here, according to the process of loading and the commodity involved, and in answering the question whether Saturday is a working day I would hold that it is to be judged by the relevant activity being undertaken—that is here the loading of wheat. The number of lay days is the parties’ agreement as to the time to be allowed for loading (or discharging) assessed perhaps

(73) [1925] All E.R. Rep. 607; [1925] A.C. 799; 16 Asp. M.L.C. 545; *affg.*, [1924] 2 K.B. 619; 16 Asp. M.L.C. 423.

(74) [1958] 2 All E.R. 695; [1958] 2 Q.B. 385; *affd.* H.L., [1960] 2 All E.R. 578; [1961] A.C. 135.

(75) [1958] 2 Q.B. at p. 394.

(76) [1959] 3 All E.R. at p. 466; [1960] 1 Q.B. at p. 510.

roughly on the normal days when work is done at the place of loading (or discharging). These "working days" are subject to "weather" or to their being "rainy". "Rainy" appears unnecessary because "weather" would seem to include rain, whereas "rain" would not include ice or cold or heat or wind, which "weather" would. However, no question arises here on that matter and I do not pursue it. A

It was decided in this court in *Alvion Steamship Corp'n. of Panama v. Galban Lobo Trading Co. S.A. of Havana* (77), on a clause not essentially dissimilar, that "a working day" was a length of time consisting of a number of hours which, according to the custom of the port, were usually worked at the port, and that the word "weather" qualified it, so that time was to be deducted from those working hours when and to the extent that "weather" interfered with the work. As wheat in bulk is normally loaded from elevators at Vancouver on only five days a week—Monday to Friday—it would be strange if the parties contracted on the basis that the lay days were to be calculated on either the highest or the lowest or the mean number of days worked in the port on other commodities; for example, if such were the case, on the basis that at coaling berths at the port work normally was undertaken on six full days a week or on the other hand it might be normally only four. I think the learned judge was right in holding that the normal loading of wheat is to be the factor. LORD GODDARD, C.J., who presided in the *Alvion* case (78) said: B C D

"Therefore, to find the working day, one must find what are the customary or ordinary hours worked either at a particular place or in a particular trade."

As with hours, so with days. That, as I see it, is the only point in issue here and I do not prolong this judgment by a further consideration of the authorities which preceded the *Alvion* case (77). I accept that Saturday is not in itself a holiday, under this charterparty. Years ago no one would have put it into that category but habits change and in many trades and activities Saturday might now not inappropriately be termed a "holiday" in contrast to a working day. In the *Alvion* case (77) it was expressly provided "Sundays and holidays and Saturday afternoons excepted", which at least gave clarity to the position on Saturday. Under the present charterparties cargoes of wheat in bulk might be worked on a Saturday at ports other than Vancouver and at Vancouver some cargoes not requiring the use of the grain elevators would normally be worked on a Saturday at least to half-day. Longshoremen always assist the elevator men in the loading of grain, but it seems to me immaterial that longshoremen on other employment normally work a half-day on Saturday. No wheat in bulk is normally loaded on that day. E F G

The court is indebted to learned counsel who so greatly assisted us with their thorough and sustained arguments. Scarcely a point has been made without some authority being quoted both for and against it and the argument has been intricate and highly refined at times—a refinement of consideration which is not always to be found at the inception of these business contracts which from time to time beset the Commercial Court and perhaps, therefore, not the right basis for their solution. H

In the result I am in agreement with the judgment of McNAIR, J., given after a careful and valuable survey of the authorities in relation to each of the various contentions. I would, therefore, dismiss the appeals. I

WILLMER, L.J.: In each of these four cases the plaintiffs (to whom for convenience I will refer hereafter as the shipowners) claim against the defendants as charterers for demurrage alleged to be due in respect of delay to which their ships were subjected at the time of the strike of elevator hands at Vancouver, which occurred during the spring of 1953. The learned judge in his very full

(77) [1955] 1 All E.R. 457; [1955] 1 Q.B. 430.

(78) [1955] 1 All E.R. at p. 459; [1955] 1 Q.B. at p. 445.

judgment has set out in detail the history of the strike, its causes, the efforts made to settle it, its effects in relation to the various elevators available for loading ships at Vancouver and the adjacent ports, and the steps taken by those in authority to regulate the use of the limited facilities available for the loading of ships. I shall, therefore, I hope, be excused if I refrain from setting out these facts again. I content myself with recording that the strike commenced at midnight of Feb. 16/17 and continued without interruption until May 7, and that its effect was to bring about a complete stoppage of work at five of the seven elevators at Vancouver as well as at the solitary elevator at New Westminster. I also append, for convenience, a statement in tabular form of the relevant dates in connexion with the four ships in question. [This statement is printed at p. 586, letter E, ante.]

Similarly, I need not set out again the clauses in the respective charterparties to which the arguments have been directed, since these have been fully set out, so far as relevant, in the judgment of the learned judge (79).

With regard to the probable duration of the strike as it appeared at the time the learned judge found (80):

“(a) that at no time before the strike began or at any stage during its continuance was the position such that a well-informed observer in the position of a shipowner or charterer making use of the facilities for inquiry open to him could have formed any really reliable appreciation as to the likely duration of the strike; (b) that in fact at no time before the strike began or at any stage during its continuance was it on balance of probabilities likely—still less was it certain—that the strike would last more than two or three weeks or more than a further two or three weeks.”

These findings were severely criticised on behalf of the shipowners, and in support of this criticism we were referred to a good deal of the evidence given by the witnesses examined at Vancouver, as well as to a considerable number of contemporary letters and cablegrams. Having carefully considered this material, I, for my part, see no reason to quarrel with the learned judge's conclusions on this point. Nor am I persuaded that any of the other findings of fact by the learned judge are open to serious criticism. The basic facts material to the determination of the present dispute were not seriously in issue, and were conveniently summarised for us by counsel for the shipowners under eight headings, as follows:

(i) Vessels arriving at Vancouver to load wheat in bulk were ordinarily loaded in the order of their arrival.

(ii) Only five of the seven elevators at Vancouver were out of action, and the remaining two represented approximately thirteen to fifteen per cent. of the loading capacity of the port. These two elevators were, however, restricted to their own normal sources of supply, and any attempt to use them for loading wheat from the ordinary sources of supply of the strikebound elevators would have resulted in the strike spreading to these two elevators.

(iii) From the two elevators that were working a total of 63,435 tons of bulk wheat was loaded during the strike, all of which was loaded in parcels of varying size into regular liners. It was not suggested that any greater quantity could have been loaded. Of this total about forty-five thousand tons went into liners carrying wheat for one or other of the charterers. No wheat was loaded into any tramp ship during the strike.

(iv) The reason why wheat was loaded into liners in preference to tramps was because of a policy decision taken at the inception of the strike by Mr. Smith, the local manager of the Canadian Wheat Board.

(v) Enough flour could have been made available within thirty days of the order being given to load a full cargo of flour on board the Riverton, provided

(79) These clauses are printed at pp. 582, 583, ante.

(80) [1959] 3 All E.R. at p. 444; [1960] 1 Q.B. at p. 479.

that she was dealt with in isolation and that there were no competitive demands for flour for other earlier ships. Similarly, sufficient flour was available to load one-third cargoes on board the *Queen City* and the *Cape Rodney* within ten to twelve days of giving the order, provided again that these ships were dealt with in isolation and that there were no competitive demands. A

(vi) There was ample wheat available in the various United States ports named in the charterparty for all the tramps to be loaded if they had been ordered thither instead of to Vancouver. B

(vii) The strike in fact lasted eighty days.

(viii) Neither the Ministry of Food nor the Government of India, nor any one on their behalf, took any step at any time to obtain a reversal of Mr. Smith's policy decision with a view to loading wheat into the tramp ships.

In the course of a hearing extending over three weeks we have listened to a very full and detailed argument on either side, in the course of which our attention has been called to a considerable number of authorities. I find it impossible in the course of a single judgment to deal with every argument that has been put forward or to refer to every case that has been cited. I shall endeavour to deal only with the main submissions put forward on either side, and I hope that my omission to deal with any particular matter will not be interpreted as meaning that it has not been considered. The argument has proceeded on the basis that there are four questions arising for determination. But since two of these questions have to be sub-divided, I think it more convenient to treat the case as raising six separate questions. I proceed to state the questions in the order in which I propose to deal with them, and which is, I believe, the logical order. C D

(i) Subject to questions (ii), (iii), (iv) and (v), do the charterers bring themselves within any of the exceptions contained in cl. 31 of the respective charterparties, and if so which? E

(ii) Are the charterers precluded from relying on cl. 31 because the delay due to the strike was something to which the ships were inevitably doomed so that it did not have the quality of being exceptional?

(iii) Are the charterers precluded from relying on cl. 31 because Vancouver was in all the circumstances a bad nomination? F

(iv) Are the charterers precluded from relying on cl. 31 because Vancouver, though originally a proper nomination, became a bad one when the strike continued, so as to impose on the charterers the duty of nominating a fresh port?

(v) Are the charterers precluded from relying on cl. 31, and if so to what extent, because they could and should have mitigated the delay by loading an alternative cargo or part cargo? (This point, it should be remarked, does not arise in the case of the *Agostino Bertani*, where the charterparty conferred no option of loading alternative cargo.) G

(vi) For the purposes of calculating lay days do Saturdays count as working days, as half working days, or not at all?

(i) As to the first question, the material words of the clause to be construed (81) are H

"Lay or working days shall not count . . . during any time when . . . the loading of the cargo, or intended cargo, or any part thereof, is delayed by . . . force majeure . . . strikes . . . or any other hindrance of whatsoever nature beyond the charterers' control." I

I pause to remark that the clause also excepts from the lay time delay due to the specified causes in the supply or bringing down of the cargo. But this provision, however material it may be in relation to the supply of an alternative cargo, is not, as I see it, relevant in relation to the cargo in fact loaded, namely bulk wheat. For it is conceded that the charterers did make all proper arrangements to supply a sufficient quantity of bulk wheat and bring it to the port. There was at

(81) I.e., cl. 31; see p. 583, letter B, ante.

all times plenty of wheat available. The delay which occurred was delay only in loading the wheat into the ships concerned.

Was that delay then caused by one of the excepted causes? The learned judge, in approaching this question, directed himself correctly, in my judgment, when he sought (81a) to apply the principles stated by FLETCHER MOULTON, L.J., in *Leonis S.S. Co., Ltd. v. Joseph Rank Ltd.* (No. 2) (82), and by LORD DUNEDIN in *Leyland Shipping Co. v. Norwich Union Fire Insurance Society* (83). Viewing the matter from a business point of view and as a matter of common sense he reached the conclusion that the cause of the delay to these four ships was the strike. For my part, I am of the same opinion. It would, I think, be difficult to reach any other conclusion on this point without saying that *Leonis v. Rank* (No. 2) (82) was wrongly decided, which, so far as I know, has never been suggested. In that case the ship was delayed in reaching her loading berth because of a congestion of shipping following a strike which was all over before she reached the loading port. Yet BIGHAM, J., and the Court of Appeal had no difficulty in arriving at the conclusion that the delay was due to the strike, so that the time lost came within the exceptions clause in that case.

If I am wrong in saying that the delay in this case was due to the strike, I should hold that the charterers would in any event bring themselves within the exception of "any other hindrance of whatsoever nature beyond the charterers' control". It is conceded that in the context of this clause these words cannot be construed ejusdem generis with the causes previously specified. That being so, the words used, as it seems to me, provide the widest possible cover.

The argument for the shipowners on this point was presented in a number of ways, but can, I think, be summarised under two headings. In the first place it is said that the only effective cause of the delay to the ships in question here was the policy decision of Mr. Smith, whereby all the available wheat at the two working elevators was used for the loading of parcels in liners to the exclusion of tramps. The delay was not, therefore, due to the strike; nor was it due to anything beyond the charterers' control, seeing that Mr. Smith was the representative of the charterers' suppliers and, as such, identifiable with them. In support of this argument we were referred to *Re Richardsons & M. Samuel & Co.* (84). In that case it was sought to excuse delay in loading oil in cases on the ground of an exception of "accidents to railway", but that point failed because the effect of the accident relied on had worn off, and oil was reaching the port in sufficient quantity to load the ship during the period in dispute. The delay was in fact due to the suppliers of the cargo having dismissed a number of their employees during the period when the railway was out of action, so that when the oil did begin to arrive again they had not a sufficient labour force to load the ship. Reliance was placed on a further exception of "other causes beyond charterer's control". This point, however, also failed because the words relied on were construed as ejusdem generis with the previously enumerated causes. Like the learned judge, I fail to see how the shipowners here can obtain any assistance from that case.

Be that as it may, the question remains whether the policy decision of Mr. Smith can be isolated from the strike which provoked it, so as to be properly regarded as in itself a separate cause of the delay. If so, the further question arises whether the charterers can show that it was a cause beyond their control. The Canadian Wheat Board, whose representative Mr. Smith was, was, it is true, the supplier of the cargo for the various ships with which we are concerned. So it was also for all the other ships arriving at Vancouver for the purpose of loading wheat. But as the representative of the Wheat Board, Mr. Smith was both in law and in fact in a public position. By s. 4 (2) of the Canadian Wheat

(81a) [1959] 3 All E.R. at pp. 454, 455; [1960] 1 Q.B. at p. 492.

(82) [1908], 13 Com. Cas. at p. 298.

(83) [1918] A.C. at p. 362; 14 Asp. M.L.C. at p. 261.

(84) [1898] 1 Q.B. 261; 8 Asp. M.L.C. 330.

Board Act, 1935, the board's powers under the Act may be exercised by it only as an agent of Her Majesty in right of Canada. Those powers are defined by s. 4 (4), which provides that the board is incorporated with the object of marketing in an orderly manner grain grown in Canada. The powers include in particular, under para. (a), the shipping of grain, and it is specifically provided in para. (i) that the board may authorise any officer or employee to act on its behalf in the conduct of its operations under the Act (85). Furthermore, the evidence showed that as the representative of the board Mr. Smith enjoyed de facto control over the ordering of ships arriving at Vancouver to load wheat. This was because, as the sole supplier of the wheat to be exported, only the board, through Mr. Smith, was in a position to give directions as to when and where the ships should load. In these circumstances I am disposed to agree with the conclusion of the learned judge that Mr. Smith, when he took his decision to load liners in preference to tramps, was acting for the board not in its capacity as agent for the charterers but as the executive authority on behalf of Her Majesty under the powers conferred by the Act. If so, I do not doubt that the action of Mr. Smith amounted at least to a hindrance delaying the loading of these four ships which was beyond the control of the charterers. To contend, as has been contended, that the charterers cannot be heard to say that Mr. Smith's policy decision was beyond their control, when they took no steps to protest against it or obtain its reversal, strikes me as unrealistic in all the circumstances. But I would go further. The learned judge has found, and I think rightly found, that Mr. Smith's decision was a reasonable one. Counsel for the shipowners put the question, "Reasonable for whom?". I would reply reasonable in the interests of the wheat trade of Vancouver as a whole, and in the interests of the majority of the ships coming to the port for the purpose of loading wheat. If this be so, I think there is room for the application of the maxim that reasonable human conduct is part of the ordinary course of things. This was first enunciated by LINDLEY, L.J., in *The City of Lincoln* (86); it was repeated by LORD HALDANE in *Canadian Pacific Ry. Co. v. Kelvin Shipping Co., Ltd.* (87), and was adopted and applied by LORD WRIGHT in *The Oropesa* (88). It seems to me that Mr. Smith's reasonable decision cannot be regarded as a separate cause of the delay to these four ships. Notwithstanding the intervention of Mr. Smith the delay was, in my judgment, caused by the strike.

I have dealt with this point so far on the footing that Mr. Smith's act was an executive act taken in what I may call his public capacity; but I am far from saying that the same result would not follow even if he were more properly to be regarded as acting in the capacity of agent for the charterers. As I have pointed out, he was equally agent for the charterers in the case of all the other ships waiting to load wheat, as well as the representative of the shippers of all the parcels of wheat loaded into the liners. Given the acute shortage of loading facilities due to the strike he was really placed in an impossible position. He cannot be said to have been a free agent, but was in truth the victim of circumstances. Some action he had to take, but whatever action he took was bound to injure some though it benefited others. In such circumstances, given that Mr. Smith's action was reasonable, I do not think that, even if he is to be regarded as the charterers' agent, his action can be held to have broken the chain of causation. Even on this basis, in my judgment, the strike remains the cause of the delay to these four ships. I do not think, therefore, that the shipowners' argument that the delay was due to the act of Mr. Smith can prevail.

The second line of argument presented on behalf of the shipowners was to the following effect. The strike was never more than a partial strike, seeing that throughout two elevators continued working at Vancouver. There was at all

(85) The relevant provisions of the Act are set out at p. 584, letters B to F, ante.

(86) (1889), 15 P.D. at p. 18; 6 Asp. M.L.C. at p. 477.

(87) (1927), 138 L.T. at p. 370; 17 Asp. M.L.C. at p. 355.

(88) [1943] 1 All E.R. 211; [1943] P. 32.

times sufficient grain available in these two elevators to load any one of these ships if taken in isolation. The delay to the ships was accordingly not caused by the strike, but by the fact that the charterers had other commitments, in that they had chartered more ships than they were in a position to load. Further, it is said, the fact of the charterers having other commitments cannot be regarded as a hindrance beyond their control.

In support of this line of reasoning reliance was placed on the decision of the House of Lords in *Central Argentine Ry. Ltd. v. Marwood* (89). I do not pause to set out the facts of this rather unusual and difficult case, for they are, I think, sufficiently set out in the judgment of the learned judge (90). The essential fact is that the ship in respect of which demurrage was being claimed was, because of a strike, kept out of her berth by the presence of other ships discharging cargo for the same charterers. But apart from a single sentence (91) in the speech of LORD SUMNER I cannot find anything in the report of the case to lend support to the view that in determining whether charterers bring themselves within an exception of strikes their other commitments must be totally disregarded. The case was tried on an agreed statement of facts, and its difficulties appear to me to have been largely due to the facts not having been stated as clearly as they might have been. It is this circumstance which, in my view, provides the real ratio of the decision—for three of the members of the House expressed the view that there was nothing in the statement of facts to show that the vessel in question would not have been delayed just as long by the presence of the other vessels ahead of her, even if there had been no strike—see per LORD PARKER OF WADDINGTON (92), LORD SUMNER (91), and LORD WRENBURY (93).

LORD SUMNER did, however, say this in the course of his speech—and this is the passage relied on (91):

“I think the words ‘which prevents or delays the discharging’ mean strikes which in themselves prevent or delay the discharging of the chartered ship herself, and do not extend to the case of strikes which only prevent the chartered ship from getting into a berth because they prevent some other ship from getting out of that berth.”

This expression of view, as I have pointed out, was not necessary for the decision of the case. The point made by LORD SUMNER does not appear to have been argued—indeed, had it been part of the shipowners’ case, it seems inconceivable that they would have admitted the charterers’ right to claim any protection at all. In any case I cannot interpret LORD SUMNER’s words as going so far as to say that in considering a charterer’s claim to be protected by an exception of strikes his other commitments must be totally disregarded.

In so far as the charterers in the present case seek to rely on the exception of “any other hindrance” *Marwood’s* case (89) is certainly no authority against them. On this aspect of the case I think considerable assistance is to be derived from *Tennants (Lancashire), Ltd. v. C. S. Wilson & Co., Ltd.* (94), the facts of which are sufficiently set out in the judgment of MCNAIR, J. (95). It is true that in that case the dispute was between buyers and sellers under a contract for the sale of goods, but the principle applicable must be the same in the case of a contract between shipowner and charterer. Adapting the dictum of EARL LOREBURN (96), to the circumstances of this case I would say that to place a charterer in the position of being unable to load unless he dislocates his business and breaks his other contracts in order to fulfil one surely hinders loading.

(89) [1915] A.C. 981; 13 Asp. M.L.C. 153.

(90) [1959] 3 All E.R. at pp. 458, 459; [1960] 1 Q.B. at p. 498; see also p. 592, letter A, ante, in the judgment of SELLERS, L.J.

(91) [1915] A.C. at p. 989; 13 Asp. M.L.C. at p. 155.

(92) [1915] A.C. at p. 988; 13 Asp. M.L.C. at p. 155.

(93) [1915] A.C. at p. 992; 13 Asp. M.L.C. at p. 156.

(94) [1917] A.C. 495.

(95) [1959] 3 All E.R. at pp. 459, 460; [1960] 1 Q.B. at p. 500.

(96) [1917] A.C. at p. 510.

(ii) The second question for determination arises from a submission put forward on behalf of the shipowners that by a well-settled rule of construction neither party can rely on an exceptions clause in a charterparty if the specified cause is one to which the ship was inevitably doomed to be subjected. The excepted cause, it is said, must be something exceptional. Here, however, nothing happened to the four ships concerned other than that which was inevitably bound to happen if they were sent to Vancouver. The authorities cited in support of the principle contended for are set out in the judgment of the learned judge (97), and I need not, therefore, refer to them in detail. There are a number of dicta referring to the existence of the doctrine contended for, but only one reported case appears to have been actually decided on this ground, namely *Ciampa v. British India Steam Navigation Co., Ltd.* (98)—and even that decision, it may be remarked, can be supported on the alternative ground that the ship was unseaworthy. I may add that, if the point is a good one, it is surprising that it was not taken in some of the many other cases to which we have been referred in the course of the hearing, notably *Leonis S.S. Co., Ltd. v. J. Rank, Ltd.* (No. 2) (99) and *Matheos (Owners) v. Louis Dreyfus & Co.* (100).

For reasons which will appear in a moment I do not find it necessary to express any concluded opinion as to the validity of the principle contended for. But I venture to think that the formulation of the principle, if it exists, must be subject to two qualifications. (a) The facts which show that the ship must be inevitably doomed to be subject to the specified cause must be facts in existence at the time when the contract is made. It could not in any case be sufficient merely to prove *ex post facto* that, in the light of events as they in fact turned out, the excepted cause was bound to operate. In the present case the relevant date would, I think, be the date of the nomination of Vancouver. For it was only on that date that the charterparty, in the case of the respective ships, became a contract to proceed to Vancouver. (b) The second qualification, which follows on the first, is that the existence of facts, which show that the excepted cause is bound to operate, must be known to the parties at the time of the contract, or at least to the party who seeks to rely on the exception. In this respect I would respectfully accept and adopt the views expressed by SELLERS, J., in *Steamship "Induna" Co., Ltd. v. British Phosphate Comrs.* (101). So far as the present case is concerned, whether or not the principle contended for is valid, I am of the opinion that the submission put forward on behalf of the shipowners fails on the facts. Looking at the matter at the time of the nomination of the respective ships, it is not possible, in the light of the knowledge which the respective parties then had, to say that any of these ships was inevitably doomed to be subject to delay at Vancouver because of the strike. In the case of the *Queen City* the strike had not even commenced at the time of the nomination, and nobody could then say with certainty whether it would ever take place at all. The nomination in the case of the *Agostino Bertani* was made at a time when the strike was nearly over, and when it could reasonably be expected that it would end very soon, as in fact occurred. It is true that in the cases of the *Riverton* and the *Cape Rodney* the respective nominations were made at a time when the strike was at its height, and the outlook, to say the least of it, was uncertain. But for all that was known the strike might have ended very quickly, as strikes often do, and it is quite impossible, even in the case of these two ships, to say that they were inevitably bound to be subject to delay. The matter was not one of certainty. It was a risk, and a risk for which the parties made express provision by the terms of the charterparty. Accordingly, I think that this submission on behalf of the shipowners fails.

(iii) The next point put forward on behalf of the shipowners was that in all the circumstances Vancouver was a bad nomination. It was conceded that in the case

(97) [1959] 3 All E.R. at pp. 455-457; [1960] 1 Q.B. at pp. 493-496.

(98) [1915] 2 K.B. 774.

(99) (1908), 13 Com. Cas. 295.

(100) [1925] All E.R. Rep. 422; [1925] A.C. 654; 16 Asp. M.L.C. 486.

(101) [1949] 1 All E.R. 522; [1949] 2 K.B. 430.

of the Queen City there could be no ground for complaint, seeing that she had been ordered to Vancouver before the strike ever started. Nor was the point very seriously pressed in the case of the *Agostino Bertani*, which was only ordered to Vancouver towards the end of the strike and in fact arrived only about a week before the strike was settled. The real complaint relates to the cases of the *Riverton* and the *Cape Rodney*. The charterparty provided in each case that the ship should proceed to Tacoma and/or Seattle or Portland, Oregon, Vancouver, B.C., or New Westminster, or Victoria, B.C. That is to say that, on the face of it, the charterers were given by the charterparty the choice of one of a number of specifically named ports. Prima facie, therefore, the charterers had the right to select whichever of the named ports they chose, without regard to the convenience of the shipowners. What is alleged, however, is that it was an implied term of the charterparty in each case that the charterers would not nominate a strikebound port, by which I understand to be meant a port at which, because of a strike, the ship would not be able to load the contractual cargo within a reasonable time. In the circumstances prevailing at the time, therefore, the nomination of Vancouver for the *Riverton* and the *Cape Rodney* constituted a breach of this implied term. If that be so, it is contended, the charterers must forfeit any right to rely on the exceptions contained in cl. 31 of the charterparty.

In support of this contention it was sought to rely, by way of analogy, on cases where shipowners have recovered damages from charterers for nominating an unsafe port. Thus we were referred to *Ogden v. Graham* (102), where the ship was ordered to a port where, because of a rebellion in progress, she would have been liable to confiscation as the result of a government order. That was a case of a port which was politically unsafe, but the principle can be no different where the port is physically unsafe. The ship had been chartered in that case to proceed to "a safe port in Chile", with leave to call at Valparaiso. It was held that this placed the charterers, on the arrival of the ship at Valparaiso, under an implied obligation to nominate a safe port within the stated range, but it is to be observed that, in contrast to the present case, the charterparty contained no list of specifically named ports to choose from. The same is true of all the other cases cited to us where damages have been recovered against charterers for failure to nominate a safe port. I do not think, therefore, that cases arising out of failure to nominate a safe port furnish any useful analogy in a case such as the present, where the charterparty specifically names a number of ports without reference to their safety. Moreover, it is to be observed that even in cases where the safety of the nominated port is in question it is well established that a mere temporary danger or obstacle will not render a port unsafe, unless its duration is such as to subject the ship to inordinate delay—see *S.S. Knutsford, Ltd. v. Tillmanns & Co.* (103).

At the same time it seems to me that some limitation on the charterers' freedom of choice must be implied, even in cases where the ports from which the choice can be made are specifically named in the charterparty. It was indeed conceded by counsel for the charterers, both before the learned judge and in this court, that an impossible port must not be nominated. Said BOWEN, L.J., in *Tharsis Sulphur and Copper Co. v. Morel Brothers & Co.* (104):

"It will not do . . . to choose a dock the entrance to which is blocked—that would be practically no exercise at all of the option . . ."

In *Akt. Olivebank v. Dansk Svovlsyre Fabrik* (105), where a ship was chartered during the first world war to carry nitrates for discharge at a safe port in the United Kingdom or at one of several named ports in Denmark, the nomination of Aalborg at a time when, to the knowledge of the charterers, it was impossible to import nitrates into Denmark owing to a prohibition by the British government was held, both by BAILHACHE, J., and the Court of Appeal, to be a mere

(102) (1861), 1 B. & S. 773.

(103) [1908] A.C. 406; 11 Asp. M.L.C. 105.

(104) [1891] 2 Q.B. at p. 652; 7 Asp. M.L.C. at p. 108.

(105) [1919] 1 K.B. 388; *affd.*, [1919] 2 K.B. 162; 14 Asp. M.L.C. 426.

nugatory nomination, entitling the shipowners to recover not only their freight A but also damages.

Subject, however, to an implied obligation not to nominate an utterly impossible port as in the above instances, the principle is well established that where a charterparty provides a choice of named places for loading or discharge, the charterer is free to exercise his option as he chooses, and in doing so is in no way bound to consult the convenience of the shipowners. It was so held in *Bulman & Dickson v. Fenwick & Co.* (106), following the dictum of BOWEN, L.J., in *Tharsis v. Morel* (107). In *Bulman v. Fenwick* (108) it was said by POLLOCK, B., whose judgment was affirmed by the Court of Appeal: B

"It is not a question between the plaintiffs and the defendants as to what is reasonable or unreasonable, it is a question of contract between the parties." C

The material part of the judgment of LORD ESHER, M.R., in the Court of Appeal (108) is quoted in extenso by MCNAIR, J., in his judgment (109), and I need not repeat it. It is interesting to observe that the learned editors of SCRUTTON ON CHARTERPARTIES (16th Edn.) at p. 142 (note (h)), make the comment,

"In *Bulman v. Fenwick* (106) . . . [the Court of Appeal] appears to hold D that the only limitation to the charterer's power to select a berth is that he must not choose one that is so blocked that the obstacle cannot be removed in a time consistent with the commercial adventure."

The decision in *Bulman v. Fenwick* (106), it may be remarked, was specifically approved by LORD DUNEDIN in *Matheos (Owners) v. Louis Dreyfus & Co.* (110).

Dobell & Co. v. Green & Co. (111) is an even stronger authority in favour of the charterers. For there the nomination of the colliery tip at which the ship was to load was made at a time when the particular colliery was known to be on strike, and the ship was in fact delayed for an even longer period than any of the ships in the present case. Substantially the same argument was advanced on behalf of the shipowners as has been advanced in the present case; yet the Court of Appeal came to the clear conclusion that the charterers were within their rights in nominating a colliery known to be on strike at the time of the nomination. The ratio of the decision was, I think, summed up in the words of COLLINS, L.J. (112): E

"In my opinion it is unreasonable to impose on the charterer the obligation of naming a colliery where no strike is going on, for it does not follow that a colliery on strike at the time when it is named will continue on strike when the obligation to load has begun." G

Substitute the word "port" for "colliery", and the case is indistinguishable from the present. It shows that a strike, even of prolonged duration, being something which may end at any time, is not to be regarded as an obstruction or block of the kind that BOWEN, L.J., had in mind in *Tharsis v. Morel* (107).

If the shipowners are right in their contention that the charterers are under an obligation not to nominate a strikebound port, it is indeed surprising that the point was not taken in *Leonis S.S. Co., Ltd. v. Rank, Ltd.* (113). Much the same applies to *Matheos v. Dreyfus & Co.* (114), where the delay was due, not to a strike, but to the freezing of the dock to which the ship was ordered. In that case the ship was already an "arrived" ship, and lay days were running, when the charterers exercised their right to select her loading berth. They in fact ordered H

(106) [1894] 1 Q.B. 179; 7 Asp. M.L.C. 388.

(107) [1891] 2 Q.B. at p. 652; 7 Asp. M.L.C. at p. 108.

(108) [1894] 1 Q.B. at pp. 183, 185; 7 Asp. M.L.C. at p. 390.

(109) [1959] 3 All E.R. at p. 452; [1960] 1 Q.B. at p. 488.

(110) [1925] All E.R. Rep. at p. 425; [1925] A.C. at p. 661; 16 Asp. M.L.C. at p. 488.

(111) [1900] 1 Q.B. 526; 9 Asp. M.L.C. 53; 5 Com. Cas. 161.

(112) [1900], 5 Com. Cas. at p. 166; 9 Asp. M.L.C. at p. 55.

(113) [1908] 1 K.B. 499.

(114) [1925] All E.R. Rep. 422; [1925] A.C. 654; 16 Asp. M.L.C. 486. I

her to a berth in a dock which, as was to be expected at the time of year, froze within two days of her arrival and remained frozen for three months. In that case LORD SUMNER said (115):

"On Dec. 10 another ship the Valkenburg, was already lying at the quay berth in question and loading from the silos, and at that time of year the river might be expected to freeze very shortly. . . . Neither of these circumstances, however, prevented the quay berth in the dock from being a loading place to which the charterers might lawfully order the Matheos. Under the charter the risk of delay in reaching it was on them, unless they were protected by some exception, since the lay days had already begun to run, and beyond taking this risk they were under no obligation to select a loading place advantageous to the ship."

Having regard to these very clear authorities I am of the opinion that any limitation on the charterers' freedom to nominate the loading port can be implied only where the block or obstruction is something of a substantial degree of permanence. What, then, is the test by which the permanence of the obstacle is to be judged? The shipowners contend that, in the case of a strike at any rate, it is sufficient if it is such as to subject the ship to unreasonable delay. The charterers, on the other hand, say that nothing short of an obstruction sufficient to frustrate the commercial object of the voyage can deprive them of the right to nominate the port of their choice. On this issue I entertain no doubt that the charterers are right. If the shipowners' contention be right, by what yardstick is one to measure the unreasonableness of delay which falls short of frustrating the commercial object of the voyage? The charterers' contention, on the other hand, furnishes a well-recognised test, though doubtless one that it will not always be easy to apply on the facts of a given case. Moreover, it is, I think, well supported by authority. In *S.S. Knutsford, Ltd. v. Tillmanns & Co.* (116), to which I have already referred, the test suggested was that of "inordinate delay". It is not without significance that this was precisely the test applied by LORD SUMNER in *Bank Line, Ltd. v. A. Capel & Co.* (117) as the measure of delay that would justify a finding that a contract has been frustrated.

In this connexion we were usefully referred to *Universal Cargo Carriers Corpn. v. Citati* (118), where it was held by DEVLIN, J., that even in a case where frustration is not in issue, the proper yardstick for measuring delay that will justify rescission of the contract is whether it is such as amounts to frustrating delay. I would particularly refer to the reasoning of the learned judge in that case (119), in the course of which he cited a number of the earlier authorities on frustrating delay. I think that the same reasoning can be applied here for the purpose of determining the quality of the delay to which the shipowners' vessels were subjected in consequence of the charterers' nomination of Vancouver. *Dahl v. Nelson, Donkin & Co.* (120), though not strictly in point, may also, I think, usefully be referred to by way of analogy. In that case there was no question as to the nomination of a discharging berth. The issue was whether a ship, which was unable to reach her discharging berth in dock by reason of a congestion of shipping which was likely to persist for a great length of time, was entitled to discharge her cargo in the river outside the dock, on the basis that she had arrived "as near thereto as she may safely get". The determination of that issue depended on the degree of permanence to be attributed to the obstacle preventing the ship from getting into dock. It was not suggested that the

(115) [1925] All E.R. Rep. at p. 426; [1925] A.C. at pp. 663, 664; 16 Asp. M.L.C. at p. 489. (116) [1908] A.C. 406; 11 Asp. M.L.C. 105.

(117) [1919] A.C. at p. 455; 14 Asp. M.L.C. at p. 370.

(118) [1957] 2 All E.R. 70; [1957] 2 Q.B. 401; *affd.* C.A., [1957] 3 All E.R. 234; [1958] 2 Q.B. 254.

(119) [1957] 2 All E.R. at pp. 80-82; [1957] 2 Q.B. at pp. 430-433.

(120) (1881), 6 App. Cas. 38; 4 Asp. M.L.C. 392; *affg.*, (1879), 12 Ch.D. 568; 4 Asp. M.L.C. 172.

contract was frustrated; yet both in the Court of Appeal and in the House of Lords the issue was determined on the basis that the prospective delay before the ship could enter the dock would have amounted in substance to a frustrating delay. A

In these circumstances, assuming in favour of the shipowners that the charterers were under an implied obligation not to nominate an impossible port, I am of the opinion that a port only becomes an impossible port for this purpose when loading thereat will subject the ship to such delay as will frustrate the commercial object of the adventure, so that the voyage when performed will be something different from that contracted for. Moreover, I am satisfied that for the purpose of determining whether the prospective delay is such as to have this character it is necessary to look at the facts and at the prospects as they would have appeared to a reasonable charterer at the time when the nomination had to be made. I think that this is implicit in the decisions to which I have already referred. The nomination of Vancouver was either a good or a bad nomination at the time when it was made. This must depend on the reasonable foresight of the parties at the time, and not on what is now known *ex post facto* as to the events which in fact subsequently occurred. B C

If this be the correct view, there can be but one answer to the question whether Vancouver was a proper nomination for the ships in question here. Here was a strike in progress, which might have ended at any time, and which, as found by the learned judge, was not on balance of probabilities likely at any material time to last more than another two or three weeks. To expect any reasonable charterer to take the view, when the time came to make his nomination, that the strike was likely to last for such a length of time as to frustrate the object of the adventure would to my mind be totally unrealistic. In my judgment the shipowners entirely fail to make good their plea that the charterers were in breach of their contract in nominating Vancouver. It follows that this affords no ground for holding that the charterers are debarred from relying on the exceptions in cl. 31. D E

(iv) I pass, therefore, to consider the fourth question, namely whether, assuming that Vancouver was a proper nomination in the first instance, the charterers subsequently came under an obligation, when the strike continued, to nominate some other port which was not strikebound. It appears to me that there are a number of compelling reasons for concluding that the charterers cannot be under any such obligation. Such an obligation, if it existed, could arise only by implication. In none of the present cases has the charterparty made any express provision for the nomination of an alternative port, and it seems to me that such provisions as are relevant are inconsistent with the existence of the suggested implied term. Clause 42 is the best example (121); but there are other clauses in the respective charterparties which are difficult to reconcile with any such implication. Moreover, an implied term such as is suggested would not in my judgment be a reasonable one, nor one to which the parties could have been expected to agree had their minds been directed to it. If an obligation is to be implied, so also must a corresponding right. But if the charterer is to have the right to change his mind and nominate a fresh port, the ship would have to obey, notwithstanding that the shipowners might already have incurred considerable expense in sending her to the first port. Moreover, if the charterer is to be entitled to change his mind once, on what principle is he to be denied the right to do so again and again? I can find no ground in common sense for implying a term such as is suggested. F G H I

It appears to me that the weight of authority is overwhelmingly against the existence of any right, and a fortiori of any obligation, on the part of a charterer to nominate a fresh port, if for any reason the port first nominated becomes impossible. No doubt this can be done by agreement between the parties, as

appears to have been done in *Bulman v. Fenwick* (122). But in the absence of agreement the effect of the original nomination is that the charterparty must be treated as if the nominated place were originally designated in the charterparty—see *Tapscott v. Balfour* (123) a decision which has frequently been followed, and which was expressly approved by KENNEDY, L.J., in *Leonis S.S. Co., Ltd. v. Rank, Ltd.* (124). Following that principle the effect of the nomination of Vancouver in the present cases was that the other named places must be treated as if they had been struck out of the respective charterparties. There could thus be no room for the nomination of a fresh port once the original nomination had been made. A direct decision to this effect is to be found in *Anglo-Danubian Transport Co., Ltd. v. Ministry of Food* (125), where the charterers, having once nominated a discharging berth for the ship, were held to have no right to alter that nomination and direct the ship to another berth. In that case DEVLIN, J., said (126):

“It is clearly settled by the authorities that where there is an express reservation in the charterparty to the charterer to nominate the port or berth, that port or berth, when nominated, is to be treated as if it had been written into the charterparty . . . it follows from that that it cannot be altered by the charterers. To permit the charterers to alter it would be to permit a unilateral alteration of the contract.”

The decision of DEVLIN, J., is not of course binding on this court. But it appears to me to be fully in accord with a consistent stream of authority, and I am certainly not prepared to say that it was wrong.

The fact is that where, as here, a charterparty names a number of ports to choose from, the nomination of one of those ports by the charterer amounts in law to an election on his part, by which he is thereafter bound, and from which he cannot subsequently withdraw. The effect of such an election was well illustrated by *Brown v. Royal Insurance Co.* (127), to which we were usefully referred. Reference may also be made on this point to *Louis Dreyfus et Cie. v. Parnaso Cia. Naviera S.A.* (128) particularly to the judgment of HARMAN, L.J.

The argument to the contrary on behalf of the shipowners was mostly based on the decision of the Privy Council in *The Teutonia* (129), which was said to be authority for the proposition that a charterer who has nominated a port which becomes impossible is under an obligation to nominate a fresh port within the permitted range. I need not refer in detail to the facts of that puzzling case, since they are sufficiently set out in the judgment of McNAIR, J. (130). The essential facts were that the consignees of the cargo quite properly, as was found, nominated Dunkirk as the discharging port. On the arrival of the ship off that port it proved impossible for her to enter and discharge her cargo because of the imminent outbreak of the Franco-Prussian War. The ship accordingly proceeded to Dover, which was itself a port within the permitted range, where the consignees claimed to have the cargo delivered to them without payment of freight. What was actually decided was that, (a) Dunkirk having become an impossible port, there was no breach of contract on the part of the ship in proceeding to Dover, (b) the contract was not dissolved by the impossibility of delivering the cargo at Dunkirk, and (c) the shipowner had not lost his lien for the freight when delivery of the cargo was demanded at Dover. As appears from what was said by MELLISH, L.J. (131), it was argued on behalf of the shipowner that, when it became impossible to deliver the cargo at Dunkirk, the consignees were bound to select

(122) [1894] 1 Q.B. 179; 7 Asp. M.L.C. 388.

(123) (1872), L.R. 8 C.P. 46; 1 Asp. M.L.C. 501.

(124) [1908] 1 K.B. at p. 518; 13 Com. Cas. at p. 151.

(125) [1949] 2 All E.R. 1068.

(126) [1949] 2 All E.R. at p. 1069.

(127) (1859), 1 E. & E. 853.

(128) [1960] 1 All E.R. at p. 763; [1960] 2 Q.B. at p. 59.

(129) (1872), L.R. 4 P.C. 171; 1 Asp. M.L.C. 214.

(130) [1959] 3 All E.R. at pp. 449 450; [1960] 1 Q.B. at pp. 483, 484.

(131) (1872), L.R. 4 P.C. at p. 182; 1 Asp. M.L.C. at p. 220.

another port from among those named in the charterparty. If this were a well-founded submission it would have been the simplest possible thing for the Privy Council to say so in terms. There certainly was no nomination by the consignees of Dover as an alternative discharging port; nor did the Privy Council say that they were under any duty to nominate an alternative port. It has been argued before us that the decision is to be explained on the footing that the consignees ought to have nominated an alternative port and that, as they did not do so, the shipowner was entitled to be put in the same position as if such a nomination had been made. Only so, it is contended, can the shipowners' right to retain his lien for freight be explained. I find myself quite unable to accept the shipowners' argument based on the decision in *The Teutonia* (132). The case is one that has puzzled the text-book writers and commentators, and various views have been expressed as to the real ratio of the decision. It seems to me, however, that, whatever else the case decided, it did not decide that where the port originally nominated has become impossible charterers or consignees are under a duty to nominate a fresh one. For my part I prefer the view that, in so far as the decision related to the shipowners' claim to exercise a lien for freight, it was no more than an application to a somewhat unusual set of facts of the equitable principles traditionally applied by the Court of Admiralty.

A further argument was addressed to us, based on the decision of the Court of Appeal in *Lewis v. Louis Dreyfus & Co.* (133). The issue in that case related to the choice of the method of loading cargo where a number of alternative methods were available. No question arose as to nomination of a port or berth. I can find nothing in the report of that case to support the shipowners' contention that in circumstances such as those in the present case charterers come under an implied obligation to nominate an alternative port.

It remains to add that, if the shipowners' contention were well founded, a difficult, and in my judgment an almost insoluble, problem would arise as to when the obligation to nominate an alternative port would attach. I apprehend that in any event the charterers would have to be allowed a reasonable time, in order to see whether the obstacle which rendered the port originally nominated an impossible one was likely to be permanent. How that is to be determined in a case where the obstacle relied on is a strike, which of its very nature is of uncertain duration and may finish at any time, seems to me to be a question of no little difficulty. Having regard to the view which I have already expressed, however, this difficulty does not arise, and need not be further considered.

(v) I pass now to what I regard as the most obstinately difficult of the problems raised by this case. Are the charterers precluded from relying on cl. 31 of the charterparty, and if so to what extent, because they could and should have mitigated the delay by loading an alternative cargo or part cargo? As already pointed out, this question does not arise in the case of the *Agostino Bertani*, where the charterparty made no provision for loading an alternative cargo. It arises in its most acute form in the case of the *Riverton*, where there was an option to load up to a full cargo of flour in bags, as well as an option to load up to one-third cargo of barley in bulk. In the cases of the *Queen City* and the *Cape Rodney* there were options to load up to one-third cargo of barley in bulk and one-third cargo of flour in bags. Although these are the only cases immediately before us, we were informed that options of a similar nature were provided in the cases of ten out of the thirty-one ships in which these charterers were interested. The contention put forward on behalf of the shipowners is that the charterers can only rely on the exceptions contained in cl. 31 to the extent of such time as they can show was reasonably necessary to enable them to load an alternative cargo (in the case of the *Riverton*) or to fill up with alternative part cargoes (in the cases of the *Queen City* and the *Cape Rodney*). The argument for the

(132) (1872) L.R. 4 P.C. at p. 171; 1 Asp. M.L.C. 214.

(133) (1926), 31 Com. Cas. 239.

charterers, which found favour with the learned judge, was that on the true construction of cl. 31 not only were they protected in respect of delay in the loading of wheat, but they were also relieved of any obligation to load alternative cargoes. It was argued, and the learned judge held, that having regard to the particular wording of this clause the present cases were distinguishable from the case of the *Castlemoor*, which was the subject of the decision of this court in *Brightman & Co. v. Bunge Y Born* (134).

In order to understand the argument it is necessary to refer briefly to the facts in *Brightman's* case (134), and to the terms of the exceptions clause which was there under consideration. In that case the ship was chartered to load at Rosario a "full and complete cargo of wheat and/or maize and/or rye". There was an exceptions clause which provided,

"If the cargo cannot be loaded by reason of riots, civil commotions, or a strike or lockout of any class of workmen essential to the loading of the cargo or by reason of obstruction or stoppages beyond the control of the charterers on the railways or in the docks or other loading places . . . the time for loading . . . shall not count during the continuance of such causes."

The charterers intended, and had made all arrangements, to load a cargo of wheat. The loading of wheat was, however, delayed by reason of a "go-slow" strike on the railway by which wheat was brought down to the port. The strike did not interfere with the actual operation of loading, nor did it affect the port railways. Eventually the Argentine government issued a prohibition against the export of wheat, and this finally brought the loading of wheat to a standstill. After an interval of six days the charterers changed over to loading maize, and the loading of the ship was in fact completed with maize. On the shipowners claiming demurrage the charterers relied on the exceptions clause. It was held by the Court of Appeal that the charterers were not protected by the clause, by BANKES, L.J., on the ground that the go-slow strike did not amount to an obstruction, and by SCRUTTON, L.J., and ATKIN, L.J., on the ground that, though the strike amounted to an obstruction, the exceptions clause afforded protection only against an obstruction preventing the actual loading of the cargo, as opposed to an obstruction preventing its being brought to the port. It was further held that on the prohibition of export of wheat being issued, the charterers came under a duty to load maize or rye, but were entitled to a reasonable time to change over to the loading of an alternative cargo.

The charterers contended, and the learned judge held (135), that the present Vancouver cases are distinguishable from *Brightman's* case (134), both on the facts, and on the construction of the respective exceptions clauses. As I have already pointed out, we are not in the present cases concerned with delay in the supply of cargo or in bringing it to the port. It is admitted that there was at all material times an abundant supply of wheat: the difficulty was only in the loading of it, due to the strike of the elevator men. But, as the learned judge pointed out (136), the clause in the present cases is much wider than that in *Brightman's* case (134), in that it includes delay in the supply and bringing down of the cargo, as well as delay in the actual loading. But the most material distinction on which the learned judge relied was that, unlike the clause in *Brightman's* case (134), the present clause deals with delay in relation not only to "the cargo", but also to "the intended cargo". It was proved, and indeed it was admitted, that the charterers did in fact intend to load wheat. In these circumstances the learned judge held, distinguishing *Brightman's* case (134), that they were protected on the ground of delay in loading the intended cargo; accordingly, no obligation arose, as in *Brightman's* case (134), to load an alternative cargo.

(134) [1924] 2 K.B. 619; 16 Asp. M.L.C. 423.

(135) [1959] 3 All E.R. at pp. 461-463; [1960] 1 Q.B. at pp. 502-505.

(136) [1959] 3 All E.R. at p. 462; [1960] 1 Q.B. at p. 503.

Since the date of the learned judge's judgment some doubt has been cast on the validity of his reasoning, having regard to the later decision of this court in *South African Despatch Line v. S.S. Niki (Owners)* (137). I do not think it is necessary to refer in detail to the facts of that rather complicated case. What is significant is that the material part of the exceptions clause read as follows:

"Charterers shall not be responsible for any delay if the cargo intended for shipment . . . cannot be provided, delivered, loaded or discharged by reason of . . . [inter alia] strikes . . ."

The charterparty provided for a wide range of possible alternative cargoes, only one of which—the one which the charterers intended to ship—was affected by a strike. The charterers contended that as "the cargo intended for shipment" could not be loaded because of the strike, they were fully protected by the clause and were under no obligation to load an alternative cargo. This court, however, rejected that contention and applied the same principle as in *Brightman's* case (138).

No doubt because of this decision the argument before us took a rather different form. Counsel for the charterers did not abandon his contention that, once it was proved or admitted that wheat was the intended cargo, the words of the present clause were apt to afford the charterers protection and to negative any obligation on their part to load an alternative cargo, but he put the main emphasis of his argument on the wording of cl. 1 of the respective charterparties, which he contended imposed a different obligation, and conferred different rights, on the charterers from those which arose in *Brightman's* case (138) and in *The Niki* (137). I quote the relevant words in the charter of the *Queen City* (139), which are as follows:

"... the said vessel . . . shall receive on board . . . a full and complete cargo . . . of wheat in bulk . . . and/or barley in bulk and/or flour in sacks as below . . ."

Then, added in type in the space below the printed words, was the following provision:

"Charterer has the option of loading up to one-third cargo of barley in bulk, in which case the above rate of freight to be increased by 2s. 6d. per ton on the quantity of barley loaded. Charterer has the option of loading up to one-third cargo of flour in bags at 10s. per ton extra over the rate for wheat, on the quantity of flour loaded . . ."

The effect of the addition of these words, it was argued, was to differentiate this clause from the corresponding clauses in *Brightman's* case (138) and *The Niki* (137), and to qualify the charterers' absolute obligation to load a full and complete cargo. The only absolute obligation that remained was to load, subject to the exceptions, a full and complete cargo of wheat. The charter became in effect a wheat charter, with options (introduced solely for the benefit of the charterers) to load part cargoes of barley and/or flour. These options, it is said, were true options, which the charterers were free to exercise or not as they chose; but they could be under no obligation to do so. This being so, having regard to the wording of the particular clause, there could be no duty, such as was held to exist in *Brightman's* case (138) and *The Niki* (137), to load an alternative cargo, and once it was proved that the loading of wheat was delayed by the strike the charterers were entitled to the protection of the exceptions clause.

I confess that this argument appealed to me when I heard it developed; but on consideration I have formed the opinion that it is fallacious. It seems to me that, notwithstanding the way in which cl. 1 is worded, the charterers remained under the obligation to load a full and complete cargo. If they could discharge this obligation by loading wheat, all well and good. But if the strike prevented them from doing that, I do not think that is necessarily the end of the matter.

(137) [1960] 1 All E.R. 285; [1960] 1 Q.B. 518.

(138) [1924] 2 K.B. 619; 16 Asp. M.L.C. 423.

(139) See p. 582, letter D, ante.

If it was still possible for them to discharge their obligation by exercising one or both of the options open to them, I do not think they show that the strike was the cause of the delay in loading the cargo or intended cargo, so as to bring themselves within the exceptions clause.

In these circumstances it seems to me that a difficult question of fact arises for determination. I do not doubt that if the charterers can show that, even had they exercised one or both of the options open to them, the ships would still have been subject to the same or greater delay, they would bring themselves within the exceptions clause—for I think that, on that hypothesis, it would still be true to say that the strike was the cause of the delay. Only to the extent that the delay could have been mitigated by exercising one or both of the options could the charterers, in my opinion, be held liable. They were in any case pursuant to the decision in *Brightman's* case (140), entitled to a reasonable time to make alternative arrangements. In *Brightman's* case (140) there was no difficulty on the facts, for it is clear that in that case the alternative grain was readily available in sufficient quantity to load a full and complete cargo. This is by no means so in any of the cases which we have to consider.

It is for the charterers to bring themselves within their exceptions clause if they can. This being so, I entertain no doubt, notwithstanding the charterers' argument to the contrary, that the learned judge rightly held (141) the burden of proof to be on them to show that, if they had attempted to load alternative cargoes, allowing a reasonable time for the change-over, the delay would have been no less. The facts must be looked at, in my judgment, not as they are now known ex post facto to have turned out, but as they would have appeared to a reasonable charterer making all reasonable inquiries at the time when the decision fell to be made. If the charterers can show that, in the light of the facts then known, it was reasonable to take the view that no delay would have been saved if they had attempted to load alternative cargoes, I think that they would sufficiently discharge the onus on them.

Now, the facts with regard to the availability of flour, as found by the learned judge, have already been set out. It is clear that there would have been considerable delay in obtaining the necessary quantity. For reasons already given it would be quite wrong in my view to consider these particular ships in isolation. If there was an obligation in the case of these ships to change over to the loading of flour, the same obligation would arise in the case of all the ships whose charters included an option to load flour. If the requirements of all these ships were taken into account it must be obvious—or at least it must reasonably have appeared obvious at the time—that an immensely long delay, measurable in months rather than weeks or days, would be bound to elapse before they could all be loaded with the necessary quantity of flour.

The facts with regard to barley are not so clear. The learned judge found, on balance of probabilities, that no barley was in fact available for the Ministry of Food. This finding has been attacked on behalf of the shipowners. But the only evidence as to availability of barley was to be found in the records of the Midland Pacific Elevator, which showed that during the currency of the strike stocks of barley at that elevator increased from practically nothing to a total of about eleven thousand tons. Most of this barley appears to have been loaded afterwards into a vessel called the *Illenao*. Assuming this barley to have been available for loading into the ships chartered by the ministry, it clearly would not have gone very far when spread over all the ships whose charters included a barley option. But the real difficulty about loading barley was that, being a bulk cargo, it could only be loaded through one of the two elevators not on strike. It was, therefore, subject to the same bottleneck as bulk wheat, and in so far as the available elevators had been used for loading barley their use for loading the bulk wheat into liners would have been pro tanto restricted. It seems inconceivable, having

(140) [1924] 2 K.B. 619; 16 Asp. M.L.C. 423.

(141) [1959] 3 All E.R. at p. 463; [1960] 1 Q.B. at pp. 505, 506.

regard to Mr. Smith's decision to use the available elevators for the loading of parcels of wheat into liners, that permission could have been obtained for using the same elevators for the purpose of loading barley into tramps. In the circumstances I think that the learned judge cannot be criticised for his finding that, for practical purposes, barley was not an available cargo. A

That, however, is not the end of the matter. Leaving aside the case of the *Riverton*, whose charter included the option to load a full cargo of flour, it remains to my mind extremely doubtful whether any of the other ships, even if they had loaded part-cargoes of flour and/or barley, would in the end of it all have been any better off. It was suggested on behalf of the shipowners that they could then have been tendered to load at one of the two available elevators sufficient bulk wheat to complete their cargoes. There was only a limited quantity of wheat available at these two elevators, and if it had been used for the purpose of filling up partly laden tramps this could only have been done at the expense of the liners. It is true that the matter was never put to the test, but had a request been made to use the available elevators for the purpose of filling up tramps, I have little doubt, having regard to the answers Mr. Smith gave in evidence, what the answer would have been. Given that the policy was to keep the liners running to schedule so far as possible, it seems inconceivable that any use of the elevators which was liable to interfere with that policy would have been sanctioned. B C D

Any course which the charterers could have taken by way of loading alternative parcels of cargo would in any case have involved the ships in considerable delay. The probability of such delay had to be balanced against the possibility that the strike might end at any time. Accepting as I do the finding of the learned judge as to the probable duration of the strike, as it would have appeared to a well-informed shipowner or charterer at the time, I think the fair conclusion is that the tramps might well have been subject to even greater delay, if the option to load alternative parcels had been exercised. Even in the case of the *Riverton* it seems to me that a reasonable charterer would have been abundantly justified in taking the view that the risk of delay would have been just as great if she loaded an alternative cargo of flour as if she waited her turn to load bulk wheat at the end of the strike. In these circumstances my conclusion is that the shipowners' contention fails on the facts. I find myself unable to say that because the charterers failed to exercise their option to load alternative cargoes or part-cargoes they are precluded, in the circumstances of this case, from relying on the exceptions in cl. 31. E F G

(vi) It remains only to deal with the question how Saturdays are to be reckoned in the calculation of the lay days. The relevant clause (142) in the respective charterparties provides as follows:

"Lay Days. Six weather working lay days (Sundays, holidays, and rainy days not to be counted as lay or working days . . .) . . . are to be allowed the charterers for loading . . ." H

As a matter of construction, and apart from authority, I should have thought the natural and ordinary meaning of this provision to be that all days are weather working lay days except those specifically excepted by the words in parentheses—that is, that the words in parentheses are inserted for the express purpose of defining what days shall not be counted as weather working lay days. On any other view, as it seems to me, the words in parentheses would have to be regarded as wholly superfluous. If that *prima facie* view be right, then Saturdays would be excepted from the lay days if, but only if, and to the extent that, they are properly to be regarded as holidays. I

As to the facts, there is no room for dispute, since the matter was the subject of agreement between the parties. For the purpose of loading bulk wheat two

(142) See cl. 15 printed at p. 582, letter H, ante.

classes of workmen are required, the elevator men working the elevators, and longshoremen working on board the ships stowing and trimming the cargo. The elevator men normally work a five-day, forty-hour, week from Monday to Friday. They do, however, sometimes work on Saturdays, if required, but only on terms of being paid one and a half times the normal rate. Longshoremen, on the other hand, normally work a five and a half day, forty-four hour, week from Monday to Saturday—that is including four hours on Saturday morning. In the event of flour in bags being loaded only the longshoremen are required. There was no evidence, to which our attention was called, to show that Saturday was generally regarded as a holiday in the port of Vancouver as a whole.

In these circumstances it has been contended on behalf of the shipowners that Saturdays, not being days excepted by the words between brackets from being working days, should be regarded as working days. It was further contended that, if Saturday counts at all, it should count as a whole working day, even though normally those who work on Saturday only work half the hours worked on other days. Alternatively, it was contended that at the worst for them Saturday should be reckoned as half a working day. The charterers contended, on the other hand, that for the purposes of loading bulk wheat Saturday should not be counted as a working day at all, seeing that the loading of bulk wheat cannot proceed without the elevator men, for whom Saturday is not normally a working day. Alternatively, it should at the most be counted as half a working day.

For the purpose of defining the meaning of "weather working day" both sides relied on the decision of this court in *Alvion Steamship Corpn. of Panama v. Galban Lobo Trading Co. S.A. of Havana* (143), in which LORD GODDARD, C.J., in the course of delivering the leading judgment, said (144):

"... a working day is a length of time consisting of the number of hours which, according to the custom of the port of discharge or loading, as the case may be, are usually worked at the port and the presence of the word 'weather' seems to qualify it so that, from the number of hours which would be the ordinary hours of the port, is to be deducted the length of time during which the weather interferes with the work."

In that particular case no question arose about Saturdays, because Saturday afternoons were specifically excepted. The decision is not, therefore, directly in point on the issue which arises here. But I venture to draw attention to the words "hours which, according to the custom of the port... are usually worked at the port", and to the further words "the ordinary hours of the port", as tending to show that, in the view of LORD GODDARD, C.J., in calculating the number of hours that go to make up a working day, regard is to be had not necessarily to the particular trade or to the particular cargo that is being loaded, but to the ordinary working hours of the port as a whole.

That this is the correct way of looking at the matter is confirmed, to my mind, by an earlier expression of view by GODDARD, J., in *Z. Steamship Co., Ltd. v. Amtorg New York* (145). It should be remarked at once that the actual decision of that case turned on a completely different point, so that what was said by GODDARD, J., can only be treated as obiter. Coming from such an authority, however, his expression of view is at least entitled to our respectful consideration. The case related to the discharging of a coal cargo at Boston, Massachusetts. At the time in question, pursuant to a labour code under the National Recovery Act, men in the coal dock industry were limited to a working week of forty hours. By local arrangement Saturdays were observed as holidays throughout the coal industry, though men were free to work on Saturdays at a higher rate of pay. The clause governing lay days in that case provided for discharging at the rate of so many "tons per weather working day, Sundays, official and local holidays

(143) [1955] 1 All E.R. 457; [1955] 1 Q.B. 430.

(144) [1955] 1 All E.R. at p. 462; [1955] 1 Q.B. at p. 449.

(145) (1938), 61 Lloyd's Rep. 97.

excepted". The evidence in the case did not show that for other trades at Boston Saturday was regarded as a holiday. On those facts GODDARD, J., declined to hold that Saturday was a holiday within the meaning of the exception, and it is to be inferred therefore that he regarded it as a working day. A

Having regard to the reasoning followed in those two cases it appears to me that the question whether Saturday is to be regarded as a working day is to be determined, not by looking at the ordinary hours worked by those engaged in the particular trade (in this case the loading of bulk wheat), but by reference to the ordinary working hours of the port as a whole. On this basis Saturday was certainly not a whole holiday at Vancouver, and I think this inevitably means that, in part at least, it must be reckoned as a working day. But I am further of the opinion that the fair result of the evidence is that in the port of Vancouver as a whole (as is commonly the case in our own country) Saturday is regarded as a half-holiday, that is as half a working day. I decline to accept the view put forward on behalf of the shipowners that Saturday should be regarded as a full working day, albeit a day of only four hours. Such a contention would lead to quite absurd and anomalous results in making up a time-sheet, if for example rain prevented loading for part only of a Saturday morning, as was convincingly pointed out by counsel for the charterers. B C D

My decision on this point, therefore, is in favour of the middle course put forward by both sides as an alternative to their main contentions. I find myself, with all respect, unable to agree with the conclusion of the learned judge that Saturday does not count as a working day at all; nor can I accept his view that the question is to be determined by reference only to the particular trade involved. To that extent, therefore, I would allow the appeal. E

On all the other issues in the case I find myself, for the reasons I have endeavoured to state, in agreement with the conclusions stated by the learned judge in his very full and careful judgment.

I cannot leave the case without expressing my appreciation of the very helpful and thorough arguments of counsel on both sides.

DONOVAN, L.J.: I think the delay here was caused by two events. First the strike itself, and second the decision of Mr. Smith. If a tramp owner were asked at the time "What is delaying your vessel?", I do not think he would simply have said "The strike". The more probable answer is, "It is the strike plus the decision of Mr. Smith to load no tramps during the strike". Then comes the problem whether Mr. Smith's decision was such an inevitable consequence of the strike as to make it right to treat the strike as the sole cause of the delay. I do not take that view. Mr. Smith might have rationed the remaining loading facilities during the strike in a way which did not totally exclude the tramps. Accordingly, I think the particular decision to which he came is to be regarded as a separate cause of delay, albeit that the decision was born of the strike. On that view the charterers are still within the protection of cl. 31 of the charterparty. Delay caused by the strike is covered by the word "strikes". Delay caused by Mr. Smith's decision is covered by the expression "other hindrance of whatsoever nature beyond the charterers' control". If cl. 31 on its true construction requires that the total delay must be brought within one or other of the causes specified and cannot be attributed in part to one and in part to another, then I think the whole delay was due to such a "hindrance" as aforesaid. F G H I

I find nothing in the decided cases precluding the aforesaid conclusions, which are really fact and not law. With one exception therefore, I do not cite them. I should, however, say this about the decision in *Central Argentine Ry. Ltd. v. Marwood* (146). I think that case is properly to be regarded as one where it was not proved that delay would have been avoided for the six days in dispute had there been no strike. A case much nearer to the present one on its facts is *Leonis*

S.S. Co., Ltd. v. Joseph Rank, Ltd. (No. 2) (147). I should add that Mr. Smith was, on my view of the evidence, clearly acting not as the charterers' agent when making his decision, but as a servant of the Canadian Wheat Board exercising its statutory duty to conduct the export of wheat "in an orderly manner" (see s. 4 (4) of the Canadian Wheat Board Act (148)).

The protection of cl. 31 is not lost because at the date of the charter, or at the date of the order to go to Vancouver, the strike was in progress and delay was therefore likely or even inevitable. There is no restriction in the charterparty on the charterers' option to select a port. Nor is one to be implied, since strikes may end at any moment. If the shipowners wished the protection of cl. 31 not to apply to a strikebound port, they could have so provided in the charterparty. Instead the parties expressly provided that delay caused by strikes should be allowed for without any restriction on the length of any particular strike. *Ciampa v. British India Steam Navigation Co., Ltd.* (149) lays down, in my view, no principle applicable to the present case. The question at issue is always one of the true construction of the particular charterparty, namely, whether its terms are such that the nomination of a port where a strike subsists involves, pro tanto, the loss of the protection of the exceptions clause.

Next the charterers are not, in my view, in breach of contract in not nominating a different port from Vancouver when it became clear that the strike would or might be a long one, or when it had lasted several weeks with no end actually in sight. If, as the authorities appear by implication to decide, the nomination of one of the optional ports of loading has the result that that port must be regarded as written into the charterparty from the beginning as the sole port of loading, the effect is as if the remaining ports were struck out. See also, as to the effect of election, *Brown v. Royal Insurance Co.* (150). On that view no port exists after such election as an alternative port except by fresh agreement. Apart from this, I do not think the charterparty ought to be read as containing an implied term that some alternative port shall be named if unreasonable delay occurs at the port first nominated. The difficulties which might arise for any shipowner from any such term are too obvious and too serious to justify implying it. It is clearly a matter for express agreement if at all. I think the decided cases on "safety" provide no safe analogy to the present case.

On this aspect of the matter I find it difficult to extract from the decision in *The Teutonia* (151) any underlying principle except that in the particular circumstances of that case it would have been very unjust to let the charterers have the cargo without paying freight. If the Admiralty Court were free to temper the strict rules of the common law by equitable doctrines, as it seems it was, this freedom would explain the decision. One thing is clear, however, namely, that the judgment of the Privy Council did not indorse the argument of the shipowner that the charterer was bound to nominate another port when Dunkirk became impossible.

Whether the charterers were bound to load an alternative cargo, once there was considerable delay in loading wheat, is again a question of construction of the charterparty. The relevant clause is cl. 1, which, omitting matter irrelevant to the present point, reads thus:

"This charterparty . . . witnesseth, that the said vessel . . . shall proceed in ballast and, upon arrival . . . shall receive on board at Tacoma and/or Seattle or Portland, Oregon, Vancouver, B.C., or New Westminster, or Victoria, B.C. . . . a full and complete cargo . . . of wheat in bulk . . . and/or barley in bulk, and/or flour in sacks as below . . . and being so loaded, shall therewith proceed to one safe port in the United Kingdom . . . and be paid freight as hereinafter provided: 80s. per ton wheat . . . Charterer has the option of loading up to one-third cargo of barley in bulk, in which case the above rate of freight to be increased

(147) (1908), 13 Com. Cas. 295.

(149) [1915] 2 K.B. 774.

(148) See p. 584, letter C, ante.

(150) (1859), 1 E. & E. 853.

(151) (1872), L.R. 4 P.C. 171; 1 Asp. M.L.C. 214.

by 2s. 6d. per ton . . . Charterer has the option of loading up to one-third cargo of flour in bags at 10s. per ton extra over the rate for wheat . . .”

This wording shows that the charterers have an unfettered option to load barley and/or flour, and not a duty to load it. They are not obliged to exercise this option in the shipowners' favour. It is admitted that a full cargo of wheat was the intended cargo here, and the circumstance that the charterers preferred to wait for it, instead of exercising the option to ship something else, gives the shipowners no legal ground of complaint. *Brightman v. Bunge Y Born* (152) and *The Niki* (153) do not govern the present case, since the wording of the relevant clause in the respective charterparties there under construction imposed an obligation to ship a full cargo made up of one or more of the specified commodities, and not a duty as to one and option as to the others. The contrary argument is that the words “wheat in bulk . . . and/or barley and/or flour . . .” themselves confer an option as to cargo, and that the words “charterer has the option . . .” etc. merely restrict the option so far as it affects barley and flour. I follow the argument, but I think the better construction of cl. 1 of the charterparty read as a whole is that it stipulates for a full cargo of wheat, subject however to an option to load one-third of a cargo in barley and one-third in flour, but not an obligation to load any barley or any flour. The natural construction of the words on which counsel for the shipowners relies is altered by the words which follow, namely “as below”, and then “Charterer has the option” etc. To fit counsel for the shipowners' construction these last words ought to read “The above option to load barley and/or flour is limited to one-third cargo”—etc. The words actually used are more apt to confer an option for the first time, not to restrict one already granted.

Whether Saturday should count as a full working day or a half working day or not at all, is a conundrum which the parties could easily have avoided by making some express agreement about it. They knew the ports within the range of the charterparty and must have known the practice at each regarding Saturdays. Instead they have left the court to find out if it can what was agreed. The expression to be construed is in cl. 15 of the charterparty, which so far as here relevant is as follows:

“Six weather working lay days (Sundays, holidays, and rainy days not to be counted as lay or working days . . .), to commence twenty-four hours after the receipt by charterers' agents at loading port of the captain's written notice . . . that his vessel is . . . ready to receive cargo . . . are to be allowed the charterers for loading . . .”

Reading this provision literally it would have the effect that if the captain's notice were given at say 6 p.m. on a Monday the lay days would start to run at 6 p.m. on the Tuesday, though all loading work might close down at the port at 5 p.m. No doubt the parties meant that in such a case the working days should start at the usual time for commencing work on the Wednesday. That is not, however, what the parties have said; but as the point does not seem to throw much light on the present problem, I say no more about it. The question is: What did the parties mean by “working days”? I think the term means those days on which according to the custom of the port work is done of loading the commodity in question. The commodity here is bulk wheat, that being the intended cargo. I think, therefore, that the expression “working days” must be construed in the light of that circumstance, ignoring the position with regard to the commodities which were optional cargoes only. The question, therefore, becomes this: is Saturday one of the days on which the work of loading bulk wheat goes on in Vancouver? The answer is admittedly “No”, for while long

(152) [1924] 2 K.B. 619; 16 Asp. M.L.C. 423; *affd.* H.L., [1925] All E.R. Rep. 607; [1925] A.C. 799; 16 Asp. M.L.C. 545.

(153) [1958] 3 All E.R. 590; [1959] 1 Q.B. 238; *affd.* C.A., [1960] 1 All E.R. 285; [1960] 1 Q.B. 518.

shoremen work a half-day on Saturday they do not then load bulk wheat because the elevator men work not at all on Saturdays and the work of both is essential to this operation. It is true that the elevator men would work on Saturdays, if required, for fifty per cent. extra pay, but the burden of paying that is not, in my view, put on the charterers by the mere words "working days". I think these mean days which are ordinarily working days, not days for which some special arrangement at extra cost might be made. Applying the test I have suggested, the result is that for loading bulk wheat at Vancouver Saturday was not a working day. If this be a result which the shipowners do not like the remedy is to make some express agreement on the point in future cases.

I express my personal indebtedness to counsel for their great help to a newcomer in this field. I should also like to record that the questions in this case, one of fact, and four of the construction of the contract, have been resolved with the aid of only fifty-five authorities.

Appeals dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Richards, Butler & Co.* (for the shipowners, Garibaldi Societa Co-operativa di Navigazione A.R.L., plaintiffs); *Stokes & Mitcalfe* (for the other three shipowners, plaintiffs); *Treasury Solicitor* (for the Ministry of Agriculture, Fisheries and Food, defendants); *William A. Crump & Son* (for the President of India, defendant).

[Reported by HENRY SUMMERFIELD, ESQ., Barrister-at-Law.]

PRACTICE DIRECTION.

CHANCERY DIVISION.

Patent—Practice and procedure—Extension of the term of a patent—Fixing appointed day—Patents Act, 1949 (12, 13 & 14 Geo. 6 c. 87), s. 24, s. 25—R.S.C., Ord. 53A, r. 4 (c), (d).

An applicant for extension of the term of a patent shall, immediately after the hearing of the summons by the master, apply to the clerk to LLOYD-JACOB, J., to fix the "appointed day" referred to in R.S.C., Ord. 53A, r. 4 (c).

As soon as the appointed day has been so fixed, the applicant shall advise the master thereof and the master will ensure that the appointed day is recited in the advertisement directed by R.S.C., Ord. 53A, r. 4 (d).

By direction of LLOYD-JACOB, J.

W. F. S. HAWKINS,
Chief Master, Chancery Division.

May 19, 1961.

W. v. W. (No. 2)

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Baker, J.), April 11, 12, 13, 1961.]

Divorce—Desertion—Constructive desertion—Incest.

Divorce—Condonation—Constructive desertion—Whether there can be condonation of constructive desertion where conduct also amounts to cruelty.

The parties were married in 1935 and there were five children of whom three were daughters, K. born in 1936, F. born in 1945 and S. born in 1948. In about March, 1959, the husband committed an offence of incest against F., to which offence he pleaded guilty on June 3, 1959. On the same date he asked for one other offence involving K. to be taken into consideration. The husband was sentenced to a term of imprisonment from which he was released in June, 1960. From the date of his release until early August, 1960, the husband attempted to effect a reconciliation with the wife; they had sexual intercourse together on a number of occasions in the open air and the wife wrote to the husband at least one reasonably affectionate letter. On Aug. 4, 1960, however, the wife wrote a letter in marked contrast with the earlier letter, telling the husband not to come to her house any more because of what he had done to K. The wife then applied for an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, on the ground of the husband's constructive desertion. In evidence the wife stated that she had written the letter of Aug. 4 because of "information" which she had received, but there was no evidence as to what that information was. The magistrates made an order in the wife's favour and included a non-cohabitation clause. On appeal by the husband,

Held: the order was properly made since—

(i) the husband's offences against F. and K., even in the absence of repetition or persistence by him, constituted cruel conduct which justified the wife in bringing cohabitation to an end; and accordingly there had been constructive desertion by him, which, for the reasons given in (ii) below, was continuing at the time when the magistrates made their order.

Ivens v. Ivens ([1954] 3 All E.R. 446) and *Lang v. Lang* ([1954] 3 All E.R. 571) applied.

(ii) that conduct had not been condoned by the wife (a) because in law the doctrine of condonation was not applicable to a case of desertion (*Perry v. Perry*, [1952] 1 All E.R. 1076, followed) and (b) because, on the facts, there had been no concluded agreement between the parties for a reconciliation (*Morley v. Morley*, [1961] 1 All E.R. 428, followed).

Per CURIAM: the decision in *Boyd v. Boyd* ([1938] 4 All E.R. 181), in so far as it related to a case of constructive desertion, is no longer authoritative in the light of *Lang v. Lang* ([1954] 3 All E.R. 571) (see pp. 633, 634, post).

QUAERE whether constructive desertion, where the conduct relied on is cruel, is capable in law of being condoned, notwithstanding *Perry v. Perry* ([1952] 1 All E.R. 1076) (see p. 629, letters B and C, post).

Blandford v. Blandford ((1883), 8 P.D. 19) considered.

Appeal dismissed.

[**Editorial Note.** The Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, are now replaced by the Matrimonial Proceedings (Magistrates' Courts) Act, 1960, which came into operation on Jan. 1, 1961.]

On condonation and desertion, see *Pizey v. Pizey*, p. 658, post.

As to sexual offences against a third party as just cause for separation, see 12 HALSBURY'S LAWS (3rd Edn.) 260, para. 493, note (t), and 249, para. 463, note (r); and for cases on the subject, see 27 DIGEST (Repl.) 351, 2908.

As to condonation in relation to desertion, see 12 HALSBURY'S LAWS (3rd Edn.) 305, para. 607, note (g); and for cases on the subject, see 27 DIGEST (Repl.) 359, 360, 2976, 2977 and Supplement.]

Cases referred to:

- Baguley v. Baguley*, post p. 635.
- Blandford v. Blandford*, (1883), 8 P.D. 19; 52 L.J.P. 17; 48 L.T. 238; 27 Digest (Repl.) 397, 3269.
- Boyd v. Boyd*, [1938] 4 All E.R. 181; [1955] P. 126 n.; 108 L.J.P. 25; 159 L.T. 522; 102 J.P. 525; 27 Digest (Repl.) 351, 2908.
- Cooper v. Cooper*, [1954] 3 All E.R. 415; [1955] P. 99; 119 J.P. 1; [1954] 3 W.L.R. 867; 3rd Digest Supp.
- Ivens v. Ivens*, [1954] 3 All E.R. 446; [1955] P. 129; [1954] 3 W.L.R. 887; 3rd Digest Supp.
- Jamieson v. Jamieson*, [1952] 1 All E.R. 875; [1952] A.C. 525; 116 J.P. 226; 3rd Digest Supp.
- Keats v. Keats and Montezuma*, (1859), 1 Sw. & Tr. 334; 28 L.J.P. & M. 57; 32 L.T.O.S. 321; 164 E.R. 754; 27 Digest (Repl.) 395, 3260.
- Lang v. Lang*, [1954] 3 All E.R. 571; [1955] A.C. 402; 119 J.P. 368; [1954] 3 W.L.R. 762; 3rd Digest Supp.
- Morley v. Morley*, [1961] 1 All E.R. 428; [1961] 1 W.L.R. 211.
- Mummery v. Mummery*, [1942] 1 All E.R. 553; [1942] P. 107; 111 L.J.P. 58; 166 L.T. 343; 27 Digest (Repl.) 401, 3301.
- Perry v. Perry*, [1952] 1 All E.R. 1076; [1952] P. 203; 116 J.P. 258; 3rd Digest Supp.
- Waters v. Waters*, [1956] 1 All E.R. 432; [1956] P. 344; 120 J.P. 105; [1956] 2 W.L.R. 661; 3rd Digest Supp.

Appeal.

This was an appeal against an order of the Cirencester justices sitting at Cirencester, dated Oct. 26, 1960. The parties were married on Oct. 29, 1935, and there were five children, namely, Kathleen, born on Feb. 3, 1936, Edward, born on May 2, 1942, Freda, born on Feb. 12, 1945, Shirley, born on July 28, 1948, and Anthony, born on June, 11, 1951. In April, 1959, the wife reported to the police an offence committed by the husband against the child Freda. On May 16, 1959, the husband was arrested and on June 3, 1959, he pleaded guilty at Monmouth Assizes at Newport to a charge of incest with Freda and asked for one other offence involving Kathleen to be taken into consideration. He was sentenced to eighteen months' imprisonment and, having earned his full remission, he was released on June 2, 1960. From then until early in August, 1960, the husband was attempting to effect a reconciliation with the wife. They met on several occasions and had sexual intercourse together—the wife said on two occasions, the husband said on about eight occasions some of which, he said, took place in the wife's bedroom. During this time the wife wrote to the husband at least one letter of a reasonably friendly character in which she invited the husband to dinner on the following Sunday. On Aug. 4, 1960, however, the wife wrote to the husband a letter which read:

"To Mr. [W.] Please don't come here any more and many thanks for what you have done to Kathleen. Isn't that girl got to have any happiness? For this I will see you in hell first before I ever speak to you again."

On Sept. 28, 1960, the wife caused a summons to be issued against the husband on her complaints (i) that he had deserted her on Aug. 4, 1960, and (ii) that he had wilfully neglected to provide reasonable maintenance for herself and for the three children, Freda, Shirley and Anthony, who were still under sixteen years of age. On Oct. 26, 1960, the magistrates found the complaints proved and ordered that the wife be no longer bound to cohabit with the husband, granted to the wife custody of Freda, Shirley and Anthony and ordered the husband to pay to the wife £1 10s. a week as maintenance for herself, 10s. a week as maintenance for Freda and £1 a week each as maintenance for Shirley and Anthony. In their reasons, dated Nov. 11, 1960, the justices stated:

"[The husband's] criminal behaviour in the matrimonial home, for which he was sent to prison for eighteen months, gave the [wife] reasonable cause to exclude him from her home. After his release from prison, the [wife] continued to exclude him from the home and the parties never resumed cohabitation. Intercourse took place between them during June and July on a number of occasions in the open air whilst the parties were discussing a possible reconciliation, but it cannot be held to be condonation of the [husband's] constructive desertion. The [husband] has offered to resume cohabitation but the [wife's] refusal to accept the offer has been justified, having regard to the nature of his criminal behaviour and to the fact that two young daughters of the marriage are still living in her home. The court therefore holds the [husband] to have deserted the [wife] on Aug. 4, 1960. The court also finds the [husband] to have been guilty of wilful neglect to provide reasonable maintenance for her and her infant children."

The husband now appealed.

A. T. Hoolahan for the husband.

L. I. Stranger-Jones for the wife.

LORD MERRIMAN, P.: I emphasise the fact that this is a case of desertion but when I adumbrate, as I shall as shortly as possible, the relevant facts leading up to the parting, it will be seen that it is a case in which the reasons for the parting had also all the elements of a charge of cruelty and, indeed, of persistent cruelty. About that there can be no contest for the authority for that is a decision of the Court of Appeal in addition to a decision of this court, by which we are bound.

[His LORDSHIP stated the facts and continued:] I notice with approval that the magistrates have properly perceived that the case with which they were dealing was not a simple case of one spouse leaving the other, but was a case of the disruption of the marriage by conduct of a peculiarly gross and revolting character and they are quite right in treating that, as they do, as a case of constructive desertion. That compels me to deal incidentally, for I think that it is only incidental to the main thread of the case, with the phrase in their reasons that "it cannot be held to be condonation of the [husband's] constructive desertion". The phrase, as has been pointed out, is ambiguous in a sense that it may have two meanings. The word "cannot" may have two meanings. It may be "cannot in law" or it may mean "we cannot bring ourselves to hold that as a matter of fact there was any condonation, intercourse or no intercourse". I will deal with both aspects of the matter, always bearing in mind that we are dealing with a charge of desertion and not a charge of cruelty. If they mean "cannot in law" they may have been referring obliquely to some advice which had been given them by their clerk on the basis of the decision of the Court of Appeal in *Perry v. Perry* (1). In that case the Court of Appeal unanimously, for on that aspect of the matter JENKINS, L.J., did not dissent, ruled that it was inappropriate to talk about condonation of desertion, founding themselves amongst other things—I say amongst other things deliberately—on the fact that desertion is not one of the offences in respect of which the court is directed before pronouncement of decree to consider the question of condonation or no condonation (2). It is to be noticed, however, at the same time that the same argument would apply to sodomy and bestiality, to neither of which the question of condonation is linked in terms. So that argument is recognised as not being conclusive in itself. I am not going to say anything else about that case, except that it does raise a question which has, I confess, always puzzled me and is relevant to the present case. I fully accept that in the sense of ordinary desertion,

(1) [1952] 1 All E.R. 1076; [1952] P. 203.

(2) The Matrimonial Causes Act, 1950, s. 4 (2) (b): 29 HALSBURY'S STATUTES (2nd Edn.) 394.

termination of the desertion by resumption of cohabitation is a more apt description than talking about condonation, but I have never understood, and I do not understand now, if I may say so without disrespect to the Court of Appeal, how constructive desertion comes into it. For it is a commonplace to say that in effect, although of course not exactly in point of law, as for example in this particular case, constructive desertion and cruelty may be identical so far as the facts are concerned and they are only two different descriptions of the same state of facts. There is no doubt that one can condone cruelty. Nobody has doubted that and supposing one is dealing with a cruelty case which is also a case of constructive desertion, identical in every respect on the facts with the charge of cruelty, it does seem to me, although I only say this as one of the things which I have not succeeded in understanding, that it cannot be right to say that one can condone the cruelty but one is not at the same time condoning the desertion. However, if the magistrates mean that as a matter of law they were not entitled to talk about condonation in connexion with constructive desertion, I am bound to say that I think that they would find unqualified authority for that proposition in *Perry v. Perry* (3).

I would also say that I have never understood how SIR RAYMOND EVERSHED, M.R., dealt with the question of the condonation of desertion, which unquestionably has been recognised by the law ever since *Blandford v. Blandford* (4) was decided by SIR JAMES HANNEN, who, if I may say with all possible respect, was the greatest judge who has ever handled the affairs of this Division and who found no difficulty whatever in saying that the fact that the wife who had resumed cohabitation after the husband had deserted her for two years, which at that time was the period which entitled her to a divorce, coupled with adultery, had taken him back and thereby, as SIR JAMES HANNEN said (5), condoned his past offences, but as SIR RAYMOND EVERSHED, M.R., said (6), condoned the adultery. The essence of the decision was that subsequent adultery revived both the antecedent adultery and the desertion which, coupled with each other, were available to the wife before she had taken her husband back and condoned both offences.

However, there I must leave it. As I say, if that is what the magistrates mean, there is the authority in *Perry v. Perry* (3) for the conclusion that condonation cannot be considered in connexion with constructive desertion. The magistrates may mean, however, as I have said, that they were not prepared to hold on the facts which they had just set out about the instances in which sexual intercourse occurred, that there was any condonation. At this point I must refer, shortly, to the two decisions by which the magistrates could not possibly have been assisted because one of them had not been reported at all, namely, *Baguley v. Baguley* (7), a decision of the Court of Appeal, and *Morley v. Morley* (8), a decision of this court distinguishing and explaining *Baguley v. Baguley* (9).

In *Baguley v. Baguley* (9), the Court of Appeal held that a single act of intercourse by a wife was conclusive evidence, in the circumstances of the case, of condonation of cruelty. As I have said already, nobody disputes that cruelty can be condoned. We had what was said to be exactly the same case in *Morley v. Morley* (8), save only that there were two acts of intercourse during two days of an attempted reconciliation, and I am not going to repeat the elaborate review which I am afraid I found it necessary to make in *Morley v. Morley* (8) of the difference between the two cases. In substance, put briefly, it was this. In *Baguley v. Baguley* (9) it was found as a fact on undisputed evidence that there had been a complete agreement so far as words could effect it for a reconciliation, but it was recognised, as it has always been recognised, that words alone are not sufficient. There must be "a something" as LORD CHELMSFORD, L.C.,

(3) [1952] 1 All E.R. 1076; [1952] P. 203.

(5) (1883), 8 P.D. at p. 20. (6) [1952] 1 All E.R. at p. 1081; [1952] P. at p. 213.

(7) Now reported, p. 635, post.

(4) (1883), 8 P.D. 19.

(8) [1961] 1 All E.R. 428.

(9) See p. 635, post.

called it in *Keats v. Keats and Montezuma* (10) which achieved actual reinstatement and in *Baguley v. Baguley* (11) it was held unanimously by the Court of Appeal that a single act of intercourse in those circumstances, whatever might be the case about a wife in other cases, amounted to the reinstatement in fact of the husband in pursuance of the agreement which had already been made. On the other hand, in *Morley v. Morley* (12), the case in which we dealt with the matter in this court, it was plain beyond a doubt, and we so held, that there was never any concluded agreement for reconciliation because although the wife had been prepared to make an agreement to be reconciled, the husband resiled from the essential condition on which she had insisted and there was no evidence whatever of any fresh agreement, excepting the vital condition on which, and on which alone, she was prepared to be reconciled. Therefore, the two cases were poles apart and we held that there was no condonation in *Morley v. Morley* (12) although the husband and wife occupied the same caravan together for two nights in circumstances which it is unnecessary to detail, and sexual intercourse occurred voluntarily between them on both those occasions. If, therefore, the magistrates mean in the present case to say "we are not prepared to hold on the facts which we have set out that there was condonation" or, alternatively, treating it more correctly, according to *Perry v. Perry* (13), that there was a resumption of cohabitation, I think that they were fully covered (although they did not know it and could not have known it) by our decision in *Morley v. Morley* (12). For in the present case it is found as a fact that it was the husband's criminal behaviour in the matrimonial home which gave the wife reasonable cause to exclude him from her home and it is found as a fact that after his release from prison the wife continued to exclude him from the home and that the parties never resumed cohabitation. In my opinion, that finding was amply justified by the facts of the present case.

It came to a head on Aug. 4, 1960, when in marked contrast with the friendly letter that she had written to him earlier (14), she wrote this letter: "To Mr. [W.]"—not "Dear Fred", as the other letter began.

"Please don't come here any more and many thanks for what you have done to Kathleen. Isn't that girl got to have any happiness? For this I will see you in hell first before I ever speak to you again."

It does not need any comment of mine to say that those two letters differ by the width of Heaven from each other. Something had happened. It is unfortunate that we do not know what had happened. There is evidence that the wife wrote that letter because of information she had received that very day. Kathleen, unfortunately I think, was not called as a witness. All we know is that there is in existence a letter from Kathleen to the mother which it does not require any great imagination to assume was what was properly referred to as "information received", but the details have never been divulged. Indeed, I suppose strictly they were not evidence without calling Kathleen or some other evidence, but it is plain to my mind beyond a peradventure that something in connexion with Kathleen had occurred. The nearest we get to it in the evidence is that the husband was cross-examined that he had made some threat to Kathleen. The rest we must leave blank, save this: that something in connexion with Kathleen had occurred which on or before Aug. 4 had induced the wife to write that letter which was described in her evidence as the basis for the date of her complaint, in other words, the charge of desertion began from that date. If she was not justified, of course, she made herself a deserter from that date because anything more uncompromising as a refusal to resume cohabitation would be difficult to imagine. There I must leave it, save that I am convinced—it is impossible to be otherwise—that there was something of however minor or gross a character, as the case may

(10) (1859), 1 Sw. & Tr. at p. 356.

(11) See p. 635, post.

(12) [1961] 1 All E.R. 428.

(13) [1952] 1 All E.R. 1076; [1952] P. 203.

(14) Referred to on p. 627, letter G, ante.

be, which had occurred between the husband and Kathleen which induced the wife to say

"... thanks for what you have done to Kathleen. Isn't that girl got to have any happiness? For this I will see you in hell first before I ever speak to you again",

and that is the man she had been seeing regularly and had been on friendly terms with until this something happened.

That brings me back to the beginning of the magistrates' reasons. I think that it is vital to characterise what had happened and to show how plainly it did put the husband in a state of constructive desertion and how plainly it could have been made a charge of cruelty and, indeed, of adultery, but for one fact, common to both, that the fact had occurred in both cases as long ago as the beginning of April, 1959, and, therefore, was hopelessly out of date as regards a charge in the magistrates' court—a substantive charge either of adultery or of cruelty, with regard to both of which either the date of the adultery or the last date, whatever it is, alleged as part of the persistent cruelty, must have occurred within six months of the date of the complaint (15), which was Sept. 28, 1960. On the other hand the desertion once started is a continuing offence unless and until it is stopped, so that time does not run with the same severity against a charge of desertion unless it has been interrupted in the meanwhile; that is to say, in the present case, unless it had been interrupted by the wife putting herself in the wrong on Aug. 4, when she wrote that letter, the desertion was plainly not interrupted, unless it had been terminated by the acts of intercourse with which I have already dealt.

Were the magistrates entitled to say, as they do, that the husband's criminal behaviour in the matrimonial home for which he was sent to prison for eighteen months gave the wife reasonable cause to exclude him from her home? To my mind the answer to that question is unquestionably "yes" and I say that on the authority of two cases, one, *Cooper v. Cooper* (16), a decision of this court and one, *Ivens v. Ivens* (17), a decision of the Court of Appeal, consisting of LORD GODDARD, C.J., HODSON, L.J., and VAISEY, J. I will take the latter, which follows the former, alone. There, a husband, respondent to divorce proceedings by his wife on the ground of cruelty, had committed indecent assaults on the wife's daughter by a previous marriage, a child between thirteen and fifteen years of age. The girl informed her mother, who protested to her husband concerning his conduct and he promised not to repeat it. The point has been made and pressed quite rightly by counsel for the husband, that there is no corresponding persistence after protest in the present case, at any rate as regards the offences as they stood at the end of March or the beginning of April, 1959, whatever may be said about some form of repetition, or attempted repetition, such as was indicated in the letter with which I have just been dealing. In *Ivens v. Ivens* (17) the husband failed to keep his promise and resumed his indecent conduct, with the result that his wife's health was affected. Eventually the husband left the house and the wife presented her petition. It was held in *Ivens v. Ivens* (17) that a criminal and indecent assault by a husband on a child might amount to cruelty to the child's mother although no intention to injure the mother was shown. In the present case the husband must have known what the effect of his conduct would be on his wife and on her state of health and yet, careless and indifferent of what the effect would be, he continued with his indecent conduct. The facts proved constituted a strong case of cruelty and the wife was entitled to a decree.

Every word of that summary, which correctly represents the position, in my opinion, is justified so far as a charge of cruelty is concerned by the decision in

(15) See the Magistrates' Courts Act, 1952, s. 104; 32 HALSBURY'S STATUTES (2nd Edn.) 503.

(16) [1954] 3 All E.R. 415; [1955] P. 99,

(17) [1954] 3 All E.R. 446; [1955] P. 129.

the House of Lords, and particularly by LORD NORMAND's opinion, in *Jamieson v. Jamieson* (18). But I must deal with the point that there is no element of persistence in the present case as distinct from that in *Ivens v. Ivens* (19). I ought to say that the Court of Appeal in *Ivens v. Ivens* (19) has approved the decision of this court in *Cooper v. Cooper* (20), but I do not think that it is necessary to go through that. I must content myself with reading one sentence of LORD GODDARD's judgment and to ask myself the same question. LORD GODDARD, C.J., said (21):

"In this case what could be worse conduct towards the wife, the mother of this child . . . than for her husband with her knowledge to carry on an indecent course of conduct and indecent practices towards the daughter, and the daughter resenting it?"

There is no insistence in that sentence on any element of persistence after protest. LORD GODDARD plainly stated an elementary proposition that conduct of that sort could have no other effect on the mother of the child, and I ask myself the same question about the present case. Leaving cruelty aside, for cruelty as such was not charged for the reason which I have given, how could there be any possible doubt as to the effect on a decent woman like this to learn at the end of March, 1959, that her husband had been committing incestuous adultery with their fifteen-year old daughter and at the same time was asking that some offence of an unpleasant character should be taken into account, at the time of his conviction, in respect of the eldest daughter, Kathleen?

I have not got to deal with cruelty as such. I have to deal with the statement that in the magistrates' opinion that gave the wife reasonable cause to exclude him from her home—in other words, entitled her to say that she had been constructively deserted. I go further and say that any revival, however slight, of that sort of conduct in connexion with Kathleen for the second time, whatever it was, which was referred to in the letter of Aug. 4 was ample justification for a continuance of her exclusion of him from the home and, in my opinion, the magistrates gave a most sensible, cogent reason for that view. They say:

"The [husband] has offered to resume cohabitation but the [wife's] refusal to accept the offer has been justified, having regard to the nature of his criminal behaviour and to the fact that two young daughters of the marriage are still living in her home."

The daughters were Freda, aged fifteen, in respect of whom he was convicted of incest, and Shirley, aged twelve, of whom, we have been reminded by counsel for the wife, the wife said that the husband used to make too much fuss. The magistrates continued:

"The court therefore holds the [husband] to have deserted the [wife] on Aug. 4, 1960."

I think that that date, although it does not matter very much, is justified by their saying that at any rate on that date occurred this letter, which had one of two effects. Either it protracted the position of constructive desertion or it turned the wife from her impregnable position into a deserter herself and, therefore, it is a vital date. However, I think that we are not really concerned with dates, always provided that at Oct. 26, 1960, the magistrates were rightly convinced that desertion of a constructive character was still proceeding.

In my opinion, the present case has been very well tried by the magistrates and I say so in spite of the fact that they have not had such advantage as they could have derived from the decision of this court in *Morley v. Morley* (22) because judgment had not then been given. I think their decision is perfectly right and that the appeal fails and should be dismissed.

(18) [1952] 1 All E.R. 875; [1952] A.C. 525.

(19) [1954] 3 All E.R. 446; [1955] P. 129.

(20) [1954] 3 All E.R. 415; [1955] P. 99.

(21) [1954] 3 All E.R. at p. 448; [1955] P. at p. 132. (22) [1961] 1 All E.R. 428.

BAKER, J.: I agree entirely, both in substance and in detail, with everything that LORD MERRIMAN, P., has said in the judgment that he has just given. Were this not a case of some complexity and interest I would not venture to add any words of my own. It has, however, been urged on us that the husband's conduct was not such as would justify the wife in ending cohabitation, first, because it lacked the quality of repetition or persistence, and, secondly, because of the decision in *Boyd v. Boyd* (23).

The husband was convicted at the Monmouth Assizes at Newport on his own confession of the crime of incest, committed on a child of the marriage, Freda, between Mar. 30 and Apr. 6, 1959. He asked for an offence to be taken into consideration and the evidence shows that that offence was of incest with the daughter Kathleen. Freda was fourteen and Kathleen was in her early twenties. In his evidence before the magistrates the husband admitted both these offences. It has to be remembered that incest is a vile form of adultery.

While agreeing with everything that my Lord has said, I would add that it seems to me that there is nothing in any authority which has been cited to us, or to which our attention has been drawn, which could prevent this incest from being conduct which, to quote words used by LORD PORTER in giving the opinion of the Judicial Committee of the Privy Council in *Lang v. Lang* (24), "gave her ample justification for leaving him." Of that I am satisfied.

The next question is whether the decision in *Boyd v. Boyd* (23) can be said to prevent the husband's conduct being the foundation of a charge of constructive desertion. *Boyd v. Boyd* was extensively reported in the year in which it was decided, 1938 (25). In the year 1955 it found its way into the Law Reports (26) as a note at the conclusion of *Cooper v. Cooper* (27) during which reference had been made to it. In *Boyd v. Boyd* (28), which was a wife's undefended petition for divorce, BUCKNILL, J., refused a decree on the ground that the essential element of desertion must be an intention to bring the cohabitation to an end. He said (29):

"It may be that the husband has behaved so badly that his wife leaves him, and it may be that his conduct amounts to cruelty, when the wife can get a divorce on that ground, but, before there can be a case of constructive desertion, the court must be satisfied that the conduct of the husband was such as to show a clear intention on his part to drive the wife away."

Although a decree on the ground of constructive desertion was refused, the matter was adjourned, the petition was amended and re-served, and later a decree was granted on the ground of cruelty (30).

As LORD MERRIMAN, P., has pointed out in the course of the arguments, *Boyd v. Boyd* (28) cannot now stand in the face of *Lang v. Lang* (31) and, in particular, in the face of those parts in the opinion in *Lang v. Lang* (32) to which LORD MERRIMAN, P., referred in *Waters v. Waters* (33). I mention this particularly because *Boyd v. Boyd* (34) was quoted to the magistrates in this case. It may be that it was for the purpose of distinguishing it; I know not. But in my view the passage which I have cited from *Boyd v. Boyd* (29) is no longer authoritative.

There remains the short question whether the sexual intercourse which admittedly took place between these parties on two occasions, and which the magistrates found, as I read their reasons, probably took place on more occasions

(23) [1938] 4 All E.R. 181.

(24) [1954] 3 All E.R. at p. 573; [1955] A.C. at p. 418.

(25) [1938] 4 All E.R. 181; 108 L.J.P. 25; 159 L.T. 522; 102 J.P. 525.

(26) [1955] P. 126 n.

(27) [1955] P. 99.

(28) [1938] 4 All E.R. 181; [1955] P. 126 n.

(29) [1938] 4 All E.R. at p. 182; [1955] P. at p. 128.

(30) [1955] P. at p. 129.

(31) [1954] 3 All E.R. 571; [1955] A.C. 402.

(32) [1954] 3 All E.R. at pp. 579, 580; [1955] A.C. at pp. 428, 429.

(33) [1956] 1 All E.R. at pp. 440, 441; [1956] P. at pp. 360, 361.

(34) The report in [1938] 4 All E.R. 181.

but in the open air, constitutes either condonation, or a resumption of the life together which brings desertion to an end. I do not propose to discuss the question of which one ought to consider and I shall use "condonation" to cover both because it seems to me, putting the matter shortly, that unless driven by authority to hold that the sexual intercourse amounts to the "something" which LORD CHELMSFORD, L.C., said in *Keats v. Keats and Montezuma* (35) must follow an antecedent oral forgiveness, the sexual intercourse in the present case can have no effect. LORD MERRIMAN, P., has pointed this out and the magistrates have so concluded. I have heard and I know of no authority which drives me to the conclusion that this intercourse amounts to condonation. If the wife had been asked at the time: "Do you consider that you are forgiving what he has done and reinstating him?", there having been no completed agreement to forgive, although there had been negotiation, her answer would have been "That thought has never entered my mind. I have never gone beyond the stage of considering forgiveness". To my mind it would be wrong to attribute to her any intention to condone and, if I may quote the words of LORD MERRIMAN, P., in *Mummery v. Mummery* (36):

"Put in another way, does it [that is, the intercourse] raise an irrebuttable presumption that the wife, in consenting to that state of things, has condoned the previous desertion? . . . I think that it would lead to an absurd state of things if one were bound to hold that that is so."

So I, too, in the present case think that it would be absurd to hold that the wife by this intercourse was condoning what the husband had done. I agree that this appeal should be dismissed.

LORD MERRIMAN, P.: I just want to add one word, if I may, with regard to *Boyd v. Boyd* (37). All I want to say is that in speaking of *Boyd v. Boyd* (37) as being overruled, I do not consider that anything in *Lang v. Lang* (38) has overruled the subsequent cruelty decision (39). It is the first decision in *Boyd v. Boyd* (40) that was overruled by *Lang v. Lang* (38).

Appeal dismissed.

Solicitors: *Willis & Willis*, agents for *Treasure*, Gloucester (for the husband); *Ilfie, Sweet & Co.*, agents for *W. C. Davey, Son & Jones*, Cirencester (for the wife).

[Reported by N. P. METCALFE, ESQ., Barrister-at-Law.]

(35) (1859), 1 Sw. & Tr. at p. 356.

(36) [1942] 1 All E.R. at p. 555; [1942] P. at p. 112.

(37) [1938] 4 All E.R. 181; [1955] P. 126 n.

(38) [1954] 3 All E.R. 571; [1955] A.C. 402.

(39) [1955] P. at p. 129.

(40) [1938] 4 All E.R. 181.

BAGULEY v. BAGULEY.

[COURT OF APPEAL (Hodson, Morris and Sellers, L.JJ.), October 7, 8, 9, 1957.]

Divorce—Condonation—Condonation by wife—Reconciliation followed by a single act of sexual intercourse—Forgiveness and reinstatement.

The parties were married in 1939, there were two children, and they lived in a rent-restricted house. On Sept. 5, 1954, the husband committed the last of what was found to have been a series of acts of cruelty and on Oct. 23, 1954, the wife left the matrimonial home, no sexual intercourse having taken place between the parties after Sept. 5. In March, 1955, the wife presented a petition for divorce on the ground of the husband's cruelty. The husband, however, was anxious for a reconciliation and on Sept. 8, 1955, a meeting took place between the parties at which a reconciliation was effected on the terms that they would let bygones be bygones and that they would live together again when the husband had found new accommodation for them. On Sept. 10, 1955, the parties again met, and the wife voluntarily took part in an act of sexual intercourse with the husband. The husband never found new accommodation and the wife proceeded with her petition.

Held: the wife had condoned the husband's cruelty and her petition would be dismissed since on the facts there had been a complete reconciliation on Sept. 8, that is, forgiveness of the husband by the wife, and this had been confirmed by her on Sept. 10 by reinstating him as her husband.

Henderson v. Henderson and Crellin ([1944] 1 All E.R. 44) and observations of SIR CRESSWELL CRESSWELL in *Keats v. Keats and Montezuma* ((1859), 1 Sw. & Tr. at p. 347) applied.

Appeal allowed.

[**Editorial Note.** This decision was fully considered in *Morley v. Morley* ([1961] 1 All E.R. 428) and the distinction between that case and this is stated in *W. v. W.* (No. 2), p. 630, letters A to D, ante.

As to condonation by a wife of her husband's wrongdoing, see 12 HALSBURY'S LAWS (3rd Edn.) 304, para. 603, note (u); and for cases on the subject, see 27 DIGEST (Repl.) 395-405, 3254-3346.]

Cases referred to:

Campbell v. Campbell, (1857), Dea. & Sw. 285; 29 L.T.O.S. 150; 164 E.R. 578; 27 Digest (Repl.) 516, 4598.

Henderson v. Henderson and Crellin, [1944] 1 All E.R. 44; [1944] A.C. 49; 113 L.J.P. 1; 170 L.T. 84; 27 Digest (Repl.) 397, 3271.

Keats v. Keats and Montezuma, (1859), 1 Sw. & Tr. 334; 28 L.J.P. & M. 57; 32 L.T.O.S. 321; 164 E.R. 754; 27 Digest (Repl.) 395, 3260.

Snow v. Snow, (1842), 2 Notes of Cases, Supp. i; 6 Jur. 285; 27 Digest (Repl.) 404, 3339.

Appeal.

This was an appeal by the husband against an order of Mr. Commissioner EDGEDALE, Q.C., dated Nov. 7, 1956, whereby he granted the wife a decree nisi on the ground of cruelty.

The parties were married in 1939 and there were two daughters, one born in 1942, the other in 1946. They lived at 33, Thornton Road, Cambridge. The husband was a man of moderate means. The wife alleged that the husband had been guilty of a succession of assaults, the last of which was found by the commissioner to have occurred on Sept. 5, 1954. On Oct. 23, 1954, the wife left the matrimonial home, no sexual intercourse having occurred between the parties between Sept. 5, 1954, and Oct. 23, 1954. The husband was anxious to effect a reconciliation, but on Mar. 4, 1955, the wife presented a petition for divorce on the ground of the husband's cruelty. Thereafter there was correspondence between the parties and on Sept. 8, 1955, they met at the office of the wife's solicitors. At that meeting a reconciliation was effected on the terms that they

would let bygones be bygones and that they would live together again when the husband had found accommodation other than 33, Thornton Road. On Sept. 10, 1955, the parties met again at the husband's parents' house and an act of sexual intercourse took place between them. On Nov. 10, 1955, the wife wrote to the husband saying that unless he found another house she would proceed with her petition. On Dec. 12, 1955, the husband filed an answer denying the alleged cruelty and pleading condonation. A

At the hearing of the suit the commissioner found the charge of cruelty proved and also found that the wife had not condoned that cruelty. The husband appealed against both findings but during the hearing of the appeal the husband abandoned the appeal against the finding of cruelty and pursued only the appeal on the issue of condonation. The case is, therefore, reported solely on the issue of condonation. B

M. D. Van Oss and *John Griffiths* for the husband. C

R. J. A. Temple, Q.C., and *F. M. Drake* for the wife.

HODSON, L.J., stated the facts and continued: Before the petition was presented in March, 1955, both the solicitors for the wife and the solicitors for the husband did everything that they possibly could to help these parties not to be divorced but to be reconciled. The husband always wanted a reconciliation; the wife, having presented her petition for divorce, did not at that time want a reconciliation. The work which the solicitors did bore fruit, and eventually there were meetings between the husband and the wife. D

The first letter to which I need refer is a letter of July 25, 1955, from the husband to the wife. He had been seeing his wife, I think, in connexion with the access that he had been having to the children, because he said: E

"Following our conversation of Saturday and Sunday last it seems possible that a reconciliation can be achieved with a certain amount of good will on both sides. I very much hope we shall be able to manage this for the sake of ourselves and the children. First, I should like to assure you of my love and affection and a genuine desire for your return. If you feel that a return to Thornton Road would be too embarrassing, I am willing to consider moving elsewhere to a locality where the children's education can be adequately pursued with a minimum amount of disturbance, and I also can hope to make a sufficient income for our modest needs. I should like some reassurance of what I hope and believe is true, that your desire for a reconciliation is wholehearted and a completely free choice and that you are aware of the undoubted difficulties of the immediate future which we can meet together. I feel we can overcome these difficulties by mutual trust, love and forbearance, and by a determined effort by both of us to forget the past. I think the next step is for us to meet again without the children and try to establish some further points of agreement. I feel hopeful that we can achieve some amicable and workable agreement. I hope you will forgive the formality of this letter and believe me to remain, Your loving husband, George." F

That letter was followed, after an interval of something over a month, by a meeting between the parties at the office of the wife's solicitors; and they agreed to come together again. A reconciliation was effected, on the terms that the parties would let bygones be bygones and would live together when the husband had got accommodation other than 33, Thornton Road. It was further agreed that there should be no recrimination between them, and the wife forgave the husband for all that had happened in the past. There is no doubt, and indeed no dispute, that that is what happened on Sept. 8, 1955, at the solicitors' office. G

It appears from what I have said that the only question that was left was the place where the parties were to live in the future. It was not unnatural for the wife to want to leave the place where she thought that there had been so much unhappiness in the past. Further, there was the complication that one particular H I

neighbour (who gave evidence on behalf of the wife at the trial) would not very easily be able to visit the house in the future, and the husband concurred in the wife's suggestion that he should try to find something within his means elsewhere for the future where they could live together. I should say that the house where they lived at 33, Thornton Road, was a rent-restricted house, and the rent was a low one: even with the rates added to the rent, the sum which they had to pay was under £100 a year, and it goes without saying that it would not be easy for the husband to find a suitable home for his wife and family at that price. But that was the arrangement—complete reconciliation, so far as it could be effected by word of mouth, and a provision that the future married life should be spent in another home.

On Sept. 9 a letter was written by the husband's solicitors to the wife's solicitors (who were fully aware of what transpired in the office) saying that he (the solicitor) did not propose to deliver the answer in view of the proposed reconciliation. The word "proposed" was used because the parties had not achieved the living together again which would complete the reconciliation. To complete that matter, I should say that it was not until Dec. 12, 1955, that the answer was put in; so that time was given, obviously, by the wife's solicitors to the husband's solicitors in order to give him the chance of finding another house so that the reconciliation could be completed. But something happened on Sept. 10 which is vital in this case. There was a visit to the husband's parents at Olney. The husband, who, of course, was looking forward to the reconciliation, went to that house taking with him a contraceptive, thereby indicating that in his mind at any rate there was the possibility that sexual relation might take place between him and his wife if there was an opportunity; and it did take place between them. It took place freely on the part of the wife. There was no suggestion that she was other than willing to meet her husband in that way and give herself to him. The act was actually performed in the kitchen, when the parties were alone together while the meal things were being washed up. There it was: that was the uncontradicted evidence of the wife. There was nothing to suggest that, whether or not the situation came as a surprise to her, she was forced in any way or that she was deceived in any way—nothing to lead one to suppose that she was other than perfectly free to act as she did at the time when she did in this particular place. During the course of the afternoon at that house it was plain that the discussion turned, not unnaturally, on the provision of a new house other than 33, Thornton Road. Unfortunately the husband's mother expressed the view that she was not prepared to find the money, or any of it, unless she was sure that the wife was sincere in her desire for a reconciliation. This upset the wife. The end of that day was not as happy as the beginning; and the parties have never come together again.

The correspondence (which I need not read) followed for some months after that. I should refer to the fact that after Sept. 10 no letter seems to have been written until Oct. 4, when the husband wrote:

"Dear Nancy, I have hesitated to write to you before, because after making numerous inquiries about properties in and around Cambridge, I have become more and more concerned, I have also been hoping that by waiting I should have better news for you . . . I know how you feel about returning to Thornton Road, but it may be that we shall be driven to the conclusion that there is no alternative at the moment. Please believe me, it would not be one hundredth part as bad as you imagine, and just as soon as we can move I too would like to do so."

He continues by inviting her to come back to him and by expressing his affection for her and asking for a blessing on her. She wrote back on Nov. 5, realising how difficult the housing problem was, and pointing out, reasonably enough, that she did not "want a mansion" and that she did not mind which particular locality the house was in, but she just felt that she could not go back to Thornton Road.

So the matter went on. The husband was hoping against hope that the wife would get over this feeling about Thornton Road and come back there, because after all that was the economical thing to do, and he could not find anything else. Her attitude throughout the correspondence was: "I cannot come back to Thornton Road, and my decision is final". The husband became perhaps a little more bitter towards the end of the correspondence because he began to suspect that his wife allowed the question of another house to take precedence over their reconciliation. The correspondence came to an end in the same year; and the wife made it plain, by a letter of Nov. 10, that if she was not going to get another house she was going on with the divorce: and that is what she did. That has ended in this trial before the commissioner, from which the husband has appealed.

Now the law as to condonation is clear, and was laid down in *Keats v. Keats and Montezuma* (1) as long ago as 1858. In that case the Judge Ordinary (SIR CRESSWELL CRESSWELL) said (2):

"In the reports of decisions in the ecclesiastical courts, there is no case precisely in point with the present one. In almost all of them, the great proof of condonation was the recommencement of matrimonial cohabitation, or some act done; and if the husband, knowing that his wife has been guilty of adultery, takes her to his bed again, he being clearly his own master in that particular, and quite able to choose for himself, if he is so regardless of the wrong done to him as to take her back again, it is always held that this is such a proof of condonation that it cannot be got over. With reference to a wife, to whom a knowledge of her husband's adultery has been brought home, and who has yet continued to share his bed, the rule has not been so strict. The wife is hardly her own mistress; she may not have the option of going away; she may have no place to go to; no person to receive her; no funds to support her; and therefore her submission to the embraces of her husband is not considered by any means such strong proof of condonation as the act of the husband in renewing his intercourse with his wife."

That was part of the direction to a jury, which was considered by the full court presided over by LORD CHELMSFORD, L.C., later. His opinion is contained in the succeeding pages of the same report (3):

"The acts which prove forgiveness may be so strong and unequivocal, as by taking home an offending wife and cohabiting with her, that they may conclusively establish condonation. But words, however strong, can at the highest only be regarded as imperfect forgiveness, and, unless followed up by a something which amounts to a reconciliation and of a reinstatement of the wife in the condition she was in before she transgressed, it must remain incomplete. It has been argued that nothing less than renewed sexual intercourse will be sufficient to establish condonation. It is obvious, without adducing instances to illustrate my meaning, that that in some cases may be a test wholly inapplicable. But I am willing to adopt an expression which was happily used by WIGHTMAN, J., in the course of the argument, and to say that in my judgment there can be no condonation which is not followed by 'conjugal cohabitation'. This is clearly the opinion of DR. LUSHINGTON in the case of *Campbell v. Campbell* (4). To say that condonation requires conjugal cohabitation or connubial intercourse, leaves the nature of the cohabitation or intercourse to be adapted to the varying condition and circumstances of different parties. This will also justify the language of the learned Judge Ordinary, that the forgiveness must be shown by a restoration of the wife to her former position. This does not mean that the cohabitation is to be renewed with all the circumstances which surrounded her former life; to accomplish this is beyond the power of the husband. She may live with him as a wife, but live as a degraded wife. The degree or extent to which

(1) (1859), 1 Sw. & Tr. 334.

(3) (1859), 1 Sw. & Tr. at p. 356.

(2) (1859), 1 Sw. & Tr. at p. 347.

(4) (1857), Dea. & Sw. 285.

all her former privileges may be restored to her does not enter into the question; by her infidelity she has forfeited all her title to be regarded as a wife. Condonation is a pardon which is not necessarily absolute, but which may be accompanied with conditions. I see no reason at all to differ with the Judge Ordinary in the way in which he has stated the law of condonation to the jury; but with him I think that the forgiveness which is to take away the husband's right to a divorce must not fall short of reconciliation, and that this must be shown by the reinstatement of the wife in her former position, which renders proof of conjugal cohabitation, or the restitution of conjugal rights, necessary."

That view of the law has remained undisturbed throughout the years.

The House of Lords had the question under consideration—again the question of a husband condoning his wife's adultery—in *Henderson v. Henderson and Crellin* (5). VISCOUNT SIMON, L.C., said (6):

"The essence of the matter is (taking the case where it is the wife who has been guilty of the matrimonial offence) that the husband with knowledge of the wife's offence should forgive her and should confirm his forgiveness by reinstating her as his wife. Whether this further reinstatement goes to the length of connubial intercourse depends on circumstances, for there may be cases where it is enough to say that the wife has been received back into the position of wife in the home, though further intercourse has not taken place. But where it has taken place, this will, subject to one exception, amount to clear proof that the husband has carried his forgiveness into effect. The exception is that, if the intercourse was induced by a fraudulent misstatement of fact by the wife, that circumstance will prevent the husband's actions from having the effect of condonation . . . It has been more than once pointed out that the conclusion of condonation by an innocent wife of her husband's previous misconduct is not in all cases so strictly drawn from the fact of subsequent intercourse, for there may be instances where the innocent wife, owing to the difficulties of her situation, may have no means of immediately breaking off relations. In *Snow v. Snow* (7) [a case before the ecclesiastical court] DR. LUSHINGTON discusses at length whether, where a husband has been guilty of cruelty, a wife can ever maintain a suit where cohabitation was continued after the last act, and he concludes that subsequent cohabitation is not universally a bar to the wife's suit for the reason above stated. But I know of nothing in the earlier decisions, either in the ecclesiastical courts or in the Divorce Court in England, which supports the view that a husband who has intercourse, which is not induced by the fraud of the wife, after knowledge of the facts of his wife's adultery, should not thereby be regarded as condoning his wife's misconduct."

The authorities, therefore, have laid it down quite clearly that condonation involves reinstatement of the offending party, and that, in the case of a husband, who is master of his own acts, if he has intercourse with his wife knowing of her offence he cannot afterwards say that he has not reinstated her. The authorities also show that that is not the rule in the case of a wife because the wife is not mistress of the situation. In the old days, when the law was laid down on this topic, the wife was less the mistress of the situation than she is today, because she could, normally, have no property. But I think that the observations of the Judge Ordinary in *Keats v. Keats* (8), which I have already read, ought to be applied to the present case:

"With reference to a wife, to whom a knowledge of her husband's adultery has been brought home, and who has yet continued to share his bed, the rule has not been so strict. The wife is hardly her own mistress; she may not

(5) [1944] 1 All E.R. 44; [1944] A.C. 49.

(6) [1944] 1 All E.R. at p. 45; [1944] A.C. at p. 52.

(7) (1842), 2 Notes of Cases, Supp. i.

(8) (1859), 1 Sw. & Tr. at p. 347.

have the option of going away; she may have no place to go to; no person to receive her; no funds to support her; and therefore her submission to the embraces of her husband is not considered by any means such strong proof of condonation as the act of the husband in renewing his intercourse with his wife."

The question is whether there is proof of condonation or whether there is not. This is not a case in which the wife was not her own mistress, or had not the option of going away, or had no place to go to or no person to receive her, or no funds to support her. There was nothing to explain her submission to the embraces of her husband except her own will. The authorities, as I understand them, have consistently proceeded on the basis that the law of condonation is the same for the wife as for the husband in that sense—namely, that, if she has reinstated him by submitting voluntarily to his embraces without any extraneous circumstance weighing against the inference to be drawn from that submission, she must be held to have condoned the offence.

There has been, no doubt, some talk about the desirability of the law of condonation being altered, in the sense that it might be thought to be desirable that some interval should elapse—some probationary period might be allowed to supervene—before it could be said that the party could not rely on complaints previous to that condonation. That talk has not resulted in legislation. And the law, as I understand it, is as I have stated it—that once the reinstatement has taken place it cannot be said "Oh, well, it was only a short reinstatement: in this case it was only one act of intercourse: it did not even take place in the matrimonial home, it took place in a living room in somebody else's house: therefore it can be treated as of no consequence". This was not a submission to the embraces of someone of the opposite sex who had no ties with her. It was a submission of a woman to her husband; and, as *SELLERS, L.J.*, shortly pointed out in the course of the argument more than once, it is repugnant to regard that act of submission as if it were some sort of casual commerce between two persons of opposite sexes, when in fact one knows that it is an act of intercourse of a wife with her husband—indeed, following conversations at which they had agreed to reconciliation.

My conclusion on this part of the case is that it is inevitable that the court should hold that, whatever may have happened in the past, there was a complete reconciliation and a complete condonation, in the sense that there was a reinstatement of the husband; and the proof of the reinstatement was the voluntary submission to the embraces of the husband in the circumstances which I have described.

I need only add that I have described the bare facts in this case because that is all that I am able to do. The wife did not, in the course of her evidence in chief, lead up to this matter, which was clearly stated on the pleadings. She left the circumstances in which the relation took place between her husband and herself to be investigated in cross-examination if counsel so desired; and she was shortly re-examined on the matter. But the bare facts were as I have stated them, and no attempt was made in evidence by the wife or by any witness on her behalf to qualify or explain away those facts so as to make them any different in their result from that which I think they must necessarily be. It was successfully argued before the commissioner that there was no complete reconciliation, that the act of intercourse could be treated as a casual matter, and that the proposed reconciliation would only become complete so as to amount to condonation on the provision of another house. As the correspondence showed, the parties were writing to one another on those lines, the wife insisting on another house, the husband saying that he was trying to get one. In my view, nothing that appears from the correspondence affects in the least what had already taken place. If the condonation was complete (as I am satisfied it was) by Sept. 10, 1955, the fact that the efforts to obtain another house went off, or failed, does not in any way affect

the matter. For these reasons, in my opinion this appeal must be allowed; and the consequence of that will be that the petition will be dismissed.

MORRIS, L.J.: For the reasons which have been stated by HODSON, L.J., the only matter with which we have been concerned on the hearing of this appeal is whether, on the footing that the husband was guilty of cruelty, there was condonation by the wife of the matrimonial offence. The principle which is to be applied was stated by VISCOUNT SIMON, L.C., in *Henderson v. Henderson* (9). The Lord Chancellor pointed out (10):

“The essence of the matter is (taking the case where it is the wife who has been guilty of the matrimonial offence) that the husband with knowledge of the wife’s offence should forgive her and should confirm his forgiveness by reinstating her as his wife.”

Later on in his speech the Lord Chancellor said (11):

“There cannot be such a thing as contingent condonation by a husband of his wife’s adultery—certainly not when the condonation includes the irrevocable act of sexual connexion.”

The Lord Chancellor further said (12):

“Condonation is not a contract at all; it is the overlooking of past wrongs accompanied by action on the part of the aggrieved spouse which shows that they are really forgiven, and the circumstance that the guilty party, before or at the time of condonation, makes promises as to future conduct cannot lead to the consequence that previous offences are no longer condoned, if and when the promises are afterwards repudiated.”

The view of the learned commissioner in the present case was that the agreement between the parties was that there was to be no reconciliation and no restoration until a home other than the home in Thornton Road was found. His view was that the parties were not completely reconciled, but that they agreed that they would be reconciled when the husband found a new house. I do not feel able to take that view of the matter. It is true that the parties did not resume normal married life, but that was because the plan was that they were to do that in some house other than 33, Thornton Road, Cambridge; and the husband experienced difficulties in finding a house. I do not think that there is any reason to suppose that the husband’s endeavours and efforts to find a house were not thorough and painstaking.

If, then, it is necessary to consider whether there was forgiveness and also whether such forgiveness was confirmed by some form of reinstatement, it is beyond dispute in the present case that there was forgiveness. That was clearly so found by the learned commissioner; and that finding is not challenged. Accompanying the forgiveness were promises that by-gones should truly be by-gones. Marking the forgiveness there was agreement that there would be no recrimination. The parties were to make a fresh start. There was undoubtedly forgiveness. Then came the occasion when there was sexual intercourse. The learned commissioner took the view that that did not amount to the restoration of the husband to his position as a husband. That leads to the inquiry as to what should be the correct view and interpretation of that occasion. VISCOUNT SIMON, L.C., in *Henderson v. Henderson* (13), said that it had been

“more than once pointed out that the conclusion of condonation by an innocent wife of her husband’s previous misconduct is not in all cases so strictly drawn from the fact of subsequent intercourse, for there may be

(9) [1944] 1 All E.R. 44; [1944] A.C. 49.

(10) [1944] 1 All E.R. at p. 45; [1944] A.C. at p. 52.

(11) [1944] 1 All E.R. at p. 46; [1944] A.C. at p. 53.

(12) [1944] 1 All E.R. at p. 46; [1944] A.C. at p. 54.

(13) [1944] 1 All E.R. at p. 45; [1944] A.C. at p. 53.

instances where the innocent wife, owing to the difficulties of her situation, may have no means of immediately breaking off relations.”

The Lord Chancellor doubtless had in mind the passage in the summing-up of the Judge Ordinary in *Keats v. Keats* (14). There is no question of fraud in this case. What, then, are some of the circumstances being referred to? The Judge Ordinary had said this (15):

“ With reference to a wife, to whom a knowledge of her husband’s adultery has been brought home, and who has yet continued to share his bed, the rule has not been so strict. The wife is hardly her own mistress; she may not have the option of going away; she may have no place to go to; no person to receive her; no funds to support her; and therefore her submission to the embraces of her husband is not considered by any means such strong proof of condonation as the act of the husband in renewing his intercourse with his wife.”

What, then, were the circumstances here? The learned commissioner in his judgment took this view:

“ I do not think that act of sexual intercourse which took place symbolical of going back to their former life. It is quite different if, having met at the solicitors’ office, they had agreed to be reconciled and went off, say, to stay in a hotel together for some days. This was merely a case of the husband rather taking advantage of the fact that the wife was a woman who was very ill and was obviously clearly attracted by him: it was premeditated on the part of the husband but it certainly was not premeditated on the part of the wife.”

I agree, if I may say so, with the observation that has fallen from HODSON, L.J.—that any question of premeditation on the part of the husband does not appear to assist the investigation here. But I cannot think that this is a case of the husband “ rather taking advantage of the fact that the wife was a woman who was very ill ”. It does not seem to me that there is any evidence which negatives the view that the wife was a completely willing party. She was so described by the husband in his evidence. The wife, it seems to me, was a free agent who agreed to what took place. This is not a case where, applying what was said by the Judge Ordinary, the wife was not her own mistress. It is not a case where she did not have the option of going away from the marriage home: she was already away from her husband. It is not a case where she did not have a place to go to, or a person to receive her, or funds to support her. The setting of the occasion is suggestive, perhaps, of a somewhat unedifying and soulless proceeding. But there is no suggestion that the wife was overborne. There were no circumstances which rendered it difficult in any way for her to decline to accept her husband’s suggestion. She was a very willing party. She gave no evidence which negatives that she was a free agent or that cast doubt whether she was. That to which she freely consented showed, in my judgment, that as a wife she voluntarily yielded to her husband the rights of conjugal cohabitation. Having forgiven him (and the forgiveness is beyond all question) she reinstated him as her husband. Adopting the language of VISCOUNT SIMON, L.C., she forgave him and then confirmed her forgiveness by reinstating him. She accepted him again as her husband. In my judgment, if he had been guilty of the matrimonial offence of cruelty she condoned it.

SELLERS, L.J.: I agree that this appeal should be allowed. In my judgment this is a clear case of condonation. Condonation requires not only that there should be forgiveness but also that there should be reinstatement. The inquiry into whether or not there has been condonation involves consideration both of the

state of mind and the course of conduct of the particular spouse involved. It must be recognised that a course of conduct, whilst it generally reveals and permits of an interpretation, and a correct interpretation, of the state of mind, may be brought about by other considerations and may not strictly and correctly reveal the true state of mind. Those are the factors which fall for consideration.

The evidence in this case is confined to two days, substantially, Sept. 8, 1955, and Sept. 10, 1955. In order properly to interpret that evidence, one must look back to see what the circumstances were, and one is permitted to look forward to see how the parties acted, what they wrote and may have said and thought in the succeeding days. It is on that evidence that a conclusion has to be reached. The position on Sept. 8, 1955, was that the wife had launched a petition. No answer had been filed. The petition made many allegations of what have been described as minor acts of cruelty, and some allegations, relatively few and somewhat intermittent, of acts of a degree of violence or assault by striking. That was the position. The wife was formally claiming that she was entitled to a divorce because of her husband's matrimonial offences.

By the good offices of the solicitors (who seem to have acted most commendably in this case), on Sept. 8, the parties met together. I do not propose to go through the evidence in detail, but the upshot of it (revealed from those sources which I have indicated) was that the wife was willing to return to her husband. She forgave him completely—on more than one occasion she so stated. But she made one reservation, and one reservation only, and that was that she did not wish to return to the home where (as she alleged) these offences had taken place—Thornton Road, in Cambridge. Apart from that, her acceptance of her husband was, in terms and intention, complete. They left the solicitors' office, as I understand it, together, sitting in the back of a car—which occasion the husband said seemed to establish their unity and happiness once again. I recognise that that would not be enough if the matter had stayed there. However, under arrangements already made, the two children of this marriage (whose interests the parties, or at least one of them, seem to me somewhat to have lost sight of) were to be taken to see their father, who was then residing with his parents. On Sept. 10, the mother, the wife, went along with the children. They went to the parents' house. The husband and wife, therefore, met again within two days of the discussions of forgiveness and the future which had taken place. In the course of the day sexual intercourse took place. After that the parties went in to see the mother of the husband and discussed with her the ways and means of acquiring another house, because it was thought that she might be willing to lend some money. What is to be derived from those circumstances? It is said on behalf of the wife that that does not amount to condonation because although there was admitted sexual intercourse but little importance should be attached to it. To my mind, that argument does a grave injustice to the wife. One does not seek to analyse the motives which prompted such conduct. If any reliance was going to be placed on that event in excuse of the wife it seems to me that it would have been imperative that the wife should have given some explanation of how she came to act in that way against her will and desire. It was (as MORRIS, L.J., has just said) in somewhat unusual circumstances. There would have been nothing at all to have prevented the wife—even if there had been no estrangement at all—from saying that the circumstances were such that the act might be postponed. There is no indication at all that she entered into that relationship with her husband except with complete freedom and with every intention of so doing. I am not prepared to impute to her that at that time she was reserving in her mind some sort of attitude—"Although I am giving myself to you after twelve months' absence in the manner I did when I was with you as your wife, nevertheless I am not, of course, condoning what you did: I still have at the back

of my mind this cruel treatment you have given me". To hold that this was not A
condonation would be a reflection on the wife which I am not prepared to make.
I think that the intercourse was clear and conclusive evidence of condonation in
the circumstances of this case. I would allow the appeal accordingly.

Appeal allowed. Petition dismissed. Decree nisi set aside.

Solicitors: *Baylis, Pearce & Co.*, agents for *S. J. Green*, Cambridge (for the B
husband); *Collyer-Bristow & Co.*, agents for *Wilkins & Thompson*, Uttoxeter
(for the wife).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

PROPHET v. PLATT BROTHERS & CO., LTD. C

[COURT OF APPEAL (Sellers, Harman and Pearson, L.JJ.), April 13, 14, 1961.]

*Factory—Protection of eyes—"Fettling of metal castings"—Obligation to D
provide goggles—Fitter chipping groove in cast-iron component in course of
assembly work—Whether "fettling of metal castings"—Factories Act,
1937 (1 Edw. 8 & 1 Geo. 6 c. 67), s. 49—Protection of Eyes Regulations,
1938 (S.R. & O. 1938 No. 654), Schedule.*

The appellant was employed by the respondents, who were manufac- E
turers of textile machinery, as a fitter. Components of machines were
cast in the respondents' foundry; after removal from the moulds they
went through the fettling process, were then passed to the machine shop
for machining and finally to the fitters' shop for assembly. Fitters in the
course of their assembly work had, from time to time, to do some chipping
of castings with hammer and chisel to make them fit. While the appellant
was chipping a groove approximately a $\frac{1}{4}$ inch deep, 2 $\frac{1}{2}$ inches long and 1 $\frac{1}{2}$
inches wide, in a casting, a piece of metal lodged in his eye causing the
loss of a great proportion of the sight of that eye. The appellant sued F
the respondents for damages on the ground that they were in breach of the
duty imposed by the Factories Act, 1937, s. 49, and the Protection of Eyes
Regulations, 1938, in that, as he alleged, they had failed to provide suitable
goggles or effective screens to protect the eyes of persons employed in the
process of "fettling of metal castings, involving the removal of metal"
when carried on by hand tools or other portable tools.

Held: the respondents were not liable for breach of statutory duty G
because the process on which the appellant was engaged at the time of the
accident was not the "fettling of metal castings" within the meaning of
those words in the schedule to the Protection of Eyes Regulations, 1938,
for that process was the removal of gates, runners, rough edges or other
roughnesses of an iron casting after it came from the casting shop, but the
appellant had been doing fitters' assembly work. H

Moodie v. Clarke, Chapman & Co., Ltd. (Jan. 24, 1952, unreported)
approved.

Oragg v. Metropolitan Vickers Electrical Co., Ltd. (May, 1950, unreported)
distinguished; *Williams v. Falkirk Iron Co., Ltd.* ([1951] 1 All E.R. 294 n.)
doubted. I

Appeal dismissed.

[As to the processes in factories for which goggles must be provided, see 17
HALSBURY'S LAWS (3rd Edn.) 121, para. 202; and for cases on the subject, see
24 DIGEST (Repl.) 1073-1075, 316-323.

For the Factories Act, 1937, s. 49, see 9 HALSBURY'S STATUTES (2nd Edn.)
1039.

For a summary of the Protection of Eyes Regulations, 1938, see 8 HALS-
BURY'S STATUTORY INSTRUMENTS 187.]

Cases referred to:

- Cragg v. Metropolitan Vickers Electrical Co., Ltd.* (May, 1950, C.A.), unreported.
- Crump (William) v. Whitaker & Clapham, Ltd.*, (Mar. 11, 1952, Leeds Assizes), unreported.
- Moodie v. Clarke, Chapman & Co., Ltd.*, (Jan. 24, 1952, Newcastle Assizes), unreported.
- Williams v. Falkirk Iron Co., Ltd.*, [1951] 1 All E.R. 294 n.; 24 Digest (Repl.) 1074, 319.

Appeal.

The plaintiff appealed against the judgment of DIPLOCK, J., on Mar. 18, 1960, in an action brought by the appellant, who was a fitter, against his employers, the respondents, the action being based on an alleged breach of statutory duty or negligence and being for damages for personal injuries sustained by reason of a small piece of metal having lodged in the appellant's eye while he was chipping a groove in a metal component that had been cast in the respondents' foundry, had been fettled and dressed, and had been brought to the fitting shop for the appellant to work on it for the purpose of assembly. The fitters in the fitting shop had chipping jobs on an average about once to three times weekly. The chipping was done with a hammer and chisel. The appellant alleged, but the respondents denied, that the respondents did not provide goggles for fitters to use for this work. The fitters did not use goggles. The breach of statutory duty alleged was breach of the duty imposed by s. 49 of the Factories Act, 1937, and the Protection of Eyes Regulations, 1938, by failure to provide any or any suitable goggles for the appellant in his work, and failure to ensure by strict orders or reasonable supervision that the appellant wore goggles or similar protection during the work. By their defence the respondents denied that the appellant's work was work to which the Protection of Eyes Regulations, 1938, applied. On the evidence there were some three thousand fitters at the respondents' works and over twenty-five years the accident to the appellant was the first eye accident which had caused serious results from the process. His Lordship (DIPLOCK, J.), dismissed the action, holding, as a question of law*, that the work on which the appellant had been engaged at the time of the accident was not "fettling of metal castings, involving the removal of metal" within the meaning of these words in the schedule to the Protection of Eyes Regulations, 1938, and that negligence on the part of the respondents was not established. The appellant appealed on the issue of breach of statutory duty but not on the question of negligence.

The facts appear in the judgment of SELLERS, L.J.

D. P. Croom-Johnson, Q.C., and *F. P. R. Hinchliffe* for the appellant workman.

* The following is an extract of the relevant passage in the judgment of DIPLOCK, J., delivered at Manchester on Mar. 18, 1960: "Now the process which it is contended by the [appellant] was specified, and on which the [appellant] contends that he was engaged, was the following—it is the last part of the schedule to the Protection of Eyes Regulations, 1938, which reads—

The following processes when carried on by means of hand tools or other portable tools:—

'Fettling of metal castings, involving the removal of metal'.

The fettling of metal castings, involving the removal of metal, is a perfectly well-known process and had I not been assisted by expert evidence I should have thought that its meaning was perfectly clear, namely, the removal of gates, runners, rough edges or other roughnesses of an iron casting after it comes from the casting shop. What the meaning of the word is, is of course a question of law, although no doubt when it is a technical term it is one on which evidence from trade witnesses is admissible, and I am entitled to the assistance given in interpreting this word 'fettling' and to pay attention to the evidence of persons familiar with the trade.

"I am quite satisfied that no one in the trade would call the operation on which the [appellant] was engaged one of fettling, or 'fettling a metal casting involving the removal of metal'."

D. J. Brabin, Q.C., and A. M. Prestt for the respondent employers. Counsel A
for the respondents were not called on.

SELLERS, L.J.: This is a plaintiff's appeal from a judgment given by
DIPLOCK, J., at Manchester Assizes in March of last year in favour of the
defendants, the respondents to this appeal. The judgment is clear and complete
and in my view entirely right, and I feel no need to add anything to what the
learned judge has said, but it might be convenient to bring together the un- B
reported decisions to which reference has been made.

As far back as May 3, 1955, when the appellant was engaged in chipping a
groove into an iron casting, a small piece of metal lodged in his eye. It was
not at first thought to be serious, but after three days it developed into a very
serious matter and eventually, after a great deal of pain and suffering, he lost a
great proportion of the sight of his left eye. That is a grave misfortune. It
may have been by mischance. It may have been by something for which the
appellant cannot be wholly exonerated. I think that it is clear that it was not
due to any negligence or breach of duty on the part of his employers, the
respondents. It was alleged to be a breach of duty at common law. The
learned judge rightly rejected that and there has been no appeal from that
finding. The appeal has been advanced on an allegation, which also the learned
judge rejected, that there had been a breach by the respondents of statutory
duty. D

The appellant was a fitter, and, at the time of the accident, he was seeking to
assemble a component part with another part in order to construct some piece
of textile machinery. That component part had been made by hot metal being
poured into a mould in the foundry, had then come from the mould and gone
through the fettling process (which also normally takes place in the foundry or
contiguous to it), had then, as I understand it, been to the machine shop for
machining, and from there passed on, in that more complete if not wholly complete
state, as a component, to the appellant to assemble. As it chanced, the
assembly could not be made because the mould had not been properly designed
or constructed. In a place where there ought to have been a groove, with a
depth of perhaps a $\frac{1}{4}$ inch or a little less and of a size going back in length about
 $2\frac{1}{2}$ inches and in width about $1\frac{1}{2}$ inches, there was solid metal: the groove was
not there. The appellant, by using hammer and chisel, was seeking to remove
the metal and make the groove. The fault clearly was in this case that that
metal should have been prevented from getting in there by reason of a different
shape in the mould. It was not due to any other fault in the series of processes
through which the component part had gone after the mould had been made. E

On the facts of this case the appellant can establish a duty on the respon-
dents only if he can bring the case within a provision of the Protection of Eyes
Regulations, 1938, made under s. 49 of the Factories Act, 1937. If he can, then
the respondents would have been under a duty to have provided suitable goggles
or effective screens to protect the appellant's eyes. Whether there had been a
breach of that duty or whether the breach of duty could properly be said to
have been a cause or the sole cause of the accident, would have been matters
in issue if the duty had been established. The duty can arise only if the work
which the appellant was carrying out at the time was a process, carried on by
means of hand tools, of "fettling of metal castings, involving the removal of
metal". F

On that issue evidence was given which the learned judge accepted and he
found it accorded with views expressed in two unreported judgments given on
the North Eastern Circuit. The first is that of LYNSEY, J., in *Moodie v. Clarke, Chapman & Co., Ltd.* (1), given in Newcastle on Jan. 24, 1952. The
plaintiff in that case was (as was the appellant in this case) chipping off bits of
metal from something which had come (in that case) from the milling machine. G

(1) (Jan. 24, 1952), unreported. I

The fault there had been in the milling and it had nothing to do with any fault with regard to fettling, which was an earlier process. The learned judge dealt with the allegation that the work which was being done was fettling. In his judgment he said that "fettling [is] . . . the removal of rough edges from iron castings, after they come from the casting shop". The second case was *William Crump v. Whitaker & Clapham, Ltd.* (2) which came before HALLETT, J., at Leeds on Mar. 11, 1952. That case, on the facts, is more similar to this case because there the plaintiff was seeking to remove in the casting something which had been wrongly made by a faulty mould. The learned judge, in a definition similar to that which had been given by LYNSEY, J., said that fettling was cleaning the roughness off the edges of metal castings. That is the evidence accepted by the learned judge in this case. The appellant in this case was not doing that. In the course of argument counsel for the plaintiff, who put this appeal forcefully before us, referred to a decision of this court in May, 1950 (also unreported), which had not apparently come to the attention of either of those learned judges. It was an appeal heard before TUCKER, SINGLETON and JENKINS, L.J.J., in *Cragg v. Metropolitan Vickers Electrical Co., Ltd.* (3). It does not help in this case very much because there it was admitted that the work that the plaintiff was doing at the time was fettling. The point was that it was fettling done by a fitter in the course of his work, and it was fettling which it was necessary for him to do because it was something that had been omitted to be done in the proper place at the proper time in the course of the fettling process. The learned judge at the trial had found that there was no liability but the Court of Appeal took the view that because there was a routine and recurring obligation to do this work which had been overlooked in the fettling process and because it was some fifteen per cent. of the work that the fitter had to do, the work that was there being carried on was work which was contemplated by the schedule to the Protection of Eyes Regulations, 1938, that is to say, fettling a metal casting, which involved the removal of metal.

There is only one other case to which I would refer and that is *Williams v. Falkirk Iron Co., Ltd.* (4). I do not recall the details of that case which was tried before me at Birmingham, but there was a major contest as to what was the process of fettling, what it included, when it commenced, and when it finished. I came to the conclusion on the evidence that there was a definite process. The regulations are imposed under the Factories Act, 1937, on established industrial processes and established practices having regard to the risk or danger which the work involves. It may be that that case would have to be reviewed in the light of the decision of the Court of Appeal because there was in fact, prior to the mould passing on to the proper fettling process, a knocking-off in a very general and rough way, not in any detailed way, of what were called runners, or gates, by the moulders before they passed them on. That seems to have been a more or less regular practice. Whether that would properly, in the light of the Court of Appeal decision, fall within the process of fettling of metal castings may fall for consideration.

As far as this case is concerned, the appellant was altering the design of the casting in order to make it fit; he was not fettling. The judgment was clearly right, and therefore this appeal must be dismissed.

HARMAN, L.J.: I entirely agree. A man of average education knows of the noun "fettle". A horse may be in "high fettle", or a man may be in "good fettle". But the verb created out of that word is not, I think, generally so well known. "To fettle", I suppose, must mean to put into good fettle and, therefore, might be a very general expression. It is of no significance, however, to look in the dictionary and, divorcing the word from its context, arrive at its etymological or other definition. Words must be construed according to the

(2) (Mar. 11, 1952), unreported.

(3) (May, 1950), unreported.

(4) [1951] 1 All E.R. 294 n.

context in which they appear, and this word appears in the schedule to the Protection of Eyes Regulations, 1938. It refers to a process of "fettling of metal castings". From the evidence that was given in this case, and indeed from the reports of the cases at nisi prius, it seems that that is a well-known activity. Fettlers are people who do a well demarcated job, not a highly skilled one. It is a kind of trimming up of the castings as they come from the foundry. The work here in question was not that work; it was a much more skilled job. It was in fact part of the fitter's job, and therefore the learned judge rightly held that "fettling" did not describe the process (if it was a process at all) here in question. A B

The industry of counsel produced to us a case of which the learned judge did not have the advantage of perusal, but when looked at, the only point in that case was whether what went on there, which was admittedly fettling, was a "process" of fettling, and the Court of Appeal held that there was sufficient regularity in it and that it was a sufficiently routine affair to make it a process; therefore, the activity being admitted to be fettling and the court finding a process, the regulations applied. That does not seem to me to carry the matter any further, so far as deciding this case is concerned, and I cannot think that it would have made any difference to the learned judge's judgment if he had had it before him. C D

I agree that the appeal should be dismissed.

PEARSON, L.J.: I agree. The question raised in this appeal is whether the appellant was at the time when the accident occurred engaged in a process, which was carried on by means of hand tools, of fettling of metal castings involving the removal of metal, within the meaning of the Protection of Eyes Regulations, 1938, made under s. 49 of the Factories Act, 1937. What he was doing from time to time in the course of his work as a fitter, for the purpose of enabling himself to carry out his assembly work, was to excavate or gouge out metal to a depth of about a $\frac{1}{4}$ or $\frac{3}{8}$ of an inch over an area of about $2\frac{1}{2}$ inches by $1\frac{1}{2}$ inches. It was, on the evidence, a skilled operation, suitable to be done by a fitter and not suitable to be done by a fettler. E F

The learned judge said this:

"The fettling of metal castings, involving the removal of metal, is a perfectly well-known process and had I not been assisted by expert evidence I should have thought that its meaning was perfectly clear, namely, the removal of gates, runners, rough edges or other roughnesses of an iron casting after it comes from the casting shop." G

Then he referred to the evidence which had been adduced before him and he said:

"I am quite satisfied that no one in the trade would call the operation on which the plaintiff was engaged one of fettling, or 'fettling a metal casting involving the removal of metal'." H

There was ample evidence on which he could come to that conclusion, and in my view it should not be disturbed. I therefore agree that the appeal should be dismissed.

Appeal dismissed; judgment for the defendants.

Solicitors: *Evill & Coleman* (for the appellant workman); *George A. Herbert*, agent for *George Oates & Co.*, Manchester (for the respondent employers).

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

RUTBERG v. WILLIAMS.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Ashworth and Lawton, JJ.), May 10, 1961.]

Shipping—Load line—Submersion—Additional fine—Earning capacity increased, but no evidence as to extent of increase—No jurisdiction to impose additional fine—Merchant Shipping (Safety and Load Line Conventions) Act, 1932 (22 & 23 Geo. 5 c. 9), s. 44.

A court has no jurisdiction to impose an additional fine under s. 44 (2) and (3)* of the Merchant Shipping (Safety and Load Line Conventions) Act, 1932, on the owner or master of a ship which was so loaded as to submerge its load line in salt water merely because it is proved that the ship was engaged in a commercial venture and that the submersion had increased the earning capacity of the ship: to impose the additional fine the court must also have evidence as to the extent to which the earning capacity of the ship was, or would have been, increased by reason of the submersion.

Appeal allowed.

[As to additional fines for wrongful submersion of a ship's load line, see 30 HALSBURY'S LAWS (2nd Edn.) 260, note (m).]

For the Merchant Shipping (Safety and Load Line Conventions) Act, 1932, s. 44, see 23 HALSBURY'S STATUTES (2nd Edn.) 937.]

Case Stated.

Vilhelm Gustav Henning Rutberg, master of the s.s. Indus of Stockholm, who on Sept. 20, 1960, before the stipendiary magistrate for the city of Cardiff sitting as a Magistrates' Court at Cardiff, had pleaded guilty to an offence against s. 44 of the Merchant Shipping (Safety and Load Line Conventions) Act, 1932*, appealed by Case Stated against the additional fine of £300 imposed on him by the magistrate under s. 44 (2) and (3) of the Act.

The facts are stated in the judgment of LORD PARKER, C.J.

M. J. Mustill for the master, the appellant.

J. R. Cumming-Bruce for the prosecutor, the respondent.

LORD PARKER, C.J.: This is an appeal by the master of a ship from a decision of the stipendiary magistrate for the city of Cardiff by way of Special Case, his decision being that on a plea of guilty the master was to pay not only the fixed statutory fine of £100 but an additional fine of £300.

The relevant provision is s. 44 of the Merchant Shipping (Safety and Load Line Conventions) Act, 1932, which provides:

"(1) A British load line ship registered in the United Kingdom shall not be so loaded as to submerge in salt water, when the ship has no list, the appropriate load line on each side of the ship, that is to say, the load line indicating or purporting to indicate the maximum depth to which the ship is for the time being entitled under the load line rules to be loaded.

"(2) If any such ship is loaded in contravention of this section, the owner or master of the ship shall for each offence be liable to a fine not exceeding £100 and to such additional fine, not exceeding the amount hereinafter specified, as the court thinks fit to impose having regard to the extent to which the earning capacity of the ship was, or would have been, increased by reason of the submersion.

"(3) The said additional fine shall not exceed £100 for every inch or fraction of an inch by which the appropriate load line on each side of the ship was submerged, or would have been submerged if the ship had been in salt water and had had no list."

* Section 44 is printed at letters H and I, *supra*.

The short facts are these: a Swedish vessel, the s.s. Indus, of which the appellant was the master, was loaded with a full cargo of iron ore at Helsingborg, and arrived at Cardiff on Sept. 19, 1960, after a voyage of five days. Pausing there, although this was a Swedish vessel, she did come by reason of another section (1) within s. 44, to which I have referred. On the arrival of the ship in Cardiff, however, the ship was found to be loaded so as to submerge the appropriate load line on each side of the ship in salt water to a depth of 2.85 inches. On that, the learned magistrate fined the master £100 for the offence, and the maximum additional fine that he could impose, £300, being £100 in respect of each inch or part of an inch by which the appropriate load line was submerged.

The point that is taken in this appeal is that the magistrate had no jurisdiction to impose an additional fine at all in the absence of any evidence as to the extent of any increase in the earning capacity of the ship. As I have said, the section provides that the court can impose such additional fine as it thinks fit to impose having regard to the extent to which the earning capacity of the ship was increased. On those words it is said—and this seems to be clearly right—that the mere fact that the magistrate is satisfied that the earning capacity was increased is insufficient because he has to have regard to the extent to which it was increased.

In the present case it was quite clear that this was a commercial venture, and almost certainly there was an increase in the earning capacity, but no evidence at all was tendered as to the extent of that increase. The learned magistrate in para. 7 of the Case says:

“I was of opinion that I had power to impose an additional fine, having regard to the fact that this was obviously a commercial venture and I saw no reason to suspect that the earning capacity of the ship had not been increased by the admitted overloading.”

In my judgment, the learned magistrate was fully entitled to come to the conclusion that it was a commercial venture and that the earning capacity of the ship had been increased, but that, as it seems to me, is not sufficient to enable him to impose an additional fine because he must in imposing the additional fine have regard to the extent of the increase, and he had no evidence whatsoever as to that extent. Accordingly, in my judgment this appeal succeeds to the extent that the additional fine of £300 must be quashed.

ASHWORTH, J.: I agree.

LAWTON, J.: I agree.

Appeal allowed: additional fine quashed.

Solicitors: *Holman, Fenwick & Willan*, agents for *Lean & Lean*, Cardiff (for the master, the appellant); *Treasury Solicitor* (for the prosecutor, the respondent).
[Reported by HENRY SUMMERFIELD, ESQ., Barrister-at-Law.]

(1) Section 57 of the Act applies the provisions of s. 44, with immaterial modifications, “. . . to load line ships not registered in the United Kingdom, while they are within any port in the United Kingdom . . .” Section 44 therefore applied to the s.s. Indus while she was in the port of Cardiff,

INLAND REVENUE COMMISSIONERS v. R. WOOLF & CO. (RUBBER), LTD.

[COURT OF APPEAL (Holroyd Pearce, Upjohn and Donovan, L.J.J.), May 8, 9, 10, 1961.]

Surtax—Undistributed income—“Member”—Debenture stockholders—Person with “interest” in the capital or profits or income—Income Tax Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 10), s. 245, s. 255 (1), (2), s. 256 (2).

A trading company which neither was an investment company for surtax purposes nor was in the control of five or fewer shareholders by virtue of their shareholdings or of five or fewer persons under the extended definition of control in s. 256 (2) (a) and (b) of the Income Tax Act, 1952, had on its inception issued £600,000 debenture stock. The Special Commissioners made a surtax direction on the company under s. 245 of the Income Tax Act, 1952, on the ground that five or fewer debenture stockholders controlled the company and were members within s. 255 (2).

Held: the surtax direction could not be made on the company, the debenture stockholders not being “members” of the company in respect of whom a surtax direction could be made because they did not have “a share or interest in the capital or profits or income of the company” within the definition in s. 255 (2), where the word “interest” connoted persons entitled to share in capital as distinct from assets, and having an “interest” which gave the possessor a right or expectation to share in the profits if distributed, even though via a liquidation, and not loan creditors (see particularly p. 655, letter I, and p. 657, letters B and E, post).

Per CURIAM: debenture stockholders whose payment of interest depended on profits earned by a company were not outside the definition of members in s. 255 (2)* of the Act of 1952 (see p. 656, letters B and G, and p. 657, letter F, post).

Decision of DANCKWERTS, J. ([1961] 1 All E.R. 134) reversed.

[As to members of a company to whom income can be apportioned on a surtax direction, see 20 HALSBURY'S LAWS (3rd Edn.) 558, para. 1085; and for cases on the subject, see 28 DIGEST (Repl.) 358, 359, 1580-1586.]

For the Income Tax Act, 1952, s. 245, s. 255 (1), (2), s. 256 (2), see 31 HALSBURY'S STATUTES (2nd Edn.) 232, 243, 244.]

Case referred to:

F.P.H. Finance Trust, Ltd. v. Inland Revenue Comrs. (No. 2), [1945] 1 All E.R. 492; [1946] A.C. 38; 114 L.J.K.B. 203; 172 L.T. 278; 28 Tax Cas. 209; 28 Digest (Repl.) 371, 1624.

Appeal.

The taxpayer company appealed to the Special Commissioners of Income Tax against directions made on it under s. 245 of the Income Tax Act, 1952, for each of the years ended Dec. 31, 1952, 1953 and 1954, respectively. The question for determination was whether the company was a company to which s. 245 applied, as being a company which was under the control of not more than five persons within the meaning of s. 256 (2) of the Act. The company was referred to by the commissioners as the “new” company to distinguish it from the “old” company which had previously had the same name.

The new company contended that : (i) the holders of first and second mortgage debenture stock† of the company were not persons having a share or interest in the capital or profits or income of the company and, accordingly, were not members of the company within s. 255 (2); and (ii) if the debenture stockholders were to be regarded as members of the company, more than half the actual income of the company could not be apportioned to not more than five

* The definition of “member” is printed at p. 653, letter E, post.

† The debenture stock was secured by a trust deed, see [1961] 1 All E.R. at p. 137.

persons (including the stockholders) under the provisions of s. 248 of the Act and, accordingly, the company should not be deemed to be under the control of not more than five persons within the meaning of s. 256 (2); and in any event the company was not one to which s. 245 applied and the directions appealed against should be discharged. A

The Crown contended that: (i) the new company was a family company the debenture stockholders in which had an interest in the capital of the company and were therefore members of the company within the meaning of s. 255 (2); and (ii) the debenture stockholders had interests in the capital and in the income of the company sufficient to warrant the apportionment to them of substantially the whole of the actual income of the company, and the company should be deemed to be under the control of not more than five persons within the meaning of s. 256 (2); and that in any event the company was one to which s. 245 applied. B C

The commissioners held on the first point that the debenture stockholders had no share or interest in the capital or profits or income of the company and were not members of it. On the second point, they found that more than half the income of the company could be apportioned among not more than five persons only if a substantial portion of the company's income could be apportioned to the debenture stockholders, and they held that the debenture stockholders had no real interest in the company's income since it was the ordinary shareholders who were entitled to dividends declared out of the income and therefore the company was not deemed to be under the control of not more than five persons on the ground that more than half the income could be apportioned among not more than five persons under s. 256 (2) (c). The Crown appealed by way of Case Stated to the High Court. On Nov. 9, 1960, reported [1961] 1 All E.R. 134, DANCKWERTS, J., allowed the Crown's appeal, holding that the debenture stockholders had a share or interest in the capital or profits or income of the company, and that more than half the income could therefore be apportioned to not more than five persons by virtue of s. 256 (1). The taxpayer company appealed to the Court of Appeal. D E

Heyworth Talbot, Q.C., J. G. Strangman, Q.C., D. C. Miller, Q.C., and J. M. Price for the taxpayer company. F

F. N. Bucher, Q.C., E. Blanshard Stamp and A. S. Orr for the Crown.

DONOVAN, L.J., gave the first judgment at the request of HOLROYD PEARCE, L.J.: The taxpayer company, which is a trading company and not an investment company, possesses a constitution which was clearly arranged so as to take the company outside the reach of those provisions in the Income Tax Act, 1952, which impose surtax, subject to certain conditions, on the undistributed profits of companies. Thus no five or fewer shareholders together control the company by their shareholding; nor is such control in the hands of five or fewer persons according to the extended definition of control which is contained in s. 256 (2) (a) and (b) of the Act of 1952. G H

At its inception, however, the taxpayer company issued debentures for a total of £600,000 to a number of individuals for a consideration not alleged to be otherwise than full and bona fide. How this came about is set out in the Case Stated and in the judgment under appeal and need not be repeated. If the taxpayer company is right in its contention that it is not amenable to the surtax provisions that I have quoted, it follows that it could use its income in redeeming its debentures rather than in paying dividends without laying itself open to a surtax direction under s. 245 of the Act of 1952. In fact, to some extent that is what has been done. I

However, the Crown contends that five or fewer persons still control the taxpayer company and that a direction under s. 245 can therefore still be made on it if it fails to distribute reasonable dividends from its profits as, according to the Crown, it has failed to do for the three years under consideration. The

contention concerning control is based on s. 256 (2) (c) of the Act of 1952, which perhaps I should quote:

“(1) Section 245 of this Act shall apply to any company which is under the control of not more than five persons and which is not a subsidiary company or a company in which the public are substantially interested.

“(2) For the purposes of this section, a company shall be deemed to be under the control of not more than five persons . . . (c) if—(i) on the assumption that the company is a company to which the said s. 245 applies . . . more than half the income of the company . . . could be apportioned for those purposes among not more than five persons.”

I have not read the whole of sub-para. (c); I have omitted certain parts which do not apply in this case. Applying the provisions which I have just read, it is said by the Crown that five or fewer debenture-holders could have apportioned to them, on the statutory assumption, more than one-half of the income of the taxpayer company and therefore “control” the company for present purposes. It is not alleged that five or fewer persons control the company in any other way.

The taxpayer company’s reply is that in the case of a trading company such as this a debenture-holder is not a member and that s. 245 therefore has no application. This accordingly is the first issue in the case. If the taxpayer company is wrong about it, a secondary contention is raised on its behalf, viz., that more than one-half the income cannot be apportioned to five or fewer debenture-holders, and on that ground, therefore, the company escapes the section.

Dealing, however, with the first point, all depends on the true interpretation of the definition of “member”, to be found in s. 255 (2) of the Act of 1952. It reads thus:

“In this Chapter, ‘member’, in relation to any company, shall include any person having a share or interest in the capital or profits or income of the company.”

These debenture-holders, says the Crown, have a fixed charge on the taxpayer company’s freehold property (which is right), and a floating charge on its general assets (which is also right), and each such charge constitutes an interest in the capital or profits or income of the company within the meaning of the definition of “member” which I have just read.

The taxpayer company’s answer is that this contention is unsound and that a debenture-holder may have an interest in the assets of the company but not an interest in the capital or profits or income as such. These words, it is said, connote such an interest as could be expected to fructify in a dividend, not an interest which is simply that of a creditor.

The surtax code, if I may call it that, in relation to companies is now to be found in the self-contained Chapter, Ch. III of Part 9 of the Income Tax Act, 1952; but it grew up over the years from 1922, being amended and strengthened as the taxpayer discovered loopholes and the Crown, after an interval, stopped them up, or tried to. The Act of 1952 has brought all these provisions together but, being a consolidating Act, did not purport to alter them. The definition of “member” has remained unchanged since 1922, and, if the Crown is right in its contention today, it has admittedly been right ever since 1922.

In 1936 the legislature specifically introduced loan creditors into the circle of members of a company for surtax purposes, but confined this operation to investment companies as distinct from trading companies. Moreover, in the relevant enactment, being s. 20 (4) of the Finance Act, 1936, the legislature described what it was doing as an extension of the original definition of member. It is therefore important, as counsel for the Crown says, to look at the original legislation to see how matters developed.

The original definition of "member", which so far as concerns trading companies has not been altered, is contained in s. 21 (7) of the Finance Act, 1922, and reads:

"In this section the expression 'member' shall include any person having a share or interest in the capital or profits or income of a company..."

This definition was, and still is, wide enough to include, not merely members on the registers of companies, but members who were simply nominees of others and members who were trustees for others also; and, since surtax is concerned with the beneficial ownership of income some provision was necessary to enable the Special Commissioners to find out who they were, and one finds such power given in s. 21 (8) of the Act of 1922, combined with the provisions of Sch. 1. These read as follows. Section 21 (8):

"The provisions contained in Sch. 1 to this Act shall have effect as to the computation of the actual income from all sources of the company, the apportionment thereof amongst members of the company, and otherwise for the purpose of carrying into effect, and in connexion with, this section."

Paragraph 11 of Sch. 1 to the Act provides:

"Any person in whose name any shares of a company are registered shall, if required by notice in writing by the Special Commissioners, state whether or not he is the beneficial owner of those shares, and if not the beneficial owner of those shares or any of them shall furnish the name and address of the person or persons on whose behalf the shares are registered in his name."

If, as the Crown asserts, the definition of "member" included from the first a loan creditor with a fixed charge, it is, to say the least of it, odd that a similar power was not given to the Special Commissioners to discover the beneficial owner of debentures held by a nominee or a trustee. Counsel for the Crown give answers to this point which, if I may say so, do not wholly blunt it, but I will not take up time by elaborating the matter, since to do so might give the impression that I regard the point as crucial, which of course it is not, although it does, I think, possess at least some significance, particularly when one finds that even today machinery is still lacking, in the case of trading companies, to discover the beneficial ownership of debentures held by a nominee, although such machinery has been supplied in the case of debentures held in an investment company.

Moving on, however, to 1936, one finds the legislature clearly minded to put a stop to surtax evasion by those who formed investment companies, transferred their assets to them in return for debentures, and thereafter enjoyed the company's income, surtax-free, in the shape of capital, namely, moneys which had come to them through the debenture redemptions by the investment company. Section 20 (4) of the Finance Act, 1936, provided:

"Where an investment company is deemed by virtue of the last foregoing subsection to be under the control of not more than five persons by reason that any five or fewer persons would, if the company were wound up, be entitled as loan creditors to receive more than one-half of the assets therein referred to (whether or not it would otherwise be deemed to be under such control)—(a) the definition of the expression 'member' shall, for the purposes of the said s. 21 and any provisions of this or any other Act relating thereto, be extended so as to include any loan creditor of the company."

Paragraph (b) of that subsection provides:

"for the purpose of para. 8 of Sch. 1 to the Finance Act, 1922, a loan creditor shall be deemed to have an interest in any income of the company to be apportioned under that paragraph to the extent that that income, or assets representing it, has or have been expended or applied or is or are

available to be expended or applied in redemption or repayment or discharge of the loan capital or debt . . . in respect of which he is a loan creditor."

Subsection (5) of s. 20 enacted as follows:

"In relation to an investment company para. 11 of Sch. 1 to the Finance Act, 1922, shall have effect as if references to shares included references to loan capital."

If words mean anything this shows, in my view, that the legislature at any rate understood, by its previous definition of "member" in the Act of 1922, that loan creditors were excluded, for the definition now is being extended to include them. The Crown's reply to this argument is that the extension is simply to bring in unsecured creditors, creditors with a fixed charge on assets being already included. For this contention I could find in the language of s. 20 (4) of the Act of 1936 no warrant whatever, and the absurdities to which the contention would lead, I think, destroy it. Thus a banker giving an overdraft to a company within s. 21 (1) of the Finance Act, 1922 (now s. 245 of the Act of 1952) and taking a charge as security, thereby becomes a "member", and, if he is a private individual or a partner in a partnership or if his bank is a private company, runs the risk of having to pay surtax on the borrowing company's undistributed profits. Yet it will be seen that in the case of investment companies, who were the special target of the legislature in this field, bankers have been carefully excluded from the definition of loan creditor: see the proviso to s. 20 (7) of the Act of 1936, now reproduced as s. 258 (4) of the Act of 1952. Yet according to the Crown they are left vulnerable in the case of the bona fide trading company.

The Crown's interpretation of the statutory definition of "member" is also admittedly wide enough to cover the judgment creditor, the vendor with a lien for unpaid purchase money, and even the employees of the company, for they, too, have an "interest" in the capital or income or profits of the company if "interest" is to be as widely construed as the Crown asks. In this particular instance it is noteworthy that from the outset the legislature deliberately excluded employees who were also shareholders when computing the number of shareholders in one of these companies, unless they were also directors: see s. 21 (6) and (7) of the Finance Act, 1922. But what is the sense of the distinction if the shareholding and non-shareholding employees alike have an "interest" which makes them both members?

These considerations, and others like them, lead me to the conclusion that, when in 1936 the legislature spoke of "extending" the definition of members to include loan creditors of investment companies, it was using language of legal accuracy.

The word "capital", where it occurs as part of the definition of "member", may mean issued share capital or the net capital, being the difference between assets and liabilities, or it may mean both. A creditor, even with a fixed charge, does not seem to me to have an interest, for present purposes, in capital so understood. He has, of course, an interest in the assets whether his charge be fixed or floating, but the word "assets" is a word which is absent from the definition.

I also agree with the taxpayer company's contention that he has not an interest in the profits or the income where he has no right to a share in the profits or income as such. It has to be remembered that what the legislature set out to do in 1922 was to obtain surtax which was being currently avoided by those who were entitled to share in a company's profits if they were distributed. It is in this context, and against this background, that, in my view, the word "interest" must be construed; and so construed I think it connotes an interest which gives the possessor of it a right or expectation to share in the company's profits, even though they may come to him via a liquidation.

That, I think, with respect, is what LORD RUSSELL OF KILLOWEN was saying

in *F.P.H. Finance Trust, Ltd. v. Inland Revenue Comrs. (No. 2)* (1). The learned judge below thought that he was constrained by LORD RUSSELL's remarks (1) to decide this case in favour of the Crown. With respect, I do not share that view. I think that all relevant considerations lead to the conclusion that a loan creditor has not been made a member of a trading company for the purpose of these special surtax provisions, and taking that view I would allow the appeal. In the circumstances I find it unnecessary to deal with the taxpayer company's secondary contention. It only remains to say that this decision will not govern a case, in my opinion, where a debenture-holder is entitled under his debenture to receive a share of profits as such.

UPJOHN, L.J.: I agree with the judgment which has been delivered. Section 245 of the Income Tax Act, 1952, refers to a distribution of the income of a company among the members. "Members" are defined in s. 26 of the Companies Act, 1948, as persons on the register of members of the company. It is essential to remember this when interpreting s. 255 (2) of the Income Tax Act, 1952, which provides that

"... 'member' . . . shall include any person having a share or interest in the capital or profits or income of the company."

A member has no share or interest in the assets of the company, for it is a fundamental concept of company law that the company is the beneficial owner of its assets. The share or interest of a member in the capital of a company has no precise legal signification. In the context it may refer to the share or interest of the member in the issued share capital, or it may refer to his ultimate right to receive a dividend in the liquidation after all creditors have been discharged.

The share or interest of a member in profits or income does not mean the share or interest in the daily income or profits earned by the company. Those daily profits belong to the company and swell its own coffers. The expression "profits or income" in this context means the profits or income of the company when ascertained by its accounts over a trading period and available for dividend. Even then the shareholder has no right to those profits or income unless actually declared by way of dividend in accordance with the articles of association. I see nothing in s. 255 (2) which in my judgment entitles the court to give any other meaning to the words "capital or profits or income" than that which I have just discussed.

In my judgment, the subsection was introduced to bring into the ambit of the section those who are not members as they are not on the register, yet have a share or interest in the capital or profits or income, and in particular, having regard to the purpose of s. 245, trading profits or income that had not been distributed by way of dividend. To give one or two examples, persons having an option over shares would be included, beneficiaries under trusts, and even creditors with payment of interest depending on profits earned by the company: see some examples in the forms of debentures Nos. 67 to 71 in PALMER'S COMPANY PRECEDENTS (16th Edn.), the "Debenture" volume. In the last-mentioned case the debenture-holder is caught, not because he is secured but because payment of his interest depends directly on the profits earned by the company and so he has an interest in those profits. But the rights and interests of secured debenture-holders are in marked contrast to the rights and interests of members that I have been describing. The secured debenture-holders in this case have an interest in all the assets and the whole undertaking of the company. When the security becomes enforceable, they can step in and claim those assets and run the undertaking for their own benefit; but they have no right to, or interest in, the profits or income being the trading profits out of which a dividend may be declared. They have an interest in the assets which have made possible the earning of those profits, and in the assets out of which a dividend may

(1) [1945] 1 All E.R. at p. 496; 28 Tax Cas at p. 245.

be actually paid, but they are not entitled to, or interested in, those trading profits which are the trading results and ascertainable only on accountancy principles from the company's accounts. Their interest is essentially in the physical assets of the company. Further, the debenture-holder has no interest in the capital of the company. If "capital" refers to the share capital, that is obviously so. If it refers to the surplus in a winding-up, the debenture-holder will have been paid off before the surplus can be ascertained.

I should decline to read s. 255 (2) so as to include within its terms a secured debenture-holder whose rights and interests are in such complete contrast to those of members unless compelled to do so by very clear words. Those clear words are only found in s. 258 dealing with investment companies and have no application here. Accordingly I would allow the appeal.

HOLROYD PEARCE, L.J.: I agree with what my Lords have said. The relevant sections are expressly aimed at seeing that members do not avoid surtax by a company withholding income from distribution. The word "member", by virtue of s. 255 (2) of the Income Tax Act, 1952, includes

"any person having a share or interest in the capital or profits or income of the company."

In one sense every creditor and employee has such an interest, since, if the company fails, he will lose his money or his employment. But that is clearly not the sense intended. The Act cannot be intending to include creditors in general, since s. 258 (3) (a) expressly "extends" the word "member" to include loan creditors in the case of investment companies.

Debenture-holders are not members in the normal sense of the word. In one sense they are the antithesis of members. Nor, in my judgment, are they intended to come within the class of persons who have a share or interest in the capital or profits or income. From the point of view of the general scheme there is no reason for their inclusion. The class aimed at is the class who benefit by the withholding of income from distribution, in that ultimately they enjoy the funds thus accumulated. Debenture-holders are not in that class, since they do not share in the accumulations of profits or income. If, by the special terms of the debenture, they did so, they would do so not as debenture-holders simpliciter but as debenture-holders who have a special share or interest in the profits or income, and in such a case they would probably come within the reasoning of *F.P.H. Finance Trust, Ltd. v. Inland Revenue Comrs.* (No. 2) (2).

Had it been intended that debenture-holders simpliciter should be regarded as having a share or interest in the capital or profits or income, it would have been easy to have said so. The failure to include them, so far as trading companies are concerned, in the machinery of s. 250 (4) is some confirmation of the view that it was not so intended. In my judgment, for the purposes of these sections, especially in the light of the object described in s. 245, an interest means such an interest as may be expected indirectly to yield income benefits. So read the scheme of the sections is sensible and efficient. Construed as the Crown suggests, it is unnecessarily wide and artificial and may lead to unfair and absurd results. The appeal will be allowed.

Appeal allowed. Leave to appeal to the House of Lords refused.

Solicitors: *Allen & Overy* (for the taxpayer company); *Solicitor of Inland Revenue.*

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

PIZEY v. PIZEY AND ANOTHER.

[COURT OF APPEAL (Ormerod, Willmer and Danckwerts, L.J.J.), May 10, 11, 1961.]

Divorce—Desertion—Termination—Condonation of adultery—Desertion by wife founded on her confession of adultery—Subsequent visits by husband—Acts of sexual intercourse—Course of conduct sufficiently continued to end state of desertion and render separation consensual—No subsequent desertion by wife.

In 1954 in the course of an argument with her husband, with whom her life had not been particularly happy, a wife confessed spontaneously that she had committed adultery with his brother about nine years previously. She thereupon made arrangements to leave the matrimonial home in London and took the children to live with her mother in Somerset. The husband made no secret of the fact that he did not object to her going, but he subsequently corresponded with her in letters which became increasingly friendly, and he paid constant visits to her in Somerset, particularly at week-ends and once (in October, 1955) for five days, and slept with her and had sexual intercourse with her on several occasions. These visits continued over a period of about two years. He stated also, but his wife denied, that he wrote to her (apparently in 1956) inquiring whether she would be prepared to come and live in Battersea, sharing a house with their married son, and that she refused. In 1959 the husband petitioned for divorce on the grounds of the wife's adultery and desertion, but at the hearing it was admitted that the adultery had been condoned.

Held: the husband was not entitled to a decree of divorce on the ground of desertion because—

(i) although the wife's departure from the matrimonial home was, in view of its being the consequence of her confession of adultery, an act of desertion, and the fact that the husband was willing to see her go did not make the separation consensual (*Baker v. Baker*, [1953] 2 All E.R. 1199, followed), yet the wife's state of desertion was terminated (at the latest in October, 1955) for two reasons—(a) since the adultery from which the desertion arose was condoned by the sexual intercourse between the parties on the husband's subsequent visits, the state of desertion ceased to continue as its cause had been removed, and (b) since the visits, accompanied by resumption of intercourse, continued over so long a period, they amounted to a course of conduct which showed that the separation had become consensual.

Perry v. Perry ([1952] 1 All E.R. 1076) distinguished.

(ii) on the facts desertion had not been proved to have arisen again, for the husband had not established that he had put forward to the wife any tangible practical offer to provide a home in London, the refusal of which would give rise to desertion on the part of the wife.

Appeal dismissed.

[Editorial Note. The decision summarised in holding (i) (a) above, concerning the ending of desertion, may be considered, as regards condonation and desertion, with the observations of LORD MERRIMAN, P., in *W. v. W.* (No. 2), ante at p. 629, concerning condonation and desertion based on conduct amounting to cruelty.

As to consent to separation as a defence to an allegation of desertion, see 12 HALSBURY'S LAWS (3rd Edn.) 251-253, paras. 466-471; and for cases on the subject, see 27 DIGEST (Repl.) 343, 344, 2840-2859.

As to condonation and desertion, see 12 HALSBURY'S LAWS (3rd Edn.) 305, para. 607.

As to the termination of desertion, see 12 HALSBURY'S LAWS (3rd Edn.) 263, 264, paras. 500-502.]

Cases referred to:

Baker v. Baker, [1953] 2 All E.R. 1199; [1954] P. 33; 117 J.P. 556; [1953] 3 W.L.R. 857; 3rd Digest Supp.

Perry v. Perry, [1952] 1 All E.R. 1076; [1952] P. 203; 116 J.P. 258; 3rd Digest Supp.

Appeal.

The husband appealed against an order of STEVENSON, J., made on Nov. 14, 1960, dismissing his petition for divorce on the grounds of adultery and desertion. The ground of appeal was that the decision that the wife had not deserted the husband and that her condoned adultery had not been revived was wrong in law and against the weight of the evidence.

K. B. Campbell for the husband.

N. R. Blaker for the wife.

H. S. Law for the co-respondent.

WILLMER, L.J., delivered the first judgment at the request of ORMEROD, L.J.: This is an appeal against a judgment of STEVENSON, J., given on Nov. 14, 1960, whereby he dismissed a husband's petition for divorce founded on allegations of adultery and desertion. There was no cross-prayer for relief by the wife. The learned judge found the charge of adultery proved against the wife, and indeed she did not in the course of her evidence deny the charge that had been made. So far as the co-respondent was concerned, although the learned judge found adultery proved against the wife, he found that it was not proved against the co-respondent. He therefore dismissed the co-respondent from the suit; and, although we have had the pleasure of seeing counsel for the co-respondent here today, there has in fact been no appeal so far as the co-respondent is concerned.

The charge of desertion was dismissed by the learned judge, who found that the original separation between the parties, which took place in the summer of 1954, was a consensual separation and that it continued so throughout. He further found—and, indeed, there has been no controversy about this—that the adultery proved against the wife was subsequently condoned by acts of sexual intercourse which took place between the parties. On the learned judge's findings, nothing subsequently occurred to revive it, and accordingly this charge also failed. I should add that, by an amendment, leave for which was granted at the trial, the husband asked for the discretion of the court to be exercised in his favour, he having admitted that he himself had committed adultery at a date subsequent to the filing of the petition. The learned judge never had occasion to deal with that matter, because, as I have said, in the event he dismissed the petition on the grounds which I have stated.

The marriage took place in 1932, and there were four children, two of whom at any rate are now grown-up. On the findings of the learned judge, it was never a particularly happy marriage. There were intermittent quarrels between the parties, and there is some evidence that at one time the husband actually left the wife for a period of about three months. The parties continued living together until the war, when the wife was evacuated to Somerset, which was her own home county and where her own mother lived. Cohabitation between the parties was resumed shortly after the war.

Some time in August, 1954, husband and wife were having an argument, in the course of which the wife suddenly and quite spontaneously confessed that she had committed adultery with a brother of the husband on an occasion quite shortly after the end of the war, and a good many years previously—some time about the end of 1945 or thereabouts. It happened that at the time when the wife made this confession, the co-respondent (the husband's brother) was staying in the house. So the husband immediately took the opportunity of taxing the co-respondent with what his wife had told him. He said that the co-respondent

admitted that he had committed adultery with the wife. The co-respondent, however, denied that he ever made any such admission, and he has further denied that he ever committed adultery with the wife. It was in those circumstances, there being no other evidence of adultery apart from the wife's confession, that the learned judge found that adultery was not proved against the co-respondent. As against the wife, however, he accepted the husband's evidence that she had made this confession of adultery, giving due and proper weight to the fact that the wife had not elected to give evidence denying the charge. Following her confession of adultery, the wife said that she could not stay any longer with the husband, and proceeded to make arrangements to go away to Somerset to live with her mother, taking the children with her. In fact, she left about a fortnight later. It is, I think, common ground that during that fortnight, although the spouses continued to live under the same roof, they were living very much at arm's length. The husband made no secret of the fact that he did not object to the wife's going. In fact, he seems to have been glad that she went. He said in evidence: "Well, I was rather glad at the time because things had been strained for a long, long time, and maybe that was a welcome opening for me". So the wife went off to Somerset and the husband continued living in London.

Thereafter, the parties corresponded fairly regularly. A good many letters have been preserved and put before the court. Some of the earlier letters on either side appear to be rather bitter letters, but later on they became much more friendly. There is no doubt that, beginning some time in 1955, the husband made a number of visits to Somerset, when he went down to stay with the wife and the children for week-ends. In this improved state of the relations between the parties, there was some suggestion, at some time during 1955, that the husband might get a house in Ipswich for the wife and children to live in, Ipswich being chosen on the ground that that was where the married daughter of the parties lived. It should be made clear, however, that it was not contemplated that the husband should himself go and live with the wife and children at Ipswich; for his work kept him in London. The attraction of Ipswich, as I understand it, was that it was rather nearer than Somerset, and the husband would have been able to be a fairly frequent visitor to see his wife and family. Nothing came of this, however, and the project for setting up a house in Ipswich fell through. The week-end visits to Somerset continued, however, and at some time it is admitted that the parties slept together and had sexual intercourse. There was an issue between the parties as to how often that occurred. The husband said only twice, but the wife said on a number of occasions. In the summer of 1955 the wife was in a poor state of mental health. In fact, it appears that she had been showing signs of mental instability before the parting actually took place. The result was that in September, 1955, she was admitted to a mental hospital in Somerset, where she was a patient for about ten days. Correspondence between the parties which took place while she was actually in the mental hospital has been preserved; and the upshot of it was that immediately she came out of hospital, in the early days of October, 1955, the husband paid her a more prolonged visit, in the course of which he stayed for about five days. It is both sides' case that during this particular visit sexual intercourse between the parties undoubtedly took place.

The next event in time, so far as one can follow the time sequence from the evidence, was that early in 1956 the wife obtained an offer of a house at Highbridge, in Somerset, from the local housing authority. The husband got to hear of that, and wrote a letter to the housing officer, a copy of which appears at p. 37 of the bundle of correspondence. It seems to me to be rather an important letter, in that it throws some light on the husband's then state of mind. The letter is dated Jan. 18, 1956, and reads as follows:

"Dear sir, I understand my wife has applied for a house in Highbridge. In fairness to you, I feel you should be fully conversant with my wife's

position. Firstly, I believe she is being ill advised by someone against her better judgment. Secondly, there is a great possibility of divorce proceedings against my wife in the future, in which case I would be fully justified in claiming my furniture and custody of my two children. Incidentally, I have already made plans to house my family up here in London. I understand your desire to help and I do appreciate it very much."

Then there is a postscript about responsibility for the wife's actions and debts, which is not very material. So far as the evidence goes, at that date—January, 1956—there were in fact no plans for housing the family in London; nor at that date, so far as the evidence goes, were any divorce proceedings in prospect, although the reference to that possibility by the husband throws a certain amount of light on his then state of mind.

Some time about this period or shortly afterwards—i.e., some time in 1956, although no actual date has been specified—the husband says that he wrote to his wife inquiring whether she would be prepared to come and live in Battersea. Battersea was selected because the eldest son of the marriage, who lived in London, was about to get married; he desired to live in London, and I gather from the husband's evidence that what was in contemplation was the possibility that he and his wife might resume cohabitation in London, sharing a house with the eldest son. The husband says that the wife replied to his letter, saying that she certainly was not going to come back to London, adding something about "all that smog and fog". The wife in her evidence denied that she ever received any letter inviting her to live with the husband in Battersea, but she said that if she had received such a letter she would have agreed to go, although she admitted that she disliked London and that she would have preferred not to go. The letter which the husband says that he wrote has not been preserved, nor has the reply which he says that he received from the wife.

The learned judge, if I may respectfully say so, left the issue with regard to this exchange of letters rather vague. What he said was:

"There may well have been an inquiry: 'Do you want to live in London; would you be willing to live in Battersea?' and a firm answer by the wife: 'No, I do not like London'."

There is no specific finding by the learned judge whether there was a letter in the terms which the husband says he wrote.

The husband said in evidence that after he had made this Battersea offer, which was refused by the wife, he more or less washed his hands of her, and that he did not visit her any more. On the other hand, the wife says that he continued his visits, and that these went on well into 1957; and she further says that acts of sexual intercourse continued on the occasions of these further visits. The husband's evidence was that there were only about two occasions on which acts of sexual intercourse took place, and that his visits stopped early in 1956. On this issue the learned judge found in favour of the wife, although there is no specific finding as to the date when the husband's visits finished. That is really the end of the story. After the husband ceased visiting there was no further communication between the parties, and in due course this petition was filed on Mar. 6, 1959.

On those facts, the question is whether the husband is entitled to the relief which he seeks. It is conceded that the adultery found to have been committed by the wife was condoned, so that that cannot be relied on as a ground for relief unless it can be shown that it was revived by subsequent conduct. Mr. Campbell, who has argued the case for the husband with great force, submits that he is entitled to relief on the ground of desertion. His case is that the original separation was induced by what amounted to an act of desertion on the part of the wife, and that nothing has since happened to alter the character of the separation. If that be right, not only can he succeed on the ground of desertion (the separation having lasted for more than three years preceding the presentation of the petition),

but the effect of that desertion would also be sufficient to revive the condoned adultery after the last act of sexual intercourse had taken place. A

The learned judge came to the conclusion that the original separation was a consensual separation. He further found that throughout the period from 1954 to the filing of the petition the husband never withdrew his consent to the wife remaining separate and apart from him. In the view of the learned judge, such efforts as the husband did make by way of suggesting that the parties should live together again were insufficient to reveal any true change of heart on his part. In those circumstances, no desertion having been proved, and the adultery having been condoned, there was no ground on which he could grant relief. B

Counsel for the husband has argued that the learned judge was wrong in coming to the conclusion that the original separation was consensual. His contention is that the wife's confession of adultery, which she made in August, 1954, was a thing which made further married life impossible. Even if it were not true, such a confession would amount to an act of desertion; and, as counsel says, a fortiori it would do so if it were true, as the learned judge found that it was. When counsel first developed that argument, I was inclined to be sceptical about it; but he has convinced me that it is well founded, resting (as it does) on the principle stated by the Divisional Court in *Baker v. Baker* (1). If that be right, I would agree with counsel's submission that the mere fact that the husband was glad to see the wife go would make no difference to the quality of her act in leaving him. In those circumstances, I am prepared to approach this case on the basis for which counsel contends, viz., that the wife's departure from the matrimonial home in August, 1954, in all the circumstances did amount to an act of desertion. D E

The next question which arises, therefore, is this: What is the legal effect of the husband's admitted visits to Somerset, accompanied as they were by acts of sexual intercourse? In dealing with that question, I think that we must bear in mind the learned judge's finding that those visits and the acts of intercourse were a good deal more frequent than the husband was prepared to admit in evidence. Clearly, the sexual intercourse between the parties had the immediate effect of condoning the wife's previous adultery. There is no dispute about that. But the question arises whether those acts of sexual intercourse had the further effect of bringing to an end the period of desertion which had started when the wife left. In that connexion, we were referred to *Perry v. Perry* (2) a decision of this court. There is no doubt that that case did establish once and for all that, where a period of desertion is once running, the mere fact that casual acts of sexual intercourse between the parties take place in the course of attempts at reconciliation is not enough to break the currency of the desertion. The case also established that, in relation to the offence of desertion, no question of condonation arises; the question is not whether the offence is condoned, but whether the desertion continues to run or not. F G H

Perry v. Perry (2), of course, is a decision which is binding on us, and I do not wish to say anything which can possibly be thought to be in conflict with that decision. But I do not think that it covers the facts of this case. I say that for two reasons. The first reason is this: the wife's desertion in this case arose out of rather peculiar circumstances. It depended on the circumstance that the wife's confession of adultery, whether it were true or false, was such as to make further married life between these spouses virtually impossible. That is to say, the desertion depended entirely on the wife's confession of adultery. It seems to me that it would be a very odd result if desertion which depended entirely on the confession of adultery should be held to continue after the adultery which was the cause of it had already been condoned. I confess that I do not see any answer to that difficulty. In the special circumstances of this case, it I

(1) [1953] 2 All E.R. 1199; [1954] P. 33.

(2) [1952] 1 All E.R. 1076; [1952] P. 203.

seems to me that the acts of sexual intercourse whereby the adultery was condoned must be regarded as having at one and the same time removed the cause on which the desertion depended.

My second reason for saying that this case is not within the principle of *Perry v. Perry* (3) is this: On the evidence which was accepted by the learned judge, we have here something much more than mere casual acts of sexual intercourse. There was a regular course of conduct, extending over a period of about two years, during which the husband was constantly going down for week-ends and for even longer periods, as and when he could, to stay with the wife. Obviously a question of degree must be involved in deciding whether parties who come together and have sexual intercourse are thereby resuming cohabitation. But on the facts of this case, bearing in mind the course of conduct which was pursued over such a lengthy period, I find it impossible to say that, on the principle of *Perry v. Perry* (3) the desertion none the less continued to run.

In those circumstances, as it seems to me, the effect of what took place was that not only was the adultery condoned, but the desertion which had started when the wife left the husband in 1954 was brought to an end. The evidence, I think, is rather too vague to put any precise date on the time when the desertion came to an end; but, in my judgment, it could hardly be later than the occasion when the husband paid his visit of five days in October, 1955. The situation then was that, subject to these periodical visits, these two parties were living separate and apart, one in London and the other in Somerset, in circumstances in which it was no longer possible to say that one was a deserter. That is how the situation remained from that time onwards until the petition was filed. The separation during that period of nearly four years must be regarded as a consensual separation, unless it can be shown that there was supervening desertion on the part of the wife. Nobody has suggested that there was any supervening desertion on the part of the husband.

The learned judge, dealing with this aspect of the case, said:

"There is also this series of visits by the husband to the wife, there is sexual intercourse involving condonation of the wife's adultery, and, I think, indeed I find, that the wife is right in saying that intercourse occurred much more frequently and extensively than the husband said it did. I was impressed by her evidence on that matter. From all those circumstances I draw the inference that the husband accepted and agreed to the mode of life which these parties in fact adopted."

I stop reading there, because the learned judge goes on to deal with the initial separation in August, 1954, as to which, for the reasons which I have already given, I do not find myself in agreement with what he said. But up to there I can only say that I find myself in full agreement with the inference which the learned judge drew as to what the situation was as the result of the husband's visits to Somerset and the resumption of sexual intercourse. There is no evidence that in the course of the husband's visits to Somerset, after the degree of reconciliation evidenced by the sexual intercourse had been achieved, he ever made any practical suggestions to the wife for a resumption of full cohabitation. In those circumstances, as it seems to me and as I understood counsel for the husband this morning to agree, the case for supervening desertion on the part of the wife must stand or fall according as the facts are found in relation to the husband's alleged written offer of a house in Battersea. We share with the learned judge the difficulty that we do not know the date when the offer is supposed to have been made. It is said to have been some time during 1956; but neither of the relevant letters (neither the letter from the husband nor the letter from the wife) has been preserved. Further, the parties were in conflict in their evidence whether there ever was such an exchange of letters. The learned judge, as I have already pointed out, made no precise finding on this

issue; but I do not shut my eyes to the fact that in general he was disposed to prefer the evidence of the wife, limited though it was by the fact of the mental trouble that she had been through. A

We have had read to us the material part of the husband's evidence, and I think it only right that I should refer to it now. He was asked:

"Now, your son Robert was up in London, was not he? A.—All the time.

"Q.—Were you in touch with him? A.—Yes, I made a point of going to his place every Wednesday. Q.—He is married now, is he? A.—Yes. Q.—

When did he get married? A.—I should say roughly 3½ years ago.

Q.—Since your wife went down to Somerset? A.—Yes, definitely. Q.—

Where did he live until he got married? A.—He had to go to lodgings.

Q.—In lodgings. Well now, was there ever any arrangement suggested

about where he and you should live? A.—I do not know if I have got the

question right, but there was a time when we got together to get in a house

together in Battersea, and having the two families together it would be

better still. Q.—What? A.—The two families together, his family and

my family. Q.—First of all, do you know when that time was? A.—That

was in somewhere round about 1955-56. Q.—Did your wife know anything

about this? A.—I wrote to her about it, obviously, I could not go ahead

unless I knew what she was going to do, but she wrote back and said

definitely she is not going to come back to London, all that smog and fog."

Then, after an interjection by the learned judge, counsel for the husband went on:

"Q.—Have you got the letter that she wrote to you? A.—No, I had no reason to keep any letters."

The learned judge asked:

"Is this right, that after she said she was not coming back to that fog and smog, you continued to make weekly payments to her? Is that right?

A.—Good gracious, my Lord, I had no reason to stop that."

Then counsel for the husband asked:

"Q.—In recent years, I mean in the last two or three, have you had any more suggestions made about living together? A.—No. That was the last, that was the last; I washed my hands then, that was complete, there was no chance of her coming up to London; so what else could I do?"

He was cross-examined about that, and re-examined, and further questioned by the judge on that point; but I need not burden this judgment by citing further extracts from his evidence, because I do not think that what he said in cross-examination or re-examination really added to what he had said in his examination-in-chief.

Evidence was given by the son Robert; but, for good reason or bad, he did not deal in his evidence with this suggestion of setting up a joint house in Battersea, so that no corroboration for the husband's story is to be found from that source.

It seems to me that, once it is established that as a result of these visits by the husband to Somerset the separation became consensual, it remains a consensual separation until the husband does something practical to bring that consensual separation to an end; i.e., to show that he is withdrawing his consent, so as to put the wife in desertion. The burden is on the husband to satisfy the court that something happened to convert the wife into a deserting party. In the circumstances of this case, the parties being already separated, that means in practice that the husband must prove that he made some real, practical offer to provide a home, and that such offer was met by an unqualified and final refusal by the wife. I am not to be understood as meaning that the husband must go so far as actually to obtain a house, whether by purchase or on lease.

That, I think, would be quite unreasonable. But, as it seems to me, he must at least produce some tangible and practical proposition which the wife can fairly consider. Merely to express a general desire, or put forward the general suggestion, that the parties should live together in Battersea, without making any tangible or practical proposition as to how that is to be done, would not, I think, be enough. That seems to be the view which the learned judge took; and it is not to be forgotten that in reaching his conclusion he had the advantage, denied to us, of seeing the witnesses and hearing the evidence which they gave. It may be said that the learned judge's view, that this remained a consensual separation throughout, was to some extent coloured by the fact that he had already come to the conclusion, erroneously as I think, that the original separation was a consensual separation. I have borne that well in mind in considering whether he was justified in drawing the inference that the continuance of the separation after the Somerset visits was consensual. But it seems to me, having given the matter such consideration as I can, that the learned judge's inference was well founded, and such as I would myself have drawn in all the circumstances of the case. My conclusion is that from 1955 onwards these parties, separated as they were, were living in that separated condition in accordance with the wishes of both; in other words, that they had found a mode of life which satisfied them both. In the circumstances, I think the learned judge came to a right conclusion when he held that the state of consensual separation continued right up to the moment when the petition was put on the file.

Accordingly, although I reach my conclusion by a somewhat different route, I do in the end reach the same conclusion as the learned judge, viz., that no desertion on the part of the wife was ever proved after the original desertion came to an end by reason of the Somerset visits. In those circumstances, as it seems to me, the learned judge came to a correct conclusion when he found that no relief could be granted either on the ground of adultery or on the ground of desertion. In my judgment, therefore, this appeal must be dismissed.

DANCKWERTS, L.J.: I agree. I feel some sympathy with the finding of the learned judge that the separation was consensual at the beginning of the story. It seems to me that, as a matter of fact, the judge was right in coming to the conclusion that the wife left the family home with the consent of her husband, either express or implicit, and it is only because of the application of a possibly somewhat artificial rule laid down in *Baker v. Baker* (4) that the conclusion must be reached that the wife was then to be treated as deserting her husband. But, be that as it may, when the wife was living at Highbridge it is clear on the wife's evidence, which the learned judge accepted, that the husband was visiting his wife from time to time, it seems to me as often as he wished, and that whenever he did so (except on the first occasion, apparently, when the husband and wife and the two younger children were sharing the same room) he had sexual intercourse with her whenever he wanted; and he was writing letters to her in which he added those cryptic symbols which are, one understands, supposed to represent kisses. In those circumstances, when the wife received him in that fashion and he was not relegated to a separate room and slept in her bed, it seems to me that it is quite unreal to treat the wife as still being in a position of desertion in respect of her husband. The result of that is that, if the petition was to succeed, it must succeed on the basis of there having been some further act of desertion, for it seems to me that, if there was originally desertion, it was at an end at that period and, of course, the original cause of the parties being separated, the wife's confession of adultery, had been condoned.

It seems to me that on the evidence the judge was right in reaching the conclusion that he reached, that there was no positive requirement by the husband on the wife to come to a house which he had found in London, and also that there was no positive refusal by the wife ever to live in London again. She was

(4) [1953] 2 All E.R. 1199; [1954] P. 33.

a Somerset woman and was unwilling to do it, but, as she expressed it in her evidence, she might have to go back to London because she was the husband's wife. In those circumstances, it seems to me that the conclusion reached by the judge was a correct one, and the appeal should be dismissed.

ORMEROD, L.J.: I agree with the judgment which has been just delivered by WILLMER, L.J., and, although we are not accepting in their entirety the conclusions arrived at by the learned judge, I think that there is nothing that I can usefully add. I agree, therefore, that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Matthew Morris* (for the husband); *Edwin Coe & Calder Woods*, agents for *Pardoe, David & Shaw*, Bridgwater (for the wife); *Victor Mishcon & Co.* (for the co-respondent).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

KNIGHT v. LEAMINGTON SPA COURIER, LTD.

[COURT OF APPEAL (Holroyd Pearce, Upjohn and Donovan, L.JJ.), May 15, 16, 1961.]

Factory—Dangerous machinery—Printing press—Duty to fence—Guard removed for cleaning—Rollers slowly moved—Whether machinery “in motion or in use”—Factories Act, 1937 (1 Edw. 8 & 1 Geo. 6 c. 67), s. 14 (1), s. 16, s. 20.

The plaintiff was employed by the defendants as an assistant press operator at an electrically driven printing press. From time to time when no printing was being done, the plaintiff had to clean the blankets on the printing rollers. For that purpose he lifted the guard, and in order to reach the various portions of the rollers he caused them to move at a slow speed by pressing an inching button. The movement continued only so long as he depressed the inching button. Above and to the side of the roller was the stop press housing which also revolved slowly and, together with the roller, produced a nip which was dangerous to anyone who put his finger near enough. During a cleaning operation the plaintiff allowed one of his fingers to be drawn in between the moving rollers and suffered injury. He claimed damages from his employers for breach of s. 14 (1) of the Factories Act, 1937, for failing to fence the rollers while they were in motion or in use.

Held: the employers were not guilty of a breach of s. 14 (1) of the Factories Act, 1937, because the slow sporadic rotation or intermittent movement of machinery intended to place it more advantageously for cleaning or repair did not in this case constitute its being “in motion or in use” within s. 16 of that Act.

Richard Thomas & Baldwins, Ltd. v. Cummings ([1955] 1 All E.R. 285) applied.

Appeal dismissed.

[For the Factories Act, 1937, s. 14, s. 16 and s. 20, see 9 HALSBURY'S STATUTES (2nd Edn.) 1009, 1011, 1013.]

Cases referred to:

Dodd v. Ben Capper, Ltd., (Mar. 17, 1961), unreported.

Thomas (Richard) & Baldwins, Ltd. v. Cummings, [1955] 1 All E.R. 285; [1955] A.C. 321; [1955] 2 W.L.R. 293; 24 Digest (Repl.) 1056, 223.

Appeal.

This was an appeal by the plaintiff from a judgment of His Honour JUDGE HAMILTON, given on Dec. 20, 1960, at Nuneaton County Court, dismissing his action. The plaintiff claimed in his particulars of claim damages for personal injury caused by the defendants' breach of duty under s. 14 (1) of the Factories Act, 1937, or caused by the defendants' negligence. The county court judge held that there was no breach of duty or negligence on the part of the defendants. The plaintiff appealed only on the ground of breach of statutory duty.

A. E. James, Q.C., and *I. J. Black* for the plaintiff.

John Thompson, Q.C., and *E. B. Gibbens* for the defendants.

Cur. adv. vult.

May 16. The following judgments were read.

HOLROYD PEARCE, L.J.: The plaintiff claimed damages for negligence and breach of statutory duty in respect of injuries caused by an accident during his employment. He was an assistant press operator at the defendants' factory. He had operated an electrically driven printing press for two years. When no printing was being done, the plaintiff took the opportunity to clean the blanket on the printing roller. He lifted the guard from the roller to get access to it, and took a rag dipped in petrol. The roller had an inching button which caused it to revolve at a very slow speed, five revolutions a minute, for as long as the button was actually being pressed. By this means it was possible to turn the roller as little as an inch at a time to reach various portions of it for cleaning. Above and to the side of the roller was the stop press housing which also revolved slowly, and thus, together with the roller, produced a nip which was dangerous to anyone who put his finger near enough. It was admitted that this was a dangerous part of the machinery. The plaintiff knew of the danger. He cleaned part of the surface of the roller and he wished to get at another part. While pressing the button, he allowed his finger to be drawn in, either by placing it on the moving roller or by letting it be drawn in with the rag, and failed to take his other hand off the button in time. The learned judge found no common law negligence proved. The plaintiff also alleged breach of s. 14 (1) of the Factories Act, 1937; but the judge rejected that contention, relying on *Richard Thomas & Baldwins, Ltd. v. Cummings* (1).

Section 14 (1) of the Factories Act, 1937, reads as follows:

"Every dangerous part of any machinery, other than prime movers and transmission machinery, shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced."

That section must be read in conjunction with s. 16, which reads as follows:

"All fencing or other safeguards provided in pursuance of the foregoing provisions of this Part of this Act shall be of substantial construction, and constantly maintained and kept in position while the parts required to be fenced or safeguarded are in motion or in use, except when any such parts are necessarily exposed for examination and for any lubrication or adjustment shown by such examination to be immediately necessary, and all such conditions as may be specified in regulations made by the Secretary of State are complied with."

The exception does not include exposure for cleaning purposes. Therefore, if, on the proper construction of the words as applied to the facts in the present

(1) [1955] 1 All E.R. 285; [1955] A.C. 321.

case, the dangerous parts were "in motion or in use" at the time of the accident, the defendants were in breach. Does the section, though clearly not directed to such a case as this, extend widely enough to cover it? A

The only section that applies to cleaning is s. 20, which says that a woman or young person shall not clean any part of any machine if the cleaning thereof would expose them to the risk of injury from any moving part of that machine. That seems to contemplate that there may be circumstances in which an adult male may lawfully be exposed to risk when cleaning a moving part. However, the Operations at Unfenced Machinery Regulations, 1938 and 1946 (2), seem to indicate that the inching process here involved could only be lawfully carried out with the guard removed if it were carried out in compliance with those regulations. Regulation 1 provides: B

"Regulations 2 to 7 of these regulations shall apply to the following operations namely . . . (ii) the carrying out, in pursuance of s. 16 of the [Factories Act, 1937], of an examination or any lubrication or adjustment shown by such examination to be immediately necessary, when parts of machinery otherwise required to be fenced or safeguarded are in motion or in use but are necessarily exposed for those operations: Provided that regs. 5 and 6 shall not apply in relation to any part of machinery which is only being moved by hand or by a barring engine or by an inching or similar device, so however that no such operation shall be carried out except by a male person who has attained the age of eighteen." C

That seems to indicate that the regulations other than regs. 5 and 6 do apply to any part of machinery which is being only moved by hand or by an inching device and also that, apart from the express exclusion of regs. 5 and 6, the prohibitions therein would apply to such a process. If s. 16 does not in any event apply to such an operation, there was no necessity to exclude the operation of regs. 5 and 6. D

Counsel for the defendants argues that the exclusion was inserted *ex abundanti cautela*, in case there was any misapprehension as to the meaning of s. 16. He may well be right. Moreover, subsequent regulations are no reliable guide to the construction of a statute. Furthermore, the argument founded on the regulations was available to the losers in *Richard Thomas & Baldwins, Ltd. v. Cummings* (3) and was either not taken or did not prevail. In my judgment, it is to that case that we must look for guidance, as did the learned judge. In that case, the plaintiff was a fitter who found it necessary to rotate a face plate of a power-driven grinding machine on which he was making adjustments. The power had been cut off. He pulled on one of the transmission belts and in so doing crushed his finger between the belt and a pulley. It was held that there was no breach of statutory duty, since the machinery was not "in motion or in use" within the meaning of s. 16. That case clearly established, therefore, that mere movement of the machinery did not necessarily mean that it was "in motion or in use". LORD TUCKER founded his opinion on the fact that the power was cut off, and that, therefore, in that case the machinery could not be "in motion". He left open the meaning of the words in other circumstances. E

The other noble and learned Lords, however, did not adopt this line of reasoning or regard the absence of power as the deciding factor. LORD OAKSEY said (4): F

"The words of the exception in s. 16 are expressly confined to occasions 'when any such parts are necessarily exposed for examination and for any lubrication or adjustment shown by such examination to be immediately necessary'. It is not without significance that the word 'repair' which had occurred in s. 10 (1) (d) of the Factory and Workshop Act, 1901, was omitted from s. 16 of the Act of 1937, and it is clear, in my opinion, that s. 16 only excepts examination and adjustment if immediately necessary G

(2) S.R. & O. 1938 No. 641, amended by S.R. & O. 1946 No. 156.

(3) [1955] 1 All E.R. 285; [1955] A.C. 321.

(4) [1955] 1 All E.R. at p. 287; [1955] A.C. at p. 330. H

whilst the machinery is in normal motion or use, but does not except repairs which are not immediately necessary and which, therefore, cannot be carried out whilst the machinery is in normal motion without the fencing. The words 'in motion or in use' in s. 16 do not, in my opinion, refer to such movement of machinery by hand as took place in the present case, and s. 16 does not deal in any way with such movement. There is, therefore, no statutory prohibition which makes it obligatory to keep fencing in position when machinery is being repaired and is only being moved in so far as is necessary for the repair."

It is to be noted that the word "cleaning", like the word "repair", occurred in s. 10 (1) (d) of the Factory and Workshop Act, 1901, and was similarly omitted from s. 16 of the Factories Act, 1937. Therefore, the same argument applies both to repairing and cleaning. LORD PORTER said (5):

" 'In use' would certainly mean running as it was meant to run and doing the work it was meant to do. But provision is required for cases where it was running as it was meant to run but not doing the work it was meant to do. In such a case it would, in my view, be in motion but not in use. The addition of the words 'in motion' is, accordingly, required to cover such a set of circumstances, but one would not normally say that the machine was in motion when someone turned it over by hand for the purpose of effecting a repair or some similar purpose. This view is strengthened when it is found that no provision is contained in the Act enabling fencing to be removed for the sake of repair. In such a case they may be in movement but not in motion."

After dealing with the Act of 1901 and its exception of machinery while it was under repair, he concluded (5):

"That provision was excluded from the Act of 1937 not, I think, with the result of making repair impossible unless the machine was at rest, but because it was felt that repair should not be permitted whilst it was running in its normal manner, whether driving its ordinary load or not. In the present case, it was not working in its normal way but merely being turned over in order to effect the necessary repair."

Finally, LORD REID, with whom LORD KEITH OF AVONHOLM agreed, said (6):

"The phrase 'in motion' appears to me to be more apt to describe a continuing state of motion lasting, or intended to last, for an appreciable time . . . But there must be many occasions in the course of repairing and readjusting machinery when it is necessary to expose parts which, in ordinary use, must be fenced, and to move them to an appreciable extent . . . I can see no answer to the argument that, if the respondent's construction of s. 16 is correct, it is practically impossible in such cases to make the necessary repairs and readjustments without committing an offence by contravening the provisions of s. 16."

The reasoning of those opinions applies to the present case. The construction of the words "in motion or in use" must be the same whether the object was repair or cleaning. In my judgment, that case is authority for the proposition that the words "in motion or in use" connote the substantial movement of its normal working or, if it is not at the time achieving its normal purpose, some movement reasonably comparable to its normal working. This view is in accord with that expressed by FINEMORE, J., in the unreported case of *Dodd v. Ben Capper, Ltd.* (7). The slow sporadic rotation or intermittent movement of machinery intended to place it more advantageously for cleaning or repair is not normally motion or use within the section, whether it be produced by manpower or mechanical power. In some cases it may be clear into which category

(5) [1955] 1 All E.R. at p. 289; [1955] A.C. at p. 332.

(6) [1955] 1 All E.R. at p. 290; [1955] A.C. at p. 333.

(7) (Mar. 17, 1961), unreported.

the movement fits. In border-line cases it must be a question of fact and degree. Here the learned judge was right in deciding that the machinery was not in motion. A

I cannot accept counsel for the plaintiff's forceful argument that since it was being prepared for its normal work it was in one phase of its normal activity, nor that since the inching could be used for threading paper into the machine it was, when being inched, performing its normal activity but in a lower gear. B The inching process was quite different from its normal process. The button was designed so that only while it was being pressed did the machine move; but the roller was intended to revolve continuously at high speed, not to inch forward slowly while the button was being pressed. Nor can I accept that it was the duty of the defendants to insist on the guard being lowered while the plaintiff pressed the button and caused the roller to revolve an inch or so. C Such a precaution would be unreal. The plaintiff had only to keep his hand clear while he was himself pressing the button. Indeed, if I took a contrary view as to the alleged breach of s. 14, I would hold that the plaintiff himself was entirely to blame for the accident. I would dismiss the appeal.

UPJOHN, L.J.: I agree with the judgment that HOLROYD PEARCE, L.J., has delivered, and only desire to add one or two words of my own. By s. 14 (1) of the Factories Act, 1937, every dangerous part of any machinery, other than prime movers and transmission machinery, must be securely fenced, subject to certain exceptions. The defendants concede that the relevant part of the machinery is dangerous and falls within s. 14 (1) and, therefore, it must be securely fenced. Section 16 then provides a number of conditions for such fencing, of which the only one with which we are concerned is that it shall be D

"constantly maintained and kept in position while the parts required to be fenced or safeguarded are in motion or in use . . ."

The whole question is whether, on the facts of this case, the dangerous machinery was "in motion or in use"; for, if so, the fencing admittedly provided by the employer was not, at the relevant time, maintained and kept in position. The plaintiff had lifted it out of position; but that affords no defence to the alleged breach of the statutory requirements. F

Counsel for the plaintiff has argued that the machine was in use at the time of the accident. I cannot accept that argument. As a matter of common sense and ordinary use of the English language, the machinery was not then in use. It was not being used for its ordinary commercial purpose; that is, printing. G It was a slack period when the machine was not being used at all. The plaintiff, as the machine operator, was taking advantage of the slack period, as he did and as it was his duty to do two or three times a week, to clean the machine while it was not in use. The sole question, therefore, in my judgment, is whether, at the moment of the accident, the machine was "in motion".

The question whether a machine is "in motion" for the purposes of the Act must be a matter which is largely one of fact and degree in every case, and it is not possible to lay down any general principles to provide a solution to the problem. However, the decision of the House of Lords in *Richard Thomas & Baldwins, Ltd. v. Cummings* (8) affords valuable guidance to this court as to the proper approach to the problem. It was there decided that the mere fact that the transmission machinery was moving did not mean that it was necessarily "in motion" for the purposes of the section. All the learned law Lords agreed that some limitation must be put on the words "in motion", for otherwise it would be impossible to carry out repairs except when every dangerous part was stationary, or by committing an offence under s. 16. LORD TUCKER decided the case on the short ground that the machinery was not being put in motion by mechanical means, but the other learned Lords did not take this short cut. LORD REID said, referring to the phrase "in motion" (9): H I

(8) [1955] 1 All E.R. 285; [1955] A.C. 321.

(9) [1955] 1 All E.R. at p. 290; [1955] A.C. at p. 333.

"Using the phrase in its ordinary sense, I do not think that one would naturally say of a man moving parts of a machine round to a required position that he had set the machine or its parts in motion. The phrase 'in motion' appears to me to be more apt to describe a continuing state of motion lasting, or intended to last, for an appreciable time."

Applying that to the facts of this case, what was the situation? The blanket roller was being cleaned. The plaintiff did not turn over the roller by hand but rightly used the inching button which enabled him to turn over the roller very slowly, i.e., at the rate of one revolution every twelve seconds, and so expose another segment of the roller which he then cleaned with petrol and a rag. This operation he then repeated. Is this movement of the roller, albeit by mechanical means but dead slow for I suppose two or three seconds or thereabouts at a time, to uncover another segment of the roller for cleaning purposes, properly described as being "in motion"? Having regard to the clear limitation placed on the words "in motion" in *Richard Thomas & Baldwins, Ltd. v. Cummings* (10), in my judgment the answer must necessarily be in the negative. I also agree with HOLROYD PEARCE, L.J., that, had I reached a contrary conclusion, I would have thought that the accident was entirely the plaintiff's own fault.

DONOVAN, L.J.: I agree. I also think it is impossible to prescribe an exhaustive definition of the terms "in motion" or "in use" as they are used in s. 16 of the Factories Act, 1937. One can say that "in motion" means something more than merely in movement; that a machine may be put "in motion" manually as well as by power; and that a machine may be "in use" notwithstanding some temporary halt in the running of it. Beyond this, general guidance is difficult to give, and any attempt at it might be misconceived. In particular, I do not think that it would be right to say that a machine is "in motion" when it is being run for the industrial purpose which it was installed to achieve, but not "in motion" when being run for some preparatory purpose. Some such preparatory work might involve running at high speeds, and fitters and others would be without protection if the dangerous parts of the machine were left unfenced during this operation. Parliament could not have intended that.

Accordingly, I do not think that one can do more than look at the facts of each particular case and ask whether they involve that the parts of the machine required to be fenced or safeguarded were in motion or in use for the purposes of s. 16, bearing in mind the object of this legislation, namely, the protection of the workman. The judge below answered that question in the negative; and, for the reasons already given by my Lords with which I agree, I think he was right.

As to the point raised by counsel for the plaintiff on the wording of the Regulations at Unfenced Machinery Regulations, 1938 and 1946, it is clear that whoever drafted these had in mind that there might be some cases of movement by an inching device which would put the dangerous parts of the machine "in motion" for the purposes of s. 15 and s. 16. But it does not follow that all such movement has this result. This serves to emphasise the unwisdom of trying to lay down some universal proposition which will govern the infinite variety of machines and industrial processes. On the facts of this case, the wording of the regulations does not, in my opinion, compel a decision in favour of the plaintiff.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Bosworth, Bailey, Cox & Co.*, Birmingham (for the plaintiff); *E. P. Rugg & Co.*, agents for *Buller, Jeffries & Kenshole*, Birmingham (for the defendants).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

R. v. MORRIS.

[COURT OF CRIMINAL APPEAL (Lord Parker, C.J., Ashworth and Lawton, JJ.), May 9, 1961.]

Criminal Law—Murder—Diminished responsibility—Sentence—Convicted person in need of mental treatment but local hospital not sufficiently secure—Sentence of life imprisonment imposed, not as punishment, but to leave Secretary of State with discretion to place prisoner in secure mental hospital—Whether hospital order should have been made—Mental Health Act, 1959 (7 & 8 Eliz. 2 c. 72), s. 60, s. 65, s. 72.

Although the discretion laid down in s. 60 of the Mental Health Act, 1959*, is very wide, the basic principle must be that in the ordinary case where punishment as such is not intended and where the whole object of the sentence is that a man should receive mental treatment and be at large as soon as he can safely be discharged, the court should exercise its powers under s. 60 and the matter should not be left to be dealt with by the Secretary of State under s. 72† of the Act (see p. 674, letter I, post).

The appellant killed his wife whilst he was suffering from depression superimposed on a chronic anxiety state which had substantially impaired his mental responsibility. He was indicted for murder, but the jury, on his plea of diminished responsibility under s. 2 of the Homicide Act, 1957‡, returned a verdict of manslaughter. Medical evidence was then given on behalf of the appellant, with a view to establishing diminished responsibility, by doctors qualified on these matters under the Mental Health Act, 1959, which showed that the appellant needed mental treatment and that there was a local mental hospital available for such treatment. Medical evidence on behalf of the Crown showed that the appellant's mental trouble might be much greater than his doctors had testified. The judge, not being satisfied that the local hospital concerned was sufficiently secure to justify his making a hospital order under s. 60 of the Act, with a restriction order under s. 65, since the appellant might again become at large from that hospital, sentenced the appellant to life imprisonment, so as to leave the appellant subject to the discretion of the Secretary of State under s. 72 of the Act to have the appellant removed to a mental hospital that was secure. On appeal against sentence,

Held: in the special circumstances of this case there was no ground for interfering with the judge's exercise of his discretion.

Appeal dismissed.

[As to hospital orders, see 29 HALSBURY'S LAWS (3rd Edn.) 524, para. 985; as to orders restricting discharge, see *ibid.*, p. 527, para. 990; and as to the removal to hospital of prisoners, see *ibid.*, p. 552, para. 1025.

For the Mental Health Act, 1959, s. 60, s. 62, s. 65, s. 72, see 39 HALSBURY'S STATUTES (2nd Edn.) 1013, 1016, 1019, 1027.]

Case referred to:

M'Naghten's Case, (1843), 10 Cl. & Fin. 200; 8 E.R. 718; sub nom.

McNaughton's Case, 4 State Tr. N.S. 847; 1 Town. St. Tr. 314; 14 Digest (Repl.) 60, 246.

* The relevant part of s. 60 is set out at p. 674, letters F and G, post.

† See 39 HALSBURY'S STATUTES (2nd Edn.) 1027—this section empowers the Secretary of State to direct the removal to hospital of persons serving a sentence of imprisonment who are reported by two doctors, qualified under the Mental Health Act, 1959, to be suffering from mental illness, etc.

‡ Section 2 of the Homicide Act, 1957, so far as material, provides: "(1) Where a person kills . . . another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing . . . the killing. (2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder."

Appeal.

This was an appeal by Philip Morris against a sentence of life imprisonment imposed on him at Glamorgan Assizes on Dec. 6, 1960, by JONES, J. He had been indicted with the murder on June 10, 1960, of his wife, Matilda Irene Morris, a lady of seventy-two years of age. On his plea of diminished responsibility under s. 2 of the Homicide Act, 1957*, the medical evidence for the defence was not challenged by the prosecution. Indeed the two doctors called on behalf of the Crown gave evidence that they thought that the appellant had even greater mental trouble than was stated by the doctors called on his behalf. They said "we think he suffered from insanity; at any rate he suffered from diminished responsibility". The jury brought in a verdict of manslaughter. Leave to appeal against sentence was granted by the court (HINCHCLIFFE, PAULL and VEALE, JJ.) on Mar. 3, 1961, so that the court might consider whether the sentence was wrong having regard to the court's powers under the Mental Health Act, 1959, which came into force on Nov. 1, 1960. The facts are stated in the judgment of the court.

After the jury had returned their verdict two doctors, who had been called as witnesses for the defence and of whom one was a practitioner approved for the purposes of s. 28 of the Act of 1959 as having special experience in the diagnosis and treatment of mental disorders, were recalled and gave further evidence that the appellant was suffering from mental illness of a nature which warranted the appellant's detention in a hospital for mental treatment. The doctor approved for the purposes of s. 28 further stated that arrangement had been made for the appellant's admission to Coef Coed hospital, Swansea, that this hospital had the facilities for putting into effect any of the special restrictions referred to in s. 65 of the Act of 1959, and that in his opinion there was no future danger to the public or patients in the hospital if no restriction order were made. In passing sentence on the appellant, the trial judge stated that the appellant had killed his wife deliberately, and, albeit he accepted the jury's verdict that at the time the appellant was suffering from some abnormality of mind which diminished his responsibility for the act, yet it still remained a very serious matter that he had killed her. His Lordship was not sure that the appellant's mental state was not even worse than that of diminished responsibility; at any rate he would not take the responsibility of setting the appellant "anywhere near liberty". He would pass such sentence as would involve the appellant's being entirely in the hands of the Home Secretary who had complete powers to send the appellant to the right place. His LORDSHIP could only send the appellant to prison, which might not be the right place; but the only way in which this could be done effectively was to pass a sentence of imprisonment for life.

B. M. Rees for the appellant.

The Attorney-General (Sir Reginald Manningham-Buller, Q.C.) and J. R. Cumming-Bruce as amici curiae.

B. M. Rees submitted that since the passing of the Mental Health Act, 1959, the court had full and adequate powers by virtue of s. 60 and s. 65 of that Act for such a case as the appellant's and that it was wrong in principle to sentence him with a view to leaving the Home Secretary to act under s. 72.

The Attorney-General (Sir Reginald Manningham-Buller, Q.C.), as amicus curiae, submitted that a hospital order under s. 60 of the Mental Health Act, 1959, could not be made until the court was satisfied that the necessary arrangements had been made at the specified hospital—here, the hospital available, Coef Coed, was a local mental hospital, and not a sufficiently secure hospital. The prosecution had sought to rebut the plea of diminished responsibility by calling evidence of insanity but the judge had disallowed this. It was submitted that that evidence was wrongly excluded for once the defence had put the

* See footnote † p. 672, ante.

appellant's mental capacity in issue, it was open to the prosecution to call evidence to rebut that plea—this had been allowed in *R. v. Bastian**, *R. v. Nott†* and *R. v. Grant‡*. A

LORD PARKER, C.J., delivered the following judgment of the court: This appellant was indicted at Glamorgan Assizes for the murder of his wife, a lady seventy-two years of age. He was convicted of manslaughter on a plea of diminished responsibility, and was sentenced by JONES, J., to life imprisonment. He now appeals against that sentence by leave of the court, the question being whether that sentence was wrong in principle having regard to the court's powers under the Mental Health Act, 1959. B

So far as the facts are concerned, it is sufficient to say that this unfortunate husband killed his wife, who had been seriously ill. In many ways it could be classed as a mercy killing. The unchallenged evidence, so far as the defence doctors were concerned, was that the appellant was suffering from depression superimposed on a chronic anxiety state which had substantially impaired his mental responsibility. They gave evidence—and they consisted of doctors who came within the definition of doctors qualified to speak on these matters under the Mental Health Act, 1959—that he required mental treatment, and evidence was given that a vacancy was available in a local Welsh hospital. The learned judge, however, despite that being pressed on him, sentenced the prisoner to life imprisonment, saying: C

"I am not at all sure that your mental state is not even worse than that, at any rate, I am not going to have the responsibility of setting you anywhere near liberty. I am going to pass such a sentence on you as will involve you being entirely in the hands of the Secretary of State for Home Affairs, who has complete powers to send you to the right place." E

It is agreed that under s. 72 of the Mental Health Act, 1959, the Secretary of State has ample powers, but the argument is that having regard to the court's powers under s. 60, the court in its discretion ought to have dealt with this man under that section. So far as it is material, s. 60 (1) provides: F

"Where . . . (a) the court is satisfied, on the written or oral evidence of two medical practitioners (complying with the provisions of s. 62 of this Act),—(i) that the offender is suffering from mental illness . . . ; and (ii) that the mental disorder is of a nature or degree which warrants the detention of the patient in a hospital for medical treatment, . . . ; and (b) the court is of opinion [and this is where the discretion of the court lies] having regard to all the circumstances including the nature of the offence and the character and antecedents of the offender, and to the other available methods of dealing with him, that the most suitable method of disposing of the case is by means of an order under this section, the court may by order authorise his admission to and detention in such hospital as may be specified in the order" G H

By s. 65 (1) the court has power to make at the same time what is called a restriction order which will restrict the discharge of the prisoner from hospital for such period as is stated in the restriction order except with the consent of the Secretary of State.

It seems to this court that although the discretion there laid down is very wide indeed, the basic principle must be that in the ordinary case where punishment as such is not intended, and where the sole object of the sentence is that a man should receive mental treatment and be at large as soon as he can safely be discharged, a proper exercise of the discretion demands that steps should be taken to exercise the powers under s. 60, and that the matter should not be left to be dealt with by the Secretary of State under s. 72. That, as it seems to the I

* [1958] 1 All E.R. 568. † (1959), 43 Cr. App. Rep. 8. ‡ (1960), Cr. Law R. 424.

court, is the general principle. Of course there may be cases where, although there is a substantial impairment of responsibility, the prisoner is shown on the particular facts of the case nevertheless to have some responsibility for the act he has done, for which he must be punished, and in such a case, although as the court reads the sentence imposed by the learned judge this was not such a case, it would be proper to give imprisonment allowing the Secretary of State to exercise his powers under s. 72 in order that any necessary mental treatment should be given. Prima facie, therefore, it looks as if, as counsel for the appellant has contended, this sentence was wrong in principle, in that it seems to this court that the learned judge was not intending to impose punishment. But what happened in the present case was this. The Crown sought to call rebutting evidence in regard to diminished responsibility, the form of the rebuttal being that the doctors for the Crown were going to say that the man was not merely suffering from diminished responsibility but was insane within the M'Naghten rules (1). However, unlike the course taken by some judges, this learned judge in fact refused to allow that issue of insanity under the M'Naghten rules (1) to be raised. Nevertheless, the doctors for the Crown did give evidence which showed that they clearly thought that the degree of mental trouble from which the prisoner suffered was a great deal more than that to which his own doctors had spoken. It seems to the court that the anxiety of the learned judge was really this, that he felt that the mental condition of this prisoner might be far worse than that spoken to by his doctors, and that he ought to be kept in what one might call a "secure" hospital, where very special steps are taken to see that the inmate could not get out and could not be at large. Of course, there are hospitals which come within the meaning of the Act which are qualified for that purpose. We have been told that Moss Side, Rampton and Broadmoor are "secure" hospitals in that sense, but the only evidence before the learned judge was that there was a vacancy in this local Welsh hospital, and he was clearly not satisfied that that local Welsh hospital was secure enough to enable him to take the risk of making a hospital order naming that hospital. Accordingly, having had no evidence of a vacancy in a "secure" hospital, it seems to this court that it was a perfectly proper exercise of his discretion in the special circumstances of this case to say: "Although I do not intend this as punishment, I am not going to take the responsibility of putting him in the local Welsh hospital where he can become at large, and I think it is better to leave it entirely to the Secretary of State" (2). The court feels that there is no ground for interfering with the exercise of the judge's discretion. It certainly is not wrong in principle on the special facts of this case and, accordingly, this appeal is dismissed.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Treasury Solicitor* (for the Crown as *amicus curiae*).

[*Reported by N. P. METCALFE, ESQ., Barrister-at-Law.*]

(1) See (1843), 10 Cl. & Fin. at p. 210.

(2) The words quoted above are from the summing-up by the trial judge.

Re A. E. HAYTER & SONS (PORTCHESTER), LTD.

[CHANCERY DIVISION (Pennycuik, J.), May 8, 18, 1961.]

Company—Winding-up—Compulsory winding-up—Creditor's application—Judgment creditor's petition—Majority of creditors opposing—Petitioner's consent to dismissal of petition Costs—Unreasonable to present petition.

A judgment creditor for the sum of £1,085 19s. 9d. petitioned for the compulsory liquidation of the debtor company. The petitioning creditor knew that the undertaking of the debtor company, which was in the hands of a receiver, was in course of realisation by sale and that on completion of the sale the company would, without opposition from any unsecured creditors, be put into voluntary liquidation. The petitioning creditor had been sent a circular which showed an estimated net surplus of £114,859 available for 467 unsecured creditors whose debts were expected to amount to £218,061. The court found that the petitioning creditor must have known that a petition for compulsory liquidation would be opposed by a majority of unsecured creditors, and the petitioning creditor was informed by the solicitor for a debenture-holder and by an unsecured creditor for £72,771 odd shortly after the petition was presented that nothing was to be gained from compulsory liquidation. At the hearing of the petition the petitioning creditor, in view of opposition by other creditors, consented to its dismissal, but contended that the petitioning creditor should not be ordered to pay costs.

Held: the practice whereby costs were not given against a petitioning judgment creditor whose petition, although he had acted reasonably in presenting and prosecuting it, was dismissed owing to opposition by other creditors represented a relaxation of the general rule that an unsuccessful party was ordered to pay the successful party's costs; the relaxation did not, however, extend to cases where the petitioning creditor had acted unreasonably, and since in the present case the petitioning creditor had acted unreasonably in presenting the petition (and also in prosecuting it), there would be an order on the petitioning creditor to pay the costs of the company and opposing creditors.

Re R. W. Sharman, Ltd. ([1957] 1 All E.R. 737) and *Re A.B.C. Coupler & Engineering Co., Ltd.* ([1961] 1 All E.R. 354) distinguished.

[As to costs of an application for winding-up by the court, see 6 HALSBURY'S LAWS (3rd Edn.) 554, para. 1066; and for cases on the subject, see 10 DIGEST (Repl.) 900, 901, 6089-6110, and cf. p. 680, post.]

Cases referred to:

A.B.C. Coupler & Engineering Co., Ltd., Re, [1961] 1 All E.R. 354; [1961] 1 W.L.R. 243.

British Electric Street Tramways, Re, [1903] 1 Ch. 725; 72 L.J.Ch. 386; 10 Digest (Repl.) 900, 6103.

Flagstaff Silver Mining Co. of Utah, Re, (1875), L.R. 20 Eq. 268; 45 L.J.Ch. 136; 10 Digest (Repl.) 855, 5633.

Sharman (R. W.), Ltd., Re, [1957] 1 All E.R. 737; [1957] 1 W.L.R. 774; 3rd Digest Supp.

Petition for compulsory winding-up order.

This was a petition by Allen & Simmonds (Auto Culto), Ltd., a judgment creditor of A. E. Hayter & Sons (Portchester), Ltd., for the compulsory winding-up of the company on the ground that it was insolvent and unable to pay its debts and that it was just and equitable that the company should be wound up. The facts appear in the judgment.

R. B. S. Instone for the petitioning creditor.

Muir Hunter for the company and Lloyds Bank, Ltd., debenture-holders.

A. L. Figgis for the opposing creditors.

May 18. **PENNYCUICK, J.:** This case raises a question of principle with regard to the costs of the petition which is of some general importance. The petitioning creditor, Allen & Simmonds (Auto Culto), Ltd., is a judgment creditor in the sum of £1,085 19s. 9d. representing as to £1,071 12s. 9d. the price of goods sold and delivered, and as to £14 7s. costs.

The company carries on the business of garage proprietors, and since January, 1961, its undertaking has been in the hands of a receiver appointed by Lloyds Bank, Ltd. as debenture-holders. On Mar. 9, 1961, the receiver convened an informal meeting of creditors which was attended by a large number of creditors, including the petitioner. With the notice convening the meeting the receiver circulated a statement of affairs which showed an estimated net surplus of £114,859 available for 467 unsecured creditors expected to rank in the total of £218,061, representing a fund of 10s. in the pound. At the meeting the receiver informed the creditors of negotiations on foot and approaching completion between the receiver and a company known as the Blue Star Group for the sale of the company's undertaking at a price of £174,495, which figure is taken into account in the statement of affairs above mentioned. He further informed the creditors that as soon as that sale was completed the company would call the statutory meeting of creditors under s. 293 of the Companies Act, 1948, for the purpose of going into creditors' voluntary liquidation. No resolution was passed at that meeting but none of the creditors present expressed any objection. In any case, the creditors would not have been in a position to prevent the receiver from going on with the sale.

On Apr. 19, 1961, the petitioner presented their petition. It should be mentioned that the petitioner did not recover judgment against the company until Mar. 23, 1961, but nothing seems to me to turn on this point since the petitioning creditor had an indisputably good debt at the date of the meeting on Mar. 9, 1961, and at the date when the petition was lodged. On Apr. 24, 1961, Mr. Guyer, the solicitor acting in this matter for Lloyds Bank, Ltd., called at the office of the petitioner where he saw Mr. Steele and Mr. Fryer, two of the directors of the petitioner and their solicitor. Mr. Guyer's account of this interview was as follows:

"I pointed out to those gentlemen that this petition, and the attempt to obtain a winding-up order would jeopardise the progress of the aforesaid sales, and would undoubtedly delay them and might indeed result in the completion of the sales falling through. Mr. Steele said to me that the petitioning creditors felt that they had nothing to lose by taking this step, and that they thought that if they pressed hard enough, either Lloyds Bank, Ltd. or Regent Oil Co., Ltd. would pay their debt out in full, or words to that effect. He then suggested to me that the receiver should call another meeting of creditors and get them to agree to the petitioning creditors being paid in full. To this, I replied that it was a ridiculous suggestion for even if the receiver did call such a meeting and did get such an authority any one creditor could change his mind and could attack the receiver for an improper course of conduct. Mr. Steele replied to the effect that he appreciated the position but was resolved that the petition should proceed and the interview then abruptly terminated."

On the same day, Apr. 24, 1961, a director of the company known as Scottish Midland Guarantee Trust, Ltd., wrote to the petitioner in the following terms:

"I hope you will not mind my writing to you regarding the above-named Group [Hayter Group], but I understand from the receiver that you have filed a petition for compulsory liquidation. As you know, we are the largest creditor and it seems to us that nothing would be gained by taking this course, and we would not wish to delay the matter more than necessary or to involve the creditors in additional costs. It is already the intention, of course,

to have voluntary liquidation. I should be grateful if you would be kind enough to let me have your views on the matter."

When the petition came on for hearing it was opposed by Lloyds Bank, Ltd., the debenture-holder, and by Scottish Midland Guarantee Trust, Ltd., whose debt then appeared as £72,771 9s. 5d., Regent Oil Co., Ltd., whose debt then appeared as £64,272, and Franco-British Electrical Co., Ltd., whose debt appeared as £2,066. There is no evidence that the petitioner knew the actual amount of the debts owing to the opposing creditors until he saw the list filed on the hearing of the petition. There was no supporting creditor. In these circumstances, counsel on behalf of the petitioner indicated that he could not press his petition and would consent to having it dismissed, but he contended that the petitioner should not be ordered to pay costs.

It was formerly the practice where the petitioning creditor elected not to open the petition and consented to its dismissal, that he must, as a matter of course, pay the costs of the company and also of the opposing creditors (see *Re British Electric Street Tramways* (1)). However, this practice was subjected to an important modification in *Re R. W. Sharman, Ltd.* (2) in which it was held by WYNN-PARRY, J., that where a creditor who is a judgment creditor presents a petition on which, as between himself and the company, he would be entitled to an order *ex debito justitiae*, but is prevented from obtaining an order by the opposition of other creditors of greater weight, the fair practice was to make no order as to costs. I shall read a short passage from his judgment (3):

"The present case, as is pointed out in argument, is somewhat different because it appears on the face of the petition and cannot be disputed that the petitioning company is a judgment creditor and, therefore, entitled, as between it and the company, *ex debito justitiae* to an order. The only reason which supervenes to prevent that order being made is the intervention of a body of creditors to whose wishes, under the law as it now stands, the court is bound to have regard. Is it, the question arises, a fair and reasonable practice that in these circumstances the position of such a petitioner entitled *ex debito justitiae* against a company to an order should be so much changed for the worse on the intervention of a body of a majority of creditors opposing the petition? No doubt, if the company itself alone opposes and desires to get rid of the petition it must pay the costs and that appears from *Re Flagstaff Silver Mining Co. of Utah* (4).

"The court usually hesitates very much to interfere with an existing practice, but I feel that I am at liberty here at any rate to consider the existing practice because history does not report, as I have said, how it came into existence or how long it has continued, and there is no authority which stands in the way of any such review. It appears to me that at any rate in the case of a judgment creditor the practice ought to be varied. It is perfectly true, as is pointed out in the judgment of BUCKLEY, J., in *Re British Electric Street Tramways* (1) that the petitioner who issues a petition invites creditors to attend and it may be that the present practice is perfectly fair in the case of a creditor who is not a judgment creditor, as to whose position I say no more, but where a judgment creditor presents a petition and is only deprived of what otherwise would be his right by the circumstance that an overwhelming majority of the creditors or a majority of the creditors oppose the petition, I find it difficult to see how, as a matter of principle, the practice is justified in not merely depriving the petitioner of his costs but ordering him to pay costs himself. I agree with counsel for the petitioning creditor that it is too late to review the practice with a view to seeing whether or not the petitioner should have his costs but I

(1) [1903] 1 Ch. 725. (2) [1957] 1 All E.R. 737. (3) [1957] 1 All E.R. at p. 739.
(4) (1875), L.R. 20 Eq. 268.

have come to the conclusion that at any rate as regards a judgment creditor in the position of the petitioning creditor in this case the fair practice would be that in dismissing the petition the court should make no order as to costs."

I followed this decision in the recent case of *Re A.B.C. Coupler & Engineering Co., Ltd.* (5).

The practice introduced by *Re R. W. Sharman, Ltd.* (6) is appropriate where the petitioning creditor has acted reasonably in presenting and prosecuting his petition. But it is to be observed that the practice represents a relaxation, in favour of an unsuccessful petitioner, of the general rule that a party who has brought another party before the court on a claim which has failed is, in the absence of special circumstances, ordered to pay the successful party's costs, and it seems to me that a petitioning creditor cannot be entitled to the benefit of this relaxation in so far as he has acted unreasonably in presenting or prosecuting the petition. What is reasonable depends in each particular case on all the circumstances and it would be unwise to attempt any more precise formulation.

In the present case the facts summarised above show that at the time when the petition was presented the petitioner knew that the undertaking of the company was in course of realisation by the receiver, and that what was proposed, without opposition from any unsecured creditor, was that, on the completion of the realisation, the company should be put into voluntary liquidation. Equally the petitioner must have known that any person applying for a compulsory order would encounter the opposition of unsecured creditors of greater weight. Its own debt was less than one-half per cent. of the claims of the whole of the unsecured creditors and no special ground has been suggested on which an order would be likely to be made. In those circumstances the petitioner must have recognised that the petition would be virtually bound to fail.

In all the circumstances I have come to the conclusion that the petitioner must be taken as having acted unreasonably in presenting the petition. A fortiori the petitioner acted unreasonably in prosecuting the petition after the interview and letter of Apr. 24, 1961. It follows that, in my judgment, the petitioner is not entitled to any relaxation in the matter of costs, and that I must direct the petitioner to pay the costs of the company and the opposing creditors.

Order accordingly.

Solicitors: *Church, Adams, Tatham & Co.*, agents for *Sarjeant, Brown & Co.*, Reading (for the petitioning creditor); *Guyer & Co.* (for the company and *Lloyds Bank, Ltd.*, debenture-holders); *A. R. Jackson* (for the opposing creditors).

[Reported by JENIFER SANDELL, Barrister-at-Law.]

Re SKLAN, LTD.

[CHANCERY DIVISION (Pennycuick, J.), March 6, April 17, May 1, 15, 18, 1961.]

Company—Winding-up—Compulsory winding-up—Creditor's application—Majority of creditors opposing—Debt undisputed—Reasonableness of petitioner in presenting and prosecuting petition—No order as to costs made against petitioner.

A petition for an order that a company should be compulsorily wound up was presented by a creditor for the sum of £500, who was the holder for value of a bill of exchange accepted by the company and dishonoured on presentation. The petitioner's debt was not disputed. The petition was opposed by the company and by creditors to whom the company owed about £45,365. At an adjourned hearing of the petition the petitioner agreed, on the company's undertaking to enter into voluntary liquidation, to the dismissal of the petition, but asked that he should not be ordered to pay costs. The court found that the petitioner had acted reasonably throughout in the circumstances of the case, which were of considerable complexity.

Held: where a petitioning creditor, who was not a judgment creditor but whose debt was not disputed and who had acted reasonably in presenting and prosecuting a petition for the compulsory winding-up of the debtor company, consented to the dismissal of his petition, it being opposed by a majority of the creditors, he should not be ordered to pay the costs of the company or of the opposing creditors, for he was entitled to the benefit of the same fair practice as in like circumstances would be extended to a petitioner who was a judgment creditor.

Re R. W. Sharman, Ltd. ([1957] 1 All E.R. 737) applied.

[As to costs in a winding-up by the court, see 6 HALSBURY'S LAWS (3rd Edn.) 554, para. 1066; and for cases on the subject, see 10 DIGEST (Repl.) 898, 6059-6068.]

Cases referred to:

Hayter (A. E.) & Sons (Portchester), Ltd., Re, ante, p. 676.

Sharman (R. W.), Ltd., Re, [1957] 1 All E.R. 737; [1957] 1 W.L.R. 774; 3rd Digest Supp.

Petition for compulsory winding-up order.

This was a petition by Commercial Veneered Mouldings, Ltd., a creditor of the respondent company, Sklan, Ltd., on a bill of exchange, for the compulsory winding-up of the company on the ground that it was just and equitable to do so. The petition was first pressed at the hearing, but finally, at an adjourned hearing, was dismissed by consent on the respondent company's giving certain undertakings. The facts appear in the judgment.

E. A. Seeley for the petitioning creditor.

Muir Hunter for the company.

Curr. adv. vult.

May 18. **PENNYCUICK, J.:** The petitioning creditor, Commercial Veneered Mouldings, Ltd., is a creditor in the sum of £500 as the holder for value of a bill of exchange accepted by the company and dishonoured on presentation. On Dec. 14, 1960, one W. R. Tomkinson was appointed receiver of the company's undertaking. The petition was presented on Feb. 16, 1961. Five days afterwards, on Feb. 21, 1961, there was an informal meeting of creditors at which an unofficial sub-committee was appointed to consider an offer to purchase the undertaking of the company. This offer did not come to fruition.

The petition came on for hearing on Mar. 6, 1961, when the list of creditors showed creditors with debts amounting to £45,365 supporting an application for an adjournment. Most of those creditors, if not all of them, ultimately opposed the petition. There were adjourned hearings on Apr. 17, May 1, and

again on May 15, 1961, and a considerable body of evidence was filed. By Apr. 21, 1961, the receiver had entered into fresh negotiations for the sale of the company's undertaking and these have now resulted, or are about to result, in a contract. Finally, at the adjourned hearing on May 15, the petitioner agreed to the dismissal of the petition on an undertaking to put the company into voluntary liquidation.

Counsel for the company and the opposing creditors admitted that the petitioner had acted reasonably in presenting the petition, but contended that they had acted unreasonably in prosecuting it on and after Apr. 17. I expressed at the conclusion of the adjourned hearing the view that in all the circumstances, which were of considerable complexity, the petitioner should be treated as having acted reasonably throughout, and I do not think that I can usefully go into further detail on this aspect of the matter.

Counsel for the company, however, raised a point which is of general importance, namely that the rule that a petitioner who consents to the dismissal of his petition must pay the costs of the company and of the opposing creditors should never be relaxed except in favour of a judgment creditor. As to this rule, and its relaxation, see the judgment of WYNN-PARRY, J., in *Re R. W. Sharman, Ltd.* (1), which I have already discussed in the judgment that I have just delivered in *Re A. E. Hayter & Sons (Portchester), Ltd.* (2). In that judgment, WYNN-PARRY, J., laid great stress on the circumstance that the petitioner was a judgment creditor. In at least three passages the learned judge puts the position of a judgment creditor as being quite different from that of any other creditor. I agree that a judgment creditor is in a particularly strong position in this connexion since his debt cannot be challenged. But it seems to me that in principle, a creditor who has not obtained judgment is in the same position, provided that his debt is not disputed, and I do not think that there is anything in the judgment of WYNN-PARRY, J., which precludes me from holding that the "fair practice", to quote the learned judge, is the same in the case of such a creditor. He, too, is entitled to a winding-up order unless other creditors intervene, and, if they do intervene, I do not see why he, any more than a judgment creditor, should have to pay costs provided he acts reasonably. The position would be quite different if the debt were disputed, so that it would be impossible to tell whether, apart from the intervention of other creditors, he would have been entitled to an order.

In the case before me, the petitioner's debt has never been disputed, and I do not think that they should be ordered to pay costs merely because they have not obtained judgment. Accordingly, no order will be made as to costs against the petitioner.

Order accordingly.

Solicitors: *Paisner & Co.* (for the petitioning creditor); *Ernest Randall & Rose* (for the company).

[*Reported by* JENIFER SANDELL, *Barrister-at-Law.*]

GEORGE COHEN 600 GROUP, LTD. v. MINISTER OF HOUSING AND LOCAL GOVERNMENT.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Ashworth and Lawton, J.J.),
May 10, 11, 1961.]

Town and Country Planning—Development—Recovery of scrap metal—Whether a material change of use from recovering “metal” from scrap—Former use involved smelting of raw materials and production of foundry and basic pig iron—Proposed use involved receiving scrap for the processing and storage of ferrous and non-ferrous metals and ancillary uses connected therewith—Whether the proposed use was a special industrial use within Town and Country Planning (Use Classes) Order, 1950 (S.I. 1950 No. 1131), Schedule, class 5, para. (iv) or, having regard to art. 3 (3), was a class 4 use.

Land had been used by the occupiers last preceding the appellants for purposes which came within class 5* of the Town and Country Planning (Use Classes) Order, 1950, namely, the reception of raw materials for the production of foundry and basic pig iron, the smelting of the raw materials and the casting of iron and slag. The appellants proposed to use the land for the reception of scrap metal, the separation of different scrap metals and of scrap metal from non-metallic substances, the grading of scrap metals, and the burning or shearing of scrap metal or its compression into briquettes. The scrap so prepared would be sold to trade consumers for use in their furnaces. A small proportion, however, of scrap metal received would be recovered as metal by cleaning or wire-brushing, and then would be sold for use as metal recovered. On appeal under s. 32† of the Town and Country Planning Act, 1959, on the question whether the proposed use was the “recovering of metal from scrap” within para. (iv) of class 5 of the Order of 1950, so that planning permission would not be needed, since by virtue of art. 3 (1) the change would not constitute development,

Held: the proposed use of the land would involve development for which planning permission was necessary for the following reasons—

(i) on the true construction of para. (iv) of class 5 of the Order of 1950 the word “metal” meant metal other than scrap metal, and the proposed use of the land was substantially a recovering of scrap metal which was a use within class 4‡ of the Order of 1950; moreover the fact that some small part of the scrap metal received on the land would be recovered there as metal by the cleaning process did not, by virtue of art. 3 (3)§ of the Order of 1950 prevent the use being a class 4 use.

(ii) class 5 was dealing with a genus of processes, viz., processes that involved atmospheric pollution, and did not cover a use consisting of the sorting or compressing of scrap metal to be sent to furnaces.

Appeal dismissed.

[**Editorial Note.** A new class 5 of the Town and Country Planning (Use

* Class 5, prior to its amendment by S.I. 1960 No. 1761, read: “Use for any work which is registrable under the Alkali, etc., Works Regulation Act, 1906, as extended by the Alkali, etc., Works Orders, 1928 to 1950, except a process ancillary to the getting, dressing or treatment of minerals, carried on in or adjacent to a quarry or mine.

“Use for any of the following processes, except as aforesaid, so far as not registrable under the above Act:—(i) smelting, calcining, sintering or other reduction of ores or minerals; (ii) converting, re-heating, annealing, hardening or carburising, forging or casting, of iron or other metals; (iii) galvanising; (iv) recovering of metal from scrap; (v) pickling or treatment of metal in acid; (vi) chromium plating.

(Special Industrial Group “A”)

† Section 32 is set out in footnote (1) on p. 684, post.

‡ Class 4 reads: “Use as a general industrial building for any purpose.”

§ Article 3 (3) of the Order of 1950 reads: “A use which is ordinarily incidental to and included in any use specified in the schedule to this order is not excluded from that use as an incident thereto merely by reason of its specification in the said schedule as a separate use.”

Classes) Order, 1950 (S.I. 1950 No. 1131) was substituted by the Town and Country Planning (Use Classes) (Amendment No. 2) Order, 1960 (S.I. 1960 No. 1761). This varied para. (iv) so as to read, "(iii) recovering of metal from scrap, or drosses or ashes", but it seems that the variation should not affect the application of the present decision to the substituted class 5.

For the Town and Country Planning (Use Classes) Order, 1950, as amended, see 21 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-Issue) 120.

For the Town and Country Planning Act, 1959, s. 32, see 39 HALSBURY'S STATUTES (2nd Edn.) 1207, and for the Tribunals and Inquiries Act, 1958, s. 9, see 38 HALSBURY'S STATUTES (2nd Edn.) 207.]

Appeal.

This was an appeal by way of motion by George Cohen 600 Group, Ltd. hereinafter called "the appellants") from a decision of the Minister of Housing and Local Government (hereinafter called "the minister") stated in a letter dated July 7, 1960, in which he held that the use the appellants proposed to make of land known as Cransley Iron Works, near Kettering, namely, for the processing and storage of ferrous and non-ferrous metals, would constitute a material change of use requiring planning permission. The facts are stated in the judgment of LORD PARKER, C.J.

The appellants, who were proposing to purchase the land concerned, had by letter of their surveyors dated Oct. 2, 1959, applied to the Northamptonshire County Council (hereinafter called "the council") for the latter to confirm that the proposed use for which the site was to be put, namely, the processing and storage of ferrous and non-ferrous metals and ancillary uses connected therewith came within class 5 in the schedule to the Town and Country Planning (Use Classes) Order, 1950 (S.I. 1950 No. 1131), within which class the use to which their predecessors, the Kettering Iron and Coal Co., Ltd., had put the site, had fallen; and thus to confirm that the proposed use involved no change of use for which planning permission was required. On Nov. 17, 1959, the clerk to Kettering Rural District Council wrote to the appellants' surveyors stating that the use to which the appellants proposed to put the site would, in the opinion of the local planning committee, constitute development within the meaning of the Town and Country Planning Act, 1947. The ground for the committee's determination was that the proposed use of the site was primarily for the storage of scrap metal, and that any processes for the recovery of metal from scrap would be merely incidental to the main use of the site as a dump for scrap metal. The letter concluded by stating that it should be regarded as a formal determination of the question under s. 17 of the Act of 1947 and that if the appellants were aggrieved by the decision they could appeal to the minister under s. 16 and s. 17 of that Act, within one month of their receipt of the clerk's letter. Accordingly, on Dec. 15, 1959, the appellants' solicitors wrote to the minister appealing against the determination of the local planning committee. The appellants and the council agreed to the minister's suggestion that the appeal should be decided from written statements submitted by both parties; and on Feb. 19, 1960, the appellants put forward their case and supported it by two statements—(i) of the managing director of the New Cransley Iron and Steel Co. who deposed as to the use of the site on and after July 1, 1948, namely, (a) the reception and preparation of raw materials for the production of foundry and basic pig iron in blast furnaces; (b) smelting of raw materials, yielding two liquid products, viz., iron and slag; (c) casting of iron and slag, preparation for market, loading and despatch; (ii) of a director of the appellants who deposed that the work on the site would consist generally of receiving all types of scrap, consisting of or containing metals which could be recovered for re-use, and carrying out the necessary processes for recovering such metals and making them ready for re-use. On the above statements the appellants contended that the proposed use was within class 5; they conceded that it might include in part a class 4 use but claimed that such a use was incidental to the main use

and, therefore, by art. 3 (3) of the Order of 1950 was not excluded from the main class 5 use. On Mar. 11, 1960, the council by their statement in writing contended on behalf of the local planning authority that the site would be used primarily for the storage of scrap metal and that, therefore, the proposed use was within class 10* of the Order of 1950; alternatively, should it be held that the processing of scrap constituted the main use, then the processing fell within the definition of a general industrial building† and, therefore, the proposed use would be within class 4. The minister gave his decision by way of letter dated July 7, 1960 (see p. 686, letters C and D, post), that the proposed use was not a special industrial use within class 5 and that planning permission was required. The grounds of the present appeal to the High Court from the minister's decision were stated in the notice of motion of appeal as follows:—(a) that the decision was wrong in law and that the appellants were dissatisfied with it in point of law; (b) that the use to which the appellants proposed to put the land involved, in the main, processes forming part of the use to which the land was put at the material time and accordingly did not constitute a material change of use; (c) that in so far as the use to which the appellants proposed to put the land differed from that to which it was put at the material time the different use did not constitute development for which permission was required because it fell within the same use class as the permitted use, and/or by reason of the provisions of the Town and Country Planning Acts and of the Order of 1950, permission was not required for it; (d) that the use proposed by the appellants was in law use for “the recovering of metal from scrap”, within the meaning of those words in class 5 of the Order of 1950 and accordingly, as the permitted use of the land was within the same use class, the decision was wrong in law; and (e) that the proposed use did not entail a material change of use.

Sir Derek Walker-Smith, Q.C., and Ian Percival for the appellants.

J. R. Cumming-Bruce for the respondent, the Minister of Housing and Local Government.

LORD PARKER, C.J.: This is an appeal by a company called George Cohen 600 Group, Ltd., from a decision of the Minister of Housing and Local Government given on July 7, 1960, in which he held that certain proposed user by the appellants would involve development and required planning permission. The case is of some interest as being the first, as far as I know, that has reached this court as an appeal on a point of law from the minister. It does so by virtue of s. 32 of the Town and Country Planning Act, 1959, (1), which applied s. 9 (1) of the Tribunals and Inquiries Act, 1958, (2) to a decision of the minister

* Class 10 read: “Use as a wholesale warehouse or repository for any purpose.”

† “General industrial building” is defined in art. 2 (2) of the order as “an industrial building other than a light industrial building or a special industrial building.”

(1) Section 32 of the Act of 1959, so far as material, reads: “(1) Section 9 (1) of the Tribunals and Inquiries Act, 1958 (which relates to appeals from certain tribunals), shall have effect in relation to any decision of the minister to which this section applies as it has effect in relation to a decision of any of the tribunals mentioned in that subsection, but with the substitution, for the reference to a party to proceedings before such a tribunal, of a reference to either of the following, that is to say, the person who made the application to which the minister's decision relates and the local planning authority.

“(2) This section applies to any decision of the minister made after the commencement of this Act [i.e., on or after Aug. 16, 1959]—(a) on an application under s. 17 of the Act of 1947 (which relates to applications to determine whether proposed operations or changes of use involve development or require planning permission) which is referred to the minister under the provisions of s. 15 of that Act as applied by that section; or (b) on an appeal from a decision of the local planning authority under the said s. 17, being an appeal brought under the provisions of s. 16 of that Act as so applied.”

(2) Section 9 (1), so far as material, reads: “If any party to proceedings before any such tribunal . . . is dissatisfied in point of law with a decision of the tribunal given [on or after Aug. 16, 1959] he may, according as rules of court may provide, either appeal therefrom to the High Court or require the tribunal to state and sign a case for the opinion of the High Court.” The date stated between square brackets in this footnote is the date at which s. 9 (1) of the Act of 1958 was applied to decisions of the minister; see s. 32 (2) of the Act of 1959 set out above.

made on an application to determine whether a proposed user constituted development and required permission.

Quite shortly, what happened was this. The appellants were minded to put to use a site which had previously been occupied by a company called the Cransley Ironworks near Kettering, that company being a subsidiary, as I understand it, of the Kettering Iron and Coal company. They applied to the local planning authority under the provisions of s. 17 (1) of the Town and Country Planning Act, 1947, to determine whether what they proposed to do on that land constituted and involved development for which planning permission was required. The local planning authority on Nov. 17, 1959, determined that the use to which they proposed to put the land would constitute development, and that permission was necessary. The appellants then appealed to the minister pursuant to s. 17 (2) of the Act of 1947, which applied the appeal machinery of s. 16 of that Act.

There is no doubt that the use to which the land was put by the Cransley Ironworks was a use which came within class 5 of the Town and Country Planning (Use Classes) Order, 1950. The use to which the land was put by that company was, first of all, for the reception and preparation of raw materials for the production of foundry and basic pig iron; secondly, for the smelting of the raw materials so obtained and, lastly, for the casting of iron and slag preparatory to marketing. The first process, namely, the reception and preparation of the material, involved this, that they received quantities of scrap metal on to the site, scrap which was in different forms, some of which could be smelted as received, some of which had to be fired to remove the oil, and some of which was mixed scrap in which the non-ferrous parts had to be removed from the rest, and some consisting of metal castings which had to be broken up or cut by oxy-acetylene torch. Thereafter, it was smelted and cast either in the form of ingots or in special moulds for floor plates, ballast blocks, and matters of that sort. Accordingly, it is clear that those processes came within class 5 of the order to which I have referred.

The use to which the appellants propose to put the land is shortly this. They are going to receive on to the land large quantities of scrap. They are then going to deal with that scrap according to its nature. The scrap that is received, if it is ferrous scrap, has to be separated from any other foreign elements with which it is connected, for example, asbestos lagging, insulation, and matters of that sort. It also has to be graded because the consumers in the iron and steel trade require ferrous scrap in four grades. That involves separating out different kinds of metal one from another, burning or shearing scrap which is too large for their customers' furnaces, compressing scrap into briquettes and other like processes. So far as the non-ferrous scrap is concerned, that has to be again separated, the metals and alloys, one from another. It has to be sheared, banded, bagged and despatched to the consumers of those metals. In addition, some of the scrap received is re-usable, if I may use that term, without any special process other than perhaps scraping, wire-brushing or cutting. Examples of that are plate cuttings received as such, which only have to be sheared, and old pipes, which could be wire-brushed and re-screwed. Except in the case of the category to which I have just referred, the scrap which is received has to be prepared in the way which I have indicated, and is then sold in that state to the iron and steel trade.

The appellants contend that this proposed use of the land also comes within class 5 of the Use Classes Order of 1950, in that in particular it comes within the words of para. (iv) "recovering of metal from scrap". Accordingly, if that were right they would be entitled to a decision that the use to which they proposed to put the land was a use within class 5 and that, accordingly, the original ironworks coming within that class, there is no development, and no planning permission is required.

Therefore, the sole question in the case is whether what the appellants propose to do in the way that I have shortly described can be said to be the process of recovering metal from scrap. The minister in his decision given on July 7, 1960, having referred to the history of the matter and indicated that the first question was whether the proposed use also fell within class 5, went on to refer to the decision of the local planning authority. The local planning authority had apparently decided as they did because they felt that the proposed use was really that for storage and came within class 10, which deals with "Use as a wholesale warehouse or repository for any purpose." The minister held that that was wrong, and he went on in these terms:

"In your letter of Feb. 19, 1960, it is stated: 'The appellants propose to process scrap metals and prepare them ready for smelting, despatching them elsewhere for the smelting; New Cransley did the same processing and preparing of scrap metal but went a stage further than is proposed and did the smelting on the said land'. In the minister's view this points to a significant difference between the former use and the proposed use of the land. The fact that a substantial part of the former use centred on the smelting of raw materials (including ironstone as well as scrap metal) and the casting of iron and slag characterised it as a special industrial use falling within class 5. Without this further stage in the complete process for 'the recovering of metal from scrap' the minister takes the view that the proposed use will not constitute a special industrial use falling within class 5. In his opinion a material change of use requiring planning permission is involved in the development proposed, and he determines accordingly."

It is said on behalf of the appellants in this court that the minister misdirected himself in coming to this conclusion, because he was influenced by the fact which he stated at the very outset, that there was a significant difference between the former use and the proposed use. It is, I think, rightly said, that the fact that there is a very material difference between the old use and the proposed use does not prevent both uses coming within the same class. Accordingly, his decision is criticised, first, in that respect. If I may deal shortly with that matter, I do not read that as a consideration which was influencing the minister in deciding that the proposed use was not a class 5 use. I think that he was merely pointing out that the appellants were proposing to do something different which *prima facie*, if it did not come within the class use, would amount to a material change of use within s. 12 (2) of the Act of 1947.

The next criticism is really directed to this, that the minister is saying that the appellants' proposed use does not come within class 5 because they are not going on to smelt. It is pointed out that that is not the question. True, the original occupiers of the land used it for smelting, which would come within para. (i) of class 5, but the mere fact that these appellants were not going to use it for smelting also cannot determine the question whether its proposed use comes within class 5. For my part, I do not think that the minister was saying that at all. He was saying:

"Without the process of smelting or some other process akin thereto, what you, the appellants, are proposing to do is not the recovering of metals from scrap within para. (iv) of class 5."

The real question is whether the minister was right in law in coming to that conclusion.

The court is indebted to counsel for their arguments in this case. The first question, as it seems to me, is whether what these appellants were doing was recovering "metal". It is said that on a plain and natural meaning, class 5, para. (iv) covers any getting back from general scrap of metal in whatever form, even if the result of the process is scrap metal. It is said, on the other hand, on behalf of the minister that "metal" in that paragraph does not include

scrap metal but means metal in a form ready for working. Whatever words are applied, it is said that it does not apply to what one would call scrap metal. For my part, I feel that one must construe "metal" in para. (iv) in the context of the whole of class 5. Read as a whole (3), it seems to me that "metal" where it is there used, as it is in para. (ii) and again in para. (v), is referring to something other than scrap metal. If that be right, it is clear that far and away the bulk of the processing which the appellants propose to do is the recovering of scrap metal which would be a class 4 use. It is true, as I have indicated, that a small part of the use to which the site will be put would involve, incidentally, the receipt of some metal which could be recovered as metal as opposed to metal scrap by mere cleaning or wire-brushing or cutting; but, in my judgment, that use of the land would be purely incidental to the other use of recovering metal scrap. Therefore, by reason of art. 3 (3) of the Use Classes Order (4), that would not prevent the proposed user from being a class 4 user.

Even if I am wrong in that, there is in my judgment a common denominator or genus to be found in class 5. I find it unnecessary to read it in detail, but the first use referred to there is "Use for any work which is registrable under the Alkali, etc. Works Regulation Act, 1906". That Act is dealing with the precautions which must be taken to prevent certain gases set out in the definition section in that Act being emitted and allowed to escape into the air. It is dealing with the escape of noxious and offensive gases, some escape of which is inevitable. By an order made in 1928 under that Act, the definition of "noxious and offensive gases" is further extended. Then class 5 goes on in this form as the second type of use: "Use for any of the following processes, . . . so far as not registrable under the above Act", and there then follow paras. (i) to (vi), para. (iv) of which is "recovering of metal from scrap". It seems to me, accordingly, that this class 5 is dealing and must be dealing with processes which involve what one may generally call atmospheric pollution.

It is suggested that really class 5 may be referring to processes in a particular, broadly a heavy, industry, and reference is made to class 6, class 7 and class 8. It is said that the processes of these classes can be similarly classified by reference to industries, class 6 dealing with building, class 7 the chemical industry, and class 8, soap, oil and tallow. Speaking for myself, in whatever way one treats classes 6, 7 and 8, I find it impossible to think that the draftsman in class 5 is dealing with what one might call an industry. It is coupling the processes dealt with in paras. (i) to (vi) dealing with metals, ores and minerals with alkali processes, and it is to be observed that the uses in respect of what I may call the metals only become uses within class 5 if the processes involved are not already registrable under the Alkali Act. In other words, it seems to me that the scheme of the draftsman here is to say that class 5 is dealing with processes involving atmospheric pollution. Accordingly, any work registrable under the Alkali, etc. Works Regulation Act, 1906, is included, and in addition the use for any of the processes thereafter set out in so far as they are not already registrable under that Act. Looking at the processes in paras. (i) to (vi) (though I confess I am ignorant of what is involved in chromium plating), it seems to me that all the others do involve the emission into the air of fumes, gases and matters of that sort. Accordingly, in my judgment, whatever meaning is given to the process of recovering metal from scrap in that context, it is such a process as involves in some form atmospheric pollution. It certainly does not cover sorting, cutting, compressing and the like in order to form scrap metal which can be sent to the furnaces. Accordingly, in my judgment the minister in this case came to a correct decision in point of law, and I would dismiss this appeal.

(3) Class 5 is set out in footnote *, p. 682, ante.

(4) Article 3 (3) is set out in footnote §, p. 682, ante.

ASHWORTH, J.: I agree that this appeal should be dismissed, and I would only desire to add a word on one point. The words in para. (iv) are "recovering of metal from scrap". One of the major problems in this case is whether the word "metal" must be regarded as meaning metal in its raw state or in a state in which it can be used for classification, or whether it includes scrap metal. In class 5 the word "metal" or "metals" appears three times, in (ii), in (iv) and in (v). In my judgment "metal" for the purposes of para. (iv) does not include scrap metal, and the process contemplated by that paragraph is the recovering of metal from scrap in a form in which the metal truly may be said to be restored to its original metallic state. The word "recovering" is, in my view, different from the word "isolating". The process which the appellants were proposing to carry on would be more accurately described in these words, "Isolating scrap metal from scrap preparatory to the recovery of metal from the scrap metal".

LAWTON, J.: I agree with both the judgments which have been delivered, and have nothing to add.

Appeal dismissed.

Solicitors: *Simmons & Simmons* (for the appellants); *Solicitor, Ministry of Housing and Local Government* (for the minister, the respondent).

[*Reported by N. P. METCALFE, ESQ., Barrister-at-Law.*]

R. v. SPURGE.

[COURT OF CRIMINAL APPEAL (Lord Parker, C.J., Hilbery, Gorman, Salmon and Stevenson, JJ.), April 18, May 18, 1961.]

Road Traffic—Dangerous driving—Defence—Mechanical defect—Knowledge—Brakes on car recently purchased then stated to have been overhauled—Brakes in fact defective—Defect known to driver—Whether defence of mechanical defect available where driver knew of defect—Road Traffic Act, 1930 (20 & 21 Geo. 5 c. 43), s. 11 (1).

It is a defence to a charge of dangerous driving and to a charge of careless driving that the driver, without fault of his own, was deprived of control of the motor vehicle by a mechanical defect therein of which he did not know and which was not such as he should have discovered if he had exercised reasonable prudence; the burden of proof of the defence is not on the accused, though it is for him to put forward the defence.

Hill v. Baxter ([1958] 1 All E.R. 193) considered.

Principle stated by LORD GODDARD, C.J., in *Simpson v. Peat* ([1952] 1 All E.R. at p. 448) applied.

The appellant whilst driving a sports car round a sharp and dangerous left-hand bend went over the double white lines in the middle of the road on to the wrong side and collided with an oncoming motor scooter. He was charged with driving a motor vehicle in a manner dangerous to the public contrary to s. 11 (1) of the Road Traffic Act, 1930*. The appellant had taken delivery of the car only a few days before the accident and had been told by the vendor that the brakes had been overhauled. The brakes were in fact defective, and their application when going at a moderate speed pulled the car to its offside of the road. The appellant was aware of this tendency. He contended that the accident was caused by the faulty brake mechanism and not by the manner in which he was driving. On appeal from conviction,

Held: as the appellant was aware of the tendency of the car to move to the right when the brakes were applied, the defence of mechanical defect

* Section 11 (1), so far as relevant, is set out at p. 690, letter D, post.

(stated at p. 688, letter F, ante) could not succeed, since it was dangerous for him to drive the vehicle as he did with knowledge of this mechanical defect.

Appeal dismissed.

[Editorial Note. The Road Traffic Act, 1930, s. 11 (1), as amended by the Road Traffic Act, 1956, s. 51 and para. 12 (1) of Sch. 8 thereto, has been repealed and re-enacted by the Road Traffic Act, 1960, s. 2 (1), which Act came into force on Sept. 1, 1960.

As to dangerous driving, see 33 HALSBURY'S LAWS (3rd Edn.) 623, para. 1048, and as to careless driving, see *ibid.*, p. 624, para. 1052.

For the Road Traffic Act, 1930, s. 11, see 24 HALSBURY'S STATUTES (2nd Edn.) 586.]

Cases referred to:

Hill v. Baxter, [1958] 1 All E.R. 193; [1958] 1 Q.B. 277; 122 J.P. 134; 42 Cr. App. Rep. 51; [1958] 2 W.L.R. 76; 3rd Digest Supp.

Simpson v. Peat, [1952] 1 All E.R. 447; [1952] 2 Q.B. 24; 116 J.P. 151; 3rd Digest Supp.

Woolmington v. Director of Public Prosecutions, [1935] All E.R. Rep. 1; [1935] A.C. 462; 104 L.J.K.B. 433; 153 L.T. 232; 25 Cr. App. Rep. 72; 14 Digest (Repl.) 493, 4768.

Appeal.

This was an appeal by Frederick Albert Spurge against his conviction and sentence at Hampshire Quarter Sessions on Sept. 27, 1960. He was convicted before the deputy chairman and a jury of driving a motor vehicle in a manner dangerous to the public contrary to s. 11 (1) of the Road Traffic Act, 1930. He was fined £50 and disqualified for driving for twelve months. Leave to appeal was granted by the court (LORD PARKER, C.J., WINN and WIDGERY, JJ.) on Feb. 27, 1961, against both conviction and sentence, the hearing to be before a Full Court. Suspension of the disqualification would continue until the determination of the appeal. The facts appear in the judgment of the court.

A. K. Twaddle for the appellant.

H. J. M. Tucker and R. Hughes for the Crown.

Cur. adv. vult.

May 18. SALMON, J., at the request of LORD PARKER, C.J., read the following judgment of the court: The appellant was convicted at Hampshire Quarter Sessions on Sept. 27, 1960, of driving a motor vehicle in a manner dangerous to the public contrary to s. 11 (1) of the Road Traffic Act, 1930. He was fined £50 and disqualified from driving for twelve months, and now appeals, by leave of this court, against conviction and sentence.

The facts of the case lie within a short compass. On May 14, 1960, the appellant was driving a Ferrari sports car on a road between Havant and Hayling Island. As he was travelling round a very sharp and dangerous left-hand bend, his motor car went over the double white lines in the middle of the road on to his wrong side of the road and there collided with an oncoming Lambretta motor scooter.

Evidence was called on behalf of the prosecution to the effect that the appellant was attempting to negotiate the bend very much too fast. The case for the appellant was that he approached the bend at about thirty miles an hour and that on being warned by his passenger of its dangerous nature, he decided to go round the bend at a snail's pace; accordingly, he changed down from third to second gear and applied his brakes somewhat vigorously. This application of the brakes nearly wrenched the steering wheel out of his hands and pulled the car on to its wrong side of the road in such a fashion that it was impossible for him to control it. It is to be observed that in his statement made to the police immediately after the accident, the appellant did not mention this loss of control and, indeed, denied that his motor car had crossed the white lines in

the middle of the road. Two expert witnesses were called on behalf of the appellant who had examined the motor car about two months after the accident. They testified that the brakes were in very bad condition and that a vigorous application of the brakes at thirty miles per hour pulled the car fairly violently to its offside of the road. The appellant had taken delivery of the motor car a few days before the accident and had driven it from Southampton to his home, a distance of about twenty miles. He had been told by the man from whom he had bought it that the brakes had been overhauled. He noticed, however, during the course of his twenty-mile drive home, that the brakes had what he described as a slight tendency to pull the car to the right. The appellant contended that he was not guilty of the offence charged because the danger created by his motor car when it careered across the road and collided with the oncoming motor scooter was due solely to the defect in its brakes and was in no way attributable to the manner in which he was driving. This case, therefore, raises a point hitherto undecided, namely, whether a mechanical defect can ever be relied on as a defence to a charge of driving in a manner dangerous to the public, and, if so, what are the circumstances in which a mechanical defect can be so relied on.

The Road Traffic Act, 1930, s. 11 (1), provides:

"If any person drives a motor vehicle on a road recklessly, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road"

he commits an offence. If, on a prosecution under this section, the Crown proves that a motor vehicle driven by an accused in fact endangers the public, that is strong evidence and, indeed, in any but the most exceptional circumstances, is likely to be regarded by the jury as conclusive evidence that the accused was driving in a manner dangerous to the public. If, however, a motor car endangers the public solely by reason of some sudden overwhelming misfortune suffered by the man at the wheel for which he is in no way to blame—if, for example, he suddenly has an epileptic fit or passes into a coma, or is attacked by a swarm of bees or stunned by a blow on the head from a stone, then he is not guilty of driving in a manner dangerous to the public (*Hill v. Baxter* (1)). It would be otherwise if he had felt an illness coming on but had still continued to drive, for that would have been a manifestly dangerous thing to do. It is true that in the examples given above it may be said that in a sense the man at the wheel was not driving at all, and therefore not driving dangerously. Indeed, that was the view expressed by the Divisional Court in *Hill v. Baxter* (1), a view with which this court entirely concurs. But it is also true that the sudden mischance suffered by the man at the wheel totally prevented him from controlling the movements of the motor car, and that no fault of his in any way contributed to the danger. On that ground also, it seems to this court that even if the man at the wheel could in any sense be said to be driving, he would not be guilty of driving in a manner dangerous to the public. There does not seem to this court to be any real distinction between a man being suddenly deprived of all control of a motor car by some sudden affliction of his person and being so deprived by some defect suddenly manifesting itself in the motor car. In both cases the motor car is suddenly out of control of its driver through no fault of his. Supposing a man is driving a motor car at a slow speed close to his nearside of a wide road, keeping a proper look-out and exercising all due care and skill, he is clearly driving in a safe manner. He turns the steering wheel to negotiate a gentle bend, but owing to a mechanical defect in the steering mechanism of which he has and could have no knowledge, the steering suddenly fails completely and the wheel turns helplessly in his hands so that the motor

car careers across the road into an oncoming vehicle. In these circumstances clearly the motor car endangers the safety of the member of the public driving the oncoming vehicle. Nevertheless, it could not truly be said that this danger was created by the manner of the driving of the motor car which had gone out of control. There would be nothing in the driving which created the danger. It is quite true that if the motor car had not been driven on the road, no danger to the public would have occurred. It is equally true that if the oncoming vehicle had not been on the road and no member of the public had been in the vicinity, there would have been no danger to the public. The driving of neither vehicle, however, would be the cause but the driving of each would be the occasion of the danger. As LORD GODDARD, C.J., said in *Simpson v. Peat* (2):

“It is by no means impossible, and, indeed, it must on occasions happen, that a situation of danger arises in which a motorist is involved, but it cannot be said that he caused it by driving dangerously . . . Whether the charge is under s. 11 (1) or s. 12 (1), the offence can be committed although no accident takes place. Equally, because an accident does occur it does not follow that a particular person has driven either dangerously or without due care and attention. But if he has, it matters not why he did so. Suppose a driver is confronted with a sudden emergency through no fault of his own. In an endeavour to avert a collision he swerves to his right—it is shown that had he swerved to the left the accident would not have happened. That is being wise after the event, and, if the driver was, in fact, exercising the degree of care and attention which a reasonably prudent driver would exercise, he ought not to be convicted, even though another, and, perhaps, more highly skilled, driver would have acted differently.”

The facts in *Simpson v. Peat* (3) were quite different from those in this case, but the principle enunciated by LORD GODDARD, C.J., is in point. This court desires to emphasise that cases in which a mechanical defect can successfully be relied on as a defence to a charge of dangerous driving must be rare indeed. This defence has no application where the defect is known to the driver or should have been discovered by him had he exercised reasonable prudence. To drive a motor car in such circumstances is manifestly dangerous. The essence of the defence is that the danger has been created by a sudden total loss of control in no way due to any fault on the part of the driver.

It has been argued by counsel for the Crown that even if a mechanical defect can operate as a defence, yet the onus of establishing this defence is on the accused. It is of course conceded by the Crown that this onus is discharged if the defence is made out on a balance of probabilities. In the opinion of this court, the contention made on behalf of the Crown is unsound, for in cases of dangerous driving the onus never shifts to the defence. This does not mean that if the Crown proves that a motor car driven by the accused has endangered the public, the accused could successfully submit at the end of the case for the prosecution that he had no case to answer on the ground that the Crown had not negatived the defence of mechanical defect. The court will consider no such special defence unless and until it is put forward by the accused. Once, however, it has been put forward it must be considered with the rest of the evidence in the case. If the accused's explanation leaves a real doubt in the mind of the jury, then the accused is entitled to be acquitted. If the jury rejects the accused's explanation, the jury should convict. It has been suggested by counsel for the Crown that the onus of establishing any defence based on mechanical defect must be on the accused because necessarily the facts relating to it are peculiarly within his own knowledge. The facts, however, relating to a defence of provocation or self-defence in a charge of murder are often peculiarly within the knowledge of the accused since often the only persons present at the time of the

(2) [1952] 1 All E.R. at p. 448; [1952] 2 Q.B. at p. 27.

(3) [1952] 1 All E.R. 447; [1952] 2 Q.B. 24.

killing are the accused and the deceased. Yet once there is any evidence to support these defences, the onus of disproving them undoubtedly rests on the prosecution (*Woolmington v. Director of Public Prosecutions* (4)). There is no rule of law that where the facts are peculiarly within the knowledge of the accused, the burden of establishing any defence based on these facts shifts to the accused. No doubt there is a number of statutes where the onus of establishing a statutory defence is placed on the accused because the facts relating to it are peculiarly within his knowledge. But we are not here considering any statutory defence. It is most important that the summing-up should contain a careful direction as to the onus of proof. It is equally important that the jury should be clearly told the narrow limits, laid down in this judgment, within which a defence based on sudden mechanical defect can operate.

Counsel for the defence has criticised the summing-up of the learned deputy chairman on the grounds that the defence was not sufficiently put to the jury and that the direction as to the onus of proof was unsatisfactory. In the opinion of this court, however, it is unnecessary to consider these criticisms in detail because on the evidence in this case it would have been impossible for the defence based on mechanical defect to have succeeded. The accused admitted that he was aware of the tendency of his motor car to pull to the right when its brakes were applied. It was or should have been obvious to him that the more vigorously the brakes were applied the stronger this tendency would be. It was precisely this mechanical defect which, according to the accused, caused the accident. Even had the jury accepted the whole of the defence evidence it would have been their duty to convict for it was clearly dangerous for the accused to have driven his motor car as he did with the knowledge which he possessed.

As to the appeal against sentence, this court considers that this was a bad case of dangerous driving and the sentence was very lenient. There is certainly no reason to reduce it. The appeals against conviction and sentence will, accordingly, be dismissed.

LORD PARKER, C.J.: The appellant was disqualified from driving for twelve months. That disqualification was suspended by the court pending the determination of the appeal. Now that the appeal has been dismissed, his disqualification will revive.

Appeal dismissed.

Solicitors: *Lesser & Co.* (for the appellant); *R. V. Stokes, Neville-Smith & Grubb*, Portsmouth (for the Crown).

[*Reported by N. P. METCALFE, ESQ., Barrister-at-Law.*]

J. COOKE & SONS, LTD. v. BINDING AND ANOTHER.

[COURT OF APPEAL (Upjohn and Donovan, L.JJ.), May 11, 1961.]

Debt—Committal—County court order—Suspension of order on payment of monthly instalments—Whether county court has jurisdiction to vary amount of instalments—Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 5, proviso (2)—County Court Rules, 1936, Ord. 24, r. 18, r. 19.

There is jurisdiction under proviso (2) to s. 5 of the Debtors Act, 1869*, to vary from time to time the amount of instalments made payable by a committal order as a condition of suspending the committal to prison.

Wiltshire v. Fell ([1959] 3 All E.R. 862) distinguished.

Per DONOVAN, L.J.: jurisdiction for this purpose is also to be found in C.C.R., Ord. 24, r. 18 and r. 19†.

[As to orders on judgment summonses, see 2 HALSBURY'S LAWS (3rd Edn.) 645, para. 1281; as to the acceleration of instalment payments under county court judgments, see 9 HALSBURY'S LAWS (3rd Edn.) 260, para. 609.

For the Debtors Act, 1869, s. 5, see 2 HALSBURY'S STATUTES (2nd Edn.) 294.]

Case referred to:

Wiltshire v. Fell, [1959] 3 All E.R. 862; [1960] 1 Q.B. 181; [1959] 3 W.L.R. 984; 3rd Digest Supp.

Interlocutory Appeal.

This was an appeal by J. Cooke & Sons, Ltd., the judgment creditors, against an order of His Honour JUDGE NICKLIN made on Mar. 2, 1961, at Birmingham County Court, refusing their application to increase the instalments payable as a condition of suspending a committal order made against the second defendant, Robert Gordon Binding. On June 23, 1959, the judgment creditors obtained judgment against Francis Lucy Binding (married woman) and Robert Gordon Binding for £58 10s., which sum the county court judge, exercising the powers conferred on him by the County Courts Act, 1959, s. 99, ordered to be paid by instalments of £5 per month. No instalment was paid and, after three instalments were in arrear, the judgment creditors applied by judgment summons for the committal of the second defendant under the Debtors Act, 1869, s. 5. On Dec. 8, 1959, a committal order was made committing him to prison for ten days, suspended on payment of 10s. monthly. This sum was regularly paid. It subsequently appeared from a certificate given by the second defendant's employers, after the date of the committal order, that he was earning an average of £15 a week, over the period Dec. 11, 1960 to Jan. 29, 1961. On Feb. 14, 1961, the judgment creditors gave notice of intention to apply for an order to increase to £2 the amount payable as a condition of suspending the committal order. When the application came before the county court judge on Mar. 2, 1961, he intimated that if he had had jurisdiction to do so, he would have increased the monthly instalments to 25s., but he held that he had no power to increase the amount payable as a condition of suspending an existing committal order and he dismissed the application. The judgment creditors appealed to the Court of Appeal for an order that the decision of the county court judge be set aside and that the amount payable under the committal order be increased to 25s. per month. The second defendant informed the judgment creditors that he did not propose to appear on the hearing of the appeal as he was agreeable to pay the sum of 25s. a month.

W. A. Macpherson for the appellant judgment creditors.

The respondent judgment debtor did not appear and was not represented.

* The relevant terms of the Debtors Act, 1869, s. 5, proviso (2), are set out at p. 694, letter B, post.

† For the terms of C.C.R., Ord. 24, r. 18, r. 19, see footnote (3), p. 695, post.

UPJOHN, L.J., stated the facts and continued: The county court judge came to the conclusion that he had no jurisdiction to increase or reduce the instalments payable under a committal order. In that I venture to think that he was in error. He appears to have thought that he was precluded from varying the order by a judgment of this court in *Wiltshire v. Fell* (1).

It is, I think, unnecessary for me to read s. 5 of the Debtors Act, 1869, in full, for it is very well known; I need only read proviso (2) to s. 5, which says:

“For the purposes of this section any court may direct any debt due from any person in pursuance of any order or judgment of that or any other competent court to be paid by instalments, and may from time to time rescind or vary such order.”

The true ambit of the section was discussed in *Wiltshire v. Fell* (1), which I have just mentioned. The headnote reads as follows:

“A county court judge who has made an order of committal for debt under s. 5 of the Debtors Act, 1869, is *functus officio* and cannot revoke the committal order.”

Therefore the actual decision in that case is not in point here, because neither party is asking for revocation of the committal order.

In his judgment HODSON, L.J., said this (2):

“... the position is that the Act having given no power to revoke a committal order, the committal order which has been made must stand and can only be revoked on appeal. That does not in any way take away from the learned judge the power to vary the effect of the order, or to suspend its operation, or in any way remove his control of the case.

“The difficulty in which the creditor is, if the order is revoked, is that he cannot obtain any further sanction in respect of the amount which was involved in the order of Jan. 19, 1959, in the future. For these reasons, I think that the appeal must be allowed and the order of the learned judge must be varied in so far as he has purported to revoke the order for commitment. He did, in fact, having revoked the order for commitment, make a different instalment order, which, I suppose, would operate, as a term of the suspension of the committal until the matter is further reviewed by the learned judge, at the rate of 5s. a week. All that this court is doing and all that it is asked to do, is to reverse the learned judge’s revocation of the committal order itself.”

HODSON, L.J., was very careful to confine that decision to a question of revoking the committal order itself, and it is interesting to observe that he stated that the term of suspension, until the matter was further reviewed by the judge, would be at the rate of 5s. a week, whereas until the purported revocation of the order it seems that the amount ordered to be paid as a term of the suspension was 2s. 6d. per week. So that the court in that case found no difficulty in doing what the judgment creditors are seeking in this case.

With all respect to the learned county court judge it seems to me quite plain that there is ample jurisdiction under the proviso to s. 5 of the Debtors Act, 1869, which I have read, to vary the amount payable under the order of suspension according to the circumstances that from time to time exist. Thus if the judgment debtor can show that since the order was made his means have greatly decreased, the court has power to reduce the instalments ordered to be paid as a condition of the suspension; and although I do not have in mind any particular case, I am sure I have done that on many occasions when hearing judgment summonses in bankruptcy. Per contra, if the judgment creditor can establish that the means of the judgment debtor were greater than he was able to prove at the former hearing, or that those means have increased since the date of the

(1) [1959] 3 All E.R. 862; [1960] 1 Q.B. 181.

(2) [1959] 3 All E.R. at p. 865; [1960] 1 Q.B. at p. 185.

order, it seems to me that there is ample jurisdiction to enable the court on the application of the judgment creditor to fix a greater sum to be paid by instalments as a term of the continued suspension of the committal order. In this case, with all respect to the learned judge, there was ample jurisdiction for him, being satisfied as to the proper sum, to substitute the sum of 25s. per month in lieu of 10s. per month.

One of the objections of the learned county court judge, in a very careful note which he has written for the benefit of the court, was that if it was possible for a judgment creditor or debtor to come again and again before the court there would follow a consequence for which I will quote his words:

"To grant applications such as the present one would mean that all committal orders would be subject to review on application by either the creditor or the debtor as often as either so desires. In this court, where any of three judges might have made the original order, it would virtually introduce a method of successive appeals from any order which ceased to satisfy either party."

I cannot accept that view. Of course, it is open to either party to make further applications to vary the amount ordered to be paid as a term of the suspension; but it is quite clear that if subsequent applications are made without having some new evidence to justify an alteration of the order formerly made, the application would be doomed to failure and the applicant would be mulcted in costs. I think that the jurisdiction in this case is plain, and I would allow the appeal.

DONOVAN, L.J.: I agree. The jurisdiction which the county court judge thought that he lacked is to be found not only in proviso (2) to s. 5 of the Debtors Act, 1869, but also in Ord. 24, r. 18 and r. 19 of the County Court Rules, 1936 (3).

Appeal allowed.

Solicitors: *Stafford Clark & Co.*, agents for *Faber & Co.*, Birmingham (for the appellant judgment creditors).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

(3) C.C.R., Ord. 24, r. 18, reads: "Where a judgment has been given or an order made for the payment of any sum by instalments or otherwise, and it appears to the court that the person liable under the judgment or order is unable to pay the sum ordered to be paid at the time or by the instalments ordered, the court may, on the application of such person made on notice, order the amount unpaid under the judgment or order to be paid by instalments, or, if already payable by instalments, by the same or smaller instalments, and may from time to time vary such order."

Rule 19 reads: "If it appears to the court that the person liable under any judgment or order for payment by instalments is able to pay the sum ordered to be paid either in one sum or by larger instalments than those ordered, the court may, on the application of the person entitled to enforce the judgment or order made on notice, order the amount unpaid to be paid in one sum, or by larger instalments than those previously ordered, and may from time to time vary such order."

MARTEN AND OTHERS v. FLIGHT REFUELLING, LTD. AND ANOTHER.

[CHANCERY DIVISION (Wilberforce, J.), April 13, 14, 17, 18, 19, 20, 24, May 4, 1961.]

Restrictive Covenant—Restrictive covenant affecting land—Requisitioned land at date of covenant by purchaser—Compulsory purchase of land by government department subsequently, subject to restrictive covenant—Restrictive covenant limiting use to agricultural use—Land acquired as reserve airfield in emergency—Occupation of land meanwhile by industrial company, under licence from Air Ministry—Land preserved by company as an airfield but used by company for industrial activities as well as for purposes of Air Ministry—Whether restrictive covenant enforceable.

The Crichel Estate, which had been in the ownership of the first plaintiff's family for many years, was an agricultural estate in Dorset, about seven thousand five hundred acres in extent, and surrounded by similar estates in a district which was entirely agricultural. A farm of some 562 acres, known as C. farm, formed part of the estate and had been farmed by H. since 1920 under a tenancy agreement. After the death of the first plaintiff's father in 1940, the legal estate in the Crichel Estate was vested in the second plaintiffs, as the father's special executors, the equitable owner being the first plaintiff (then an infant), who had an estate in tail male. In July, 1942, some two hundred acres of C. farm were requisitioned by the Air Ministry, under its statutory powers, for use as an aerodrome. By a conveyance dated Mar. 25, 1943, the second plaintiffs conveyed, by way of sale, the whole of C. farm to H. By cl. 2 of the conveyance the purchaser covenanted with the vendors and their successors in title that no part of the conveyed land nor any building thereon should at any time thereafter be used for any purpose other than agricultural purposes without the consent of the vendors. By a proviso to cl. 2, if the vendors sold any part of their land immediately adjoining C. farm free from any restriction as to user, the purchaser of the farm should be free from the restriction. The conveyance did not expressly annex the benefit of the restrictive covenant to any land, but a recital in the conveyance stated that, by a vesting deed, dated Nov. 26, 1928, "the property hereinafter described (with other property)" had been vested in the first plaintiff's father in fee simple on the trusts of a settlement of 1928. In April, 1943, the restrictive covenant was registered as a land charge against C. farm in the register of land charges, under the Land Charges Act, 1925, s. 10 (1). In 1947 the Air Ministry, while still in possession of the requisitioned land, permitted the defendant company, an industrial concern, to enter into occupation as a licensee, and since November, 1949, the company had occupied the whole of the requisitioned land and the buildings thereon (with some minor exceptions). By the terms of licence, the company was given rights over the requisitioned land in the nature of a tenancy, paying a substantial rent, and undertook to maintain on the land an airfield for the use of the ministry in an emergency. Apart from the duty to maintain the airfield, the company was left free to carry on its own business on the requisitioned land. Since 1950 the company's occupation of the land was under an assurance that the Air Ministry intended to buy the site and grant a lease to the company. At no material time was the company informed by the plaintiffs of the existence of the restrictive covenant. In September, 1950, the first plaintiff, having attained her majority, disentailed her property and became absolute owner, and the second plaintiffs assented to the vesting in her of the Crichel Estate in fee simple, but the assent contained no reference to the restrictive covenant in the conveyance of Mar. 25, 1943.

In April, 1955, the Air Ministry served on H.'s executors a notice to treat* in respect of the greater part of the requisitioned land, and in August, 1955, the ministry served a notice to treat on the first plaintiff in regard to a portion of the Crichel Estate immediately adjoining C. farm. On July 1, 1958, H.'s executors conveyed to the Secretary of State for Air the greater part of the requisitioned land, the conveyance being expressed to be subject to the restrictive covenant so far as the same was valid, subsisting and capable of being enforced. The land conveyed thus ceased to be subject to requisition, but a small part of the requisitioned land, not conveyed, remained in requisition†. In 1959 the plaintiffs commenced an action against the company (the ministry being later added as a defendant) to establish the enforceability of, and, so far as possible, to enforce, the restrictive covenant in regard to the part of C. farm now owned by the ministry. On Jan. 11, 1961, the part of Crichel Estate which was the subject of the notice to treat served by the Air Ministry on the first plaintiff in 1955 was conveyed by her to the ministry free from any restriction as to user. The company's main activities at the present time were: (a) the maintenance of the airfield for the ministry; (b) design and development of flight refuelling equipment and the fitting of the equipment to Royal Air Force aircraft; (c) work on "Meteor drones" for the ministry; and (d) miscellaneous, including work on Belgian service aircraft, nuclear work for the Atomic Energy Administration and other concerns, and commercial activities with equipment similar in character to flight refuelling equipment but capable of general use in industry. The company hoped to attain a secure tenure of the airfield through a lease and to extend considerably its industrial activities.

Held: (i) the plaintiffs were entitled to the benefit of the restrictive covenant (see p. 708, letter F, post) for the following reasons—

(a) an intention that the restrictive covenant should be for the benefit of the Crichel Estate could, and should, be found from the surrounding circumstances, and it was not necessary that the intention should be expressly stated, or that the land to be benefited should be specifically identified, in the conveyance in which the restrictive covenant was contained (see p. 703, letter A, and p. 705, letter A, post).

Re Union of London & Smith's Bank, Ltd.'s Conveyance, Miles v. Easter ([1933] All E.R. Rep. 355), and *Newton Abbot Co-operative Society, Ltd. v. Williamson & Treadgold, Ltd.* ([1952] 1 All E.R. 279) considered and applied.

(b) the land for which the benefit of which the restrictive covenant was taken, viz., the Crichel Estate, was capable of being benefited by the covenant (see p. 706, letters D and E, and p. 708, letter F, post).

(c) moreover, although the first plaintiff was not an express assignee of the benefit of the restrictive covenant, she, as the person for whose benefit in equity the covenant was made, and the second plaintiffs, as the original covenantees, were entitled together to enforce the covenant by action, subject to any statutory protection available to the defendants (see p. 708, letter E, post).

Lord Northbourne v. Johnston & Son ([1922] All E.R. Rep. 144) followed.

(ii) the restrictive covenant bound and continued to bind the land conveyed to the Secretary of State for Air by the conveyance dated July 1, 1958 (see p. 710, letter E, post) for the following reasons—

* The Air Ministry, in its defence, stated that the notice was given pursuant to the Defence Acts, 1842 to 1935, the Ordnance Board Transfer Act, 1855, the Air Force (Constitution) Act, 1917, the Air Force (Application of Enactments) (No. 1) Order, 1918, and other relevant statutory provisions.

† The piece of land remaining in requisition, referred to as "the communal site" was conveyed to the Air Ministry after this action had been begun; it was conceded that no relief could be granted in respect of it.

(a) notwithstanding that the land was in requisition when the restrictive covenant was entered into and might be used under statutory powers in a manner inconsistent with the covenant, it became binding on the land (see p. 708, letters H and I, post).

Manchester, Sheffield & Lincolnshire Ry. Co. v. Anderson ([1898] 2 Ch. 394) and dictum of LUXMOORE, J., in *Re Simeon* ([1937] 3 All E.R. at p. 153) applied.

(b) the compulsory acquisition of the land by the Secretary of State for Air was not a sale within the proviso to the restrictive covenant, since the word "sale" there meant a consensual sale; accordingly the compulsory acquisition had not freed the land from the covenant (see p. 709, letter I, to p. 710, letter A, and p. 710, letter E, post).

Kirkness v. John Hudson & Co., Ltd. ([1955] 2 All E.R. 345) applied.

(iii) the plaintiffs were not entitled, however, so to enforce the restrictive covenant by injunction as to restrict the use of the land by the ministry (or by the defendant company as licensee of the ministry) for the statutory purposes for which it had been compulsorily acquired (see p. 711, letter I, post), viz., for the service of the Royal Air Force or for the defence of the realm; accordingly an injunction would be granted to restrain only the use of the land for purposes which were neither such statutory purposes nor agricultural purposes, viz., nuclear work and work for the Belgian air force (see p. 720, letters F to I, post), and in determining on the grant of an injunction and its scope—

(a) the approach of the court should be a broad one, so as not to embark on inquiries into matters that were essentially for the administrative discretion of the government (see p. 717, letter F, post).

Hawley v. Steele (1877), 6 Ch.D. 521) applied.

(b) the court was entitled to take into account that the plaintiffs had not drawn the defendant company's attention to the existence of the restrictive covenant, although a land charge had been registered in respect of it which was in law notice of its existence (see p. 719, letter H, post).

[As to covenants running with land, see 14 HALSBURY'S LAWS (3rd Edn.) 559-565, paras. 1042-1052, and 34 HALSBURY'S LAWS (3rd Edn.) 367-369, paras. 646-648, 650; and for cases on the subject, see 40 DIGEST (Repl.) 339-343, 2764-2783.]

Cases referred to:

Bailey v. De Crespigny, (1869), L.R. 4 Q.B. 180; 38 L.J.Q.B. 98; 19 L.T. 681; 33 J.P. 164; 11 Digest (Repl.) 293, 1981.

Ballard's Conveyance, Re, [1937] 2 All E.R. 691; [1937] Ch. 473; 106 L.J.Ch. 273; 157 L.T. 281; 40 Digest (Repl.) 343, 2783.

Clark v. London School Board, (1874), 9 Ch. App. 120; 43 L.J.Ch. 421; 29 L.T. 903; 38 J.P. 101; 11 Digest (Repl.) 146, 248.

Formby v. Barker, [1903] 2 Ch. 539; 72 L.J.Ch. 716; 89 L.T. 249; 40 Digest (Repl.) 333, 2727.

Hawley v. Steele, (1877), 6 Ch.D. 521; 46 L.J.Ch. 782; 37 L.T. 625; 39 Digest 340, 262.

Kirkness v. Hudson (John) & Co., Ltd., [1955] 2 All E.R. 345; [1955] A.C. 696; [1955] 2 W.L.R. 1135; 28 Digest (Repl.) 310, 1356.

London County Council v. Allen, [1914] 3 K.B. 642; 83 L.J.K.B. 1695; 111 L.T. 610; 78 J.P. 449; 40 Digest (Repl.) 328, 2698.

Manchester, Sheffield & Lincolnshire Ry. Co. v. Anderson, [1898] 2 Ch. 394; 67 L.J.Ch. 568; sub nom. *Anderson v. Manchester, Sheffield & Lincolnshire Ry. Co.*, *Manchester, Sheffield & Lincolnshire Ry. Co. v. Anderson*, 78 L.T. 821; 40 Digest (Repl.) 444, 320.

- Newton Abbot Co-operative Society, Ltd. v. Williamson & Treadgold, Ltd.*, [1952] 1 All E.R. 279; [1952] Ch. 286; 40 Digest (Repl.) 353, 2839.
- Northbourne (Lord) v. Johnston & Son*, [1922] All E.R. Rep. 144; [1922] 2 Ch. 309; 92 L.J.Ch. 12; 128 L.T. 496; 40 Digest (Repl.) 352, 2834.
- Renals v. Cowlishaw*, (1878), 9 Ch.D. 125; *affd.*, C.A., (1879), 11 Ch.D. 866; 48 L.J.Ch. 830; 41 L.T. 116; 40 Digest (Repl.) 346, 2796.
- Rogers v. Hosegood*, [1900] 2 Ch. 388; 69 L.J.Ch. 652; 83 L.T. 186; 40 Digest (Repl.) 340, 2769.
- Simeon & Isle of Wight Rural District Council, Re*, [1937] 3 All E.R. 149; [1937] Ch. 525; 106 L.J.Ch. 335; 157 L.T. 473; 101 J.P. 447; 11 Digest (Repl.) 154, 304.
- Tulk v. Moxhay*, (1848), 2 Ph. 774; 18 L.J.Ch. 83; 13 L.T.O.S. 21; 41 E.R. 1143; 40 Digest (Repl.) 342, 2774.
- Union of London & Smith's Bank, Ltd.'s Conveyance, Re, Miles v. Easter*, [1933] All E.R. Rep. 355; [1933] Ch. 611; 162 L.J.Ch. 241; 149 L.T. 82; 40 Digest (Repl.) 329, 2702.

Action.

The first plaintiff, the Honourable Mrs. Marten, was the present owner in fee simple of the Crichel Estate in Dorset. By a conveyance dated Mar. 25, 1943, the second plaintiffs, Hoare Trustees, who were at that time the owners in fee simple of the Crichel Estate as the special executors of the first plaintiff's father (the first plaintiff being then an infant), conveyed a part of the estate known as Crook Farm to a purchaser. The conveyance contained a covenant by the purchaser with "the vendor and its successors in title" that no part of the conveyed land should at any time thereafter be used for any purpose other than agricultural purposes without the previous written consent of "the vendor or its agent". In 1958 a part of Crook Farm which had already been requisitioned by the Air Ministry for use as an aerodrome was conveyed to the ministry by the purchaser's executors, subject to the restrictive covenant so far as it was valid, and this land (referred to hereinafter as "the restricted land") was occupied by the defendant company, Flight Refuelling, Ltd., under licence from the ministry, and used by the defendant company for (among other purposes) industrial purposes. On Apr. 1, 1959, the first plaintiff commenced an action against the defendant company for breach of the restrictive covenant. The second plaintiffs were added as plaintiffs on Dec. 18, 1959, and the Air Ministry was added as a defendant on May 27, 1960.

By their re-amended statement of claim the plaintiffs claimed: (i) declarations (a) that the defendants, and each of them, held and occupied the restricted land subject to the restrictive covenant, (b) that the restrictive covenant forbade the user of the restricted land by the defendants, or either of them, for any purposes but agricultural purposes without the previous written consent of the plaintiffs or their agent, and (c) that the present user of the restricted land by the defendants as and for the purposes of an aerodrome and an industrial undertaking was in breach of the restrictive covenant; and (ii) an injunction restraining the defendant company from causing or permitting the restricted land or any part thereof to be used in breach of the restrictive covenant for any purpose other than agricultural purposes.

G. H. Newsom, Q.C., *W. L. Roots, Q.C.*, and *J. A. Gibson* for the plaintiffs.

Sir Milner Holland, Q.C., and *M. Broune* for the defendant company, Flight Refuelling, Ltd.

The Attorney-General (Sir Reginald Manningham-Buller, Q.C.), *Peter Foster, Q.C.*, and *E. Blanshard Stamp* for the Air Ministry.

Cur. adv. vult.

May 4. **WILBERFORCE, J.**, read the following judgment: The plaintiffs in this case seek to establish the enforceability of, and, so far as possible, to enforce, a restrictive covenant said to affect certain land in the parish of Tarrant

Rushton in the county of Dorset now owned by the Air Ministry (the second A defendant) on behalf of the Crown and occupied by Flight Refuelling, Ltd., the first defendant (referred to hereinafter as "the defendant company"). Stated very briefly, the following is the nature of the dispute. The land in question, then forming part of the Crichel Estate, was requisitioned by the Air Ministry under emergency powers in 1942, and, no doubt, the owners hoped that as soon as the war was finished it would be returned to them. In 1943 it was sold, with B other land, by the estate owners, and a restrictive covenant was imposed against user for other than agricultural purposes. When the war came (factually) to an end, the owners, like other landowners whose land had been taken, were disappointed. The Air Ministry did not give up the land. On the contrary, in 1947 the ministry permitted a commercial concern, the defendant company, to come on to it, and the company has been there ever since. In 1955 the Air C Ministry took steps to acquire the land compulsorily for use as an aerodrome, and in 1958 it was conveyed to the ministry. The ministry does not in fact use it as an aerodrome, but retains an interest in it as a reserve service airfield which can be used in an emergency. The effective occupier is the defendant company, which is carrying on an industrial undertaking there of considerable size, while at the same time maintaining the airfield for the Air Ministry. The D present owner of the Crichel Estate, while now accepting that use and maintenance of the airfield for the defence of the realm cannot be interfered with, objects to the industrial activities of the defendant company both on their present scale and such as are threatened for the future. She wishes to establish that the restrictive covenant still binds the land, even in the hands of the Crown, and seeks to enforce it against the company. That is the nature of the dispute, and E it raises a number of questions of law and of fact.

I begin by stating the conveyancing facts relevant to the creation of the covenant. The Crichel Estate is a large agricultural estate in Dorset of about seven thousand five hundred acres which has for many years been in the ownership of the family of the first plaintiff, Mrs. Marten. On the western side of it and forming part of it was a farm of some 562 acres known as Crook Farm, which F since 1920 has been farmed by a Mr. Harding under a tenancy agreement. Some two hundred acres of this farm had been requisitioned in July, 1942, by the Air Ministry for use as an aerodrome, and by March, 1943, some steps to establish the aerodrome had been taken. In 1943 the legal estate in the property was vested in the second plaintiffs, Hoare Trustees, as special executors of Lord Alington, the former tenant for life of the estate, who had died in 1940. G Under the trusts of a settlement made in 1928, the equitable owner was the first plaintiff, who is Lord Alington's daughter, she having an interest in tail male. She was at this time an infant, having been born in 1929. On Mar. 25, 1943, the second plaintiffs conveyed the whole of Crook Farm by way of sale to Mr. Harding, and it is under that conveyance that the restrictive covenant arises. I must refer in detail to certain provisions of this document. H

The document first recites that, by a vesting deed dated Nov. 26, 1928, made between Lord Alington, of the first part, Lady Mary Sibell Ashley-Cooper, of the second part, and certain trustees, of the third part, it was declared that "the property hereinafter described (with other property)" was vested in Lord Alington in fee simple on the trusts of the settlement of 1928. There followed other recitals relevant to the title and then cl. 1 contained the conveyance to the I purchaser of the property sold. Clause 2 was, so far as material, as follows:

"The purchaser hereby covenants with the vendor and its successors in title (1) That no part of the land hereby conveyed nor any building or erection thereon shall at any time hereafter be used for any purpose other than agricultural purposes without the previous written consent of the vendor or its agent Provided always that if the vendor should sell all or any part of its land immediately adjoining or adjacent to the land hereby conveyed either free from any restriction as to user or on terms permitting the

same to be used for any purpose other than agricultural purposes or if the vendor should agree with the town or country planning authorities that all or any part of the land immediately adjoining the land hereby conveyed may be used for purposes other than agricultural purposes the purchaser shall be at liberty to use or sell all or any part of the land hereby conveyed either free from any restriction as to user or subject to the same conditions as to user as those imposed by the vendor on such sale or agreed with the town or country planning authorities as the case may be . . .”

That is all that I think I need read of the conveyance.

The first plaintiff, having attained her majority on Sept. 12, 1950, disentailed the property and became its absolute owner. On Sept. 18, 1950, the second plaintiffs assented to the vesting in her of the Crichel Estate in fee simple, but the assent contained no reference to the covenant. Meanwhile, the Air Ministry, still in possession of the requisitioned land (which I shall refer to as “the blue land”), in 1947 permitted the defendant company to occupy the aerodrome, and the company entered into occupation as licensee. I shall refer later to the terms of its occupation. In or about 1954 the Air Ministry decided to purchase the blue land, and in April, 1955, the ministry served on Mr. Harding’s executors a notice to treat in respect of the greater part of it. On July 1, 1958, this portion of the blue land was conveyed by Mr. Harding’s executors to the Air Ministry, the conveyance being expressed to be subject to the restrictive covenant so far as the same was valid, subsisting and capable of being enforced. This left a small parcel of the blue land (which has been referred to as “the communal site”) still under requisition, and it remained under requisition until after the issue of the writ and until after the joinder of the Air Ministry as a defendant. It has since been conveyed to the Air Ministry, but it is conceded that in this action no relief can be granted in respect of the user of it.

The points which arise for decision are the following: (i) Are the plaintiffs, or is one of them, entitled to the benefit of the restrictive covenant? (ii) Is the blue land subject to the burden of the restrictive covenant? (iii) Can the covenant be enforced to any and what extent against either of the defendants? (iv) What relief (if any) in equity should be granted to the plaintiffs? First, are the plaintiffs, or is one of them, entitled to the benefit of the restrictive covenant? This involves several subsidiary questions, namely (a) whether the covenant was entered into for the benefit of any land of the covenantee; (b) whether that land is sufficiently defined or ascertainable by permissible inference or evidence; (c) whether that land is, or was, capable of being benefited by the covenant [p. 706, post]; (d) whether, since the first plaintiff is not the express assignee of the covenant, the action can be brought by the second plaintiffs or by the first and second plaintiffs jointly [p. 708, post].

Question (a): This would appear to be a simple point. The covenant is of the type considered in the leading case, *Tulk v. Moxhay* (1), that is to say, a covenant imposed on land sold by a vendor and restricting its user—precisely the same kind of case to which the doctrine of restrictive covenants binding in equity has been developed. As to these, LORD COTTENHAM, L.C., said (2):

“That this court has jurisdiction to enforce a contract between the owner of land and his neighbour purchasing a part of it, that the latter shall either use or abstain from using the land purchased in a particular way, is what I never knew disputed.”

He held that such a covenant would be enforced in equity, regardless of whether it ran with the land at law, against any purchaser with notice. However, an elaborate argument was addressed to me by the defendants to support a contention [Question (b) above] that the benefit of the covenant was not available to the plaintiffs. The conveyance, it was said, does not “annex” the benefit of the covenant to any

(1) (1848), 2 Ph. 774.

(2) (1848), 2 Ph. at p. 777.

land so that it would pass automatically on a conveyance of the land to a purchaser. Further, it does not indicate that it was made for the benefit of any land, and, even supposing that it was so made, it does not identify, or provide any material on which to identify, what that land is. A

It is, however, well established by the authorities that the benefit of restrictive covenants can pass to persons other than the original covenantee, even in the absence of annexation, provided that certain conditions are fulfilled. There is, however, dispute as to the nature of these conditions. The defendants' contentions are, first, that there must appear from the terms of the deed itself an intention to benefit some land, and, secondly, that the precise land to be benefited must also be stated in the deed, or at least must be capable of ascertainment from the terms of the deed by evidence which is admissible in accordance with the normal rules of interpretation of documents. They rely principally on the decision in *Re Union of London & Smith's Bank, Ltd.'s Conveyance, Miles v. Easter* (3) and submit that the decision of UPJOHN, J., in *Newton Abbot Co-operative Society, Ltd. v. Williamson & Treadgold, Ltd.* (4), which appears to admit parol evidence for the purpose of identifying the land to be benefited, goes too far. B C

I proceed, therefore, first to examine *Miles v. Easter* (3). The facts in the case were, briefly, that the defendant Easter, who was one of the persons seeking to enforce the covenant, was the owner of the greater part of certain land coloured green which had previously been owned by the Shoreham Company. That company was possessed of certain lands of considerable but undefined extent, including some foreshore land and some land coloured yellow. The conveyance of 1908, by which the covenant was imposed, contained other covenants (5) expressed to be made D E

"... with the purchasers their heirs and assigns or other the owners or owner for the time being of the land coloured pink or any part or parts thereof..."

—i.e., in language adapted and intended to annex the benefit of these other covenants to particular land. The covenant which the defendant was trying to enforce was not in this form at all; it used no language of annexation. In these circumstances the Court of Appeal, affirming the decision of BENNETT, J., held that it had not been shown that the covenant was taken for the benefit of the green land, and, in doing so, they relied particularly on the existence of the other land, which might, for all that appeared from the document, have been intended to benefit from the restriction, and on the contrast in the conveyancing language used. In the judgment of the Court of Appeal, read by ROMER, L.J., the following passage occurs (6): F G

"In the first place the 'other land' must be land that is capable of being benefited by the covenant—otherwise it would be impossible to infer that the object of the covenant was to enable the vendor to dispose of his land to greater advantage. In the next place this land must be 'ascertainable' or 'certain' to use the words of ROMER, L.J. (7), and SCRUTTON, L.J. (8), respectively. For, although the court will readily infer the intention to benefit the other land of the vendor where the existence and situation of such land are indicated in the conveyance or have been otherwise shown with reasonable certainty, it is impossible to do so from vague references in the conveyance or in other documents laid before the court as to the existence of other lands of the vendor, the extent and situation of which are undefined." H I

(3) [1933] All E.R. Rep. 355; [1933] Ch. 611.

(4) [1952] 1 All E.R. 279; [1952] Ch. 286.

(5) These were covenants entered into by the vendors, as owners of the land coloured green: see [1933] All E.R. Rep. at p. 359; [1933] Ch. at p. 622.

(6) [1933] All E.R. Rep. at pp. 365, 366; [1933] Ch. at p. 631.

(7) In *Formby v. Barker*, [1903] 2 Ch. at p. 554.

(8) In *London County Council v. Allen*, [1914] 3 K.B. at p. 672.

This passage is clearly and carefully expressed, and I resist the invitation of the Attorney-General to interpret it in the light of certain expressions (to my mind less clear) in the judgment of BENNETT, J. (9) at first instance. It shows that the court's opinion was that the existence and situation of the land to be benefited need not be indicated in the conveyance, provided that it could be otherwise shown with reasonable certainty, and the natural interpretation to place on these latter words is, first, that they may be so shown by evidence dehors the deed, and, secondly, that a broad and reasonable view may be taken as to the proof of the identity of the lands. This general approach would, I think, be consistent with the equitable origin and character of the enforcement of restrictive covenants, which should not, I think, be constricted by technicalities derived from the common law of landlord and tenant.

Against this approach, the Attorney-General relied strongly on a passage of the same judgment, where ROMER, L.J., said this (10):

"... the first question that has to be considered is whether or no an intention is shown in the deed of Oct. 23, 1908, that the restrictive covenants should enure for the benefit of any particular land of the covenantees."

The Attorney-General argued that this showed that the court considered that only the deed of conveyance could be looked at. With all respect, I do not think that this consequence follows. In that particular case, reliance was placed on the deed, and on the deed alone: the fact that the court confined its consideration to the terms of the deed does not, in the circumstances, carry any implication that no other evidence than the deed itself could be considered.

Before passing to *Newton Abbot Co-operative Society, Ltd. v. Williamson & Treadgold, Ltd.* (11), I should add that the rule as stated by the Court of Appeal in *Miles v. Easter* (12) seems to me to be clearly in line with other statements of principle made by the courts. In *Rogers v. Hosegood* (13), a leading case on annexation, COLLINS, L.J., reading the judgment of the Court of Appeal, said (14):

"When, as in *Renals v. Cowlishaw* (15), there is no indication in the original conveyance, or in the circumstances attending it, that the burden of the restrictive covenant is imposed for the benefit of the land reserved, or any particular part of it, then it becomes necessary to examine the circumstances under which any part of the land reserved is sold, in order to see whether a benefit, not originally annexed to it, has become annexed to it on the sale, so that the purchaser is deemed to have bought it with the land, and this can hardly be the case when the purchaser did not know of the existence of the restrictive covenant."

This seems to support the view that an intention to benefit may be found from surrounding or attending circumstances, as, indeed, is frequently done in practice in the case, mentioned by COLLINS, L.J., of building schemes.

In *Formby v. Barker* (16), which is one of the authorities which shows that unless the covenantee retains some land intended to be benefited he cannot sue any person except the original covenantor, VAUGHAN WILLIAMS, L.J., said (17):

"I have not been able to find any case in which, after the sale of the whole of an estate in land, the benefit of a restrictive covenant has been enforced by injunction against an assignee of the purchaser at the instance of a plaintiff having no land retained by the vendor, although there are cases in which restrictive covenants seem to have been enforced at the

(9) [1933] All E.R. Rep. at p. 362; [1933] 1 Ch. at p. 625.

(10) [1933] All E.R. Rep. at p. 367; [1933] 1 Ch. at p. 634.

(11) [1952] 1 All E.R. 279; [1952] Ch. 286.

(12) [1933] All E.R. Rep. 355; [1933] Ch. 611.

(14) [1900] 2 Ch. at pp. 407, 408.

(16) [1903] 2 Ch. 539.

(13) [1900] 2 Ch. 388.

(15) (1878), 9 Ch.D. 125.

(17) [1903] 2 Ch. at pp. 550, 551.

instance of plaintiffs, other than the vendor, for the benefit of whose land it appears from the terms of the covenant, or can be inferred from surrounding circumstances, that the covenant was intended to operate."

A reference to these passages was made by UPJOHN, J., in the *Newton Abbot* case (18), but I have thought it worth while to set them out here so that they can be compared with other citations.

I would add to these a reference to the facts in *Lord Northbourne v. Johnston & Son* (19), where the covenant was expressed to be with the trustees of a settlement, their heirs and assigns, the deed containing no reference to any land at all. SARGANT, J., seems not to have doubted that it could be shown that the covenant was for the benefit of the unsold part of a particular building estate which in fact was vested in the trustees.

I pass now to the *Newton Abbot* case (18). The facts were that the original covenantee was the owner of a property called Devonian, in Fore Street, Bovey Tracey, on which she carried on business as an ironmonger. The original covenantors were the purchasers from her of other properties in Fore Street opposite Devonian, and the covenant was (briefly) against carrying on the business of an ironmonger. There was no reference in the conveyance by which the covenant was imposed to any land for whose benefit it was made, the only mention of Devonian being that the vendor was described as "of Devonian". The action was between assigns of the covenantee's son, who inherited her estate, and assigns of the covenantors. UPJOHN, J., held that the benefit of the covenant was not annexed to Devonian, but held that, looking at the attendant circumstances, the land to be benefited was shown with reasonable certainty and that the land in question was Devonian.

That decision was attacked by the Attorney-General in a lively argument, and I was invited not to follow it. Of course, it relates to its own special facts, and, no doubt, I could leave it on one side. But I see nothing in it contrary to the principles which appear to be securely laid down. Here were two shops in common ownership facing each other in the same street, one of them, Devonian, an ironmonger's shop. The shops opposite are sold with a covenant against carrying on an ironmonger's business. What could be more obvious than that the covenant was intended for the protection or benefit of the vendor's property Devonian? To have rejected such a conclusion would, I venture to think, have involved not only an injustice but a departure from common sense. So far from declining the authority of that case, I welcome it as a useful guide. But it is only a guide, and I must ultimately reach my conclusion on the facts of the present case. These I now consider. They are not in dispute. I have the fact that the Crichel Estate is, and for many years has been, not merely a conglomeration of separate farms and cottages, but a recognizable and recognized agricultural unit. Its identity in 1943 has been established by an agreed map: it has, in fact, hardly changed since 1928, the date of the vesting deed mentioned in the conveyance, or up to the present time. It has been managed as one for a number of years—thus, no doubt, acquiring its own character—is surrounded by its own ring fence, has its mansion house, secondary residence, home farm, farm cottages, woodlands, ornamental water, all the indicia of an extremely valuable unit. Its character was entirely agricultural, with the single exception of the paper mill at Witchhampton, and it is surrounded by other similar, or at least comparable, estates in a district which is entirely agricultural—in the words of one witness, "a rather unique area". The property sold in 1943, Crook Farm, was before the sale a part of the estate, the purchaser, Mr. Harding, being, as was his father before him, tenant of the farm from the estate: it was also a wholly agricultural property. The vendors of the farm were the second plaintiffs, selling in the character of fiduciary owners of the Crichel Estate as a whole: in taking any restrictive covenant, they had, of course, no individual or

(18) [1952] 1 All E.R. 279; [1952] Ch. 286.

(19) [1922] All E.R. Rep. 144; [1922] 2 Ch. 309.

personal interest or any interest other than as owners of the estate as a whole.

On these facts I consider that I should come to the conclusion that the covenant was taken for the benefit of land of the vendors, that land being the Crichel Estate. In doing so, I do not, so it seems to me, go outside such surrounding or attendant circumstances as, in accordance with the authorities, it is legitimate for the court to take into account. A decision based on the mere wording of cl. 2 of the conveyance would, in my judgment, be unduly narrow and, indeed, technical and would go far to undermine the usefulness of the rule which equity courts have evolved that the benefit of restrictive covenants may be capable of passing to assigns of the "dominant" land or of the covenant in cases other than those of annexation. I would add two observations. First, the rules in *Miles v. Easter* (20) properly relate to cases where the covenant is sought to be enforced by an assign from the original covenantee. In this case, however, the second plaintiffs are the original covenantees and the first plaintiff is the person for whose benefit in equity the covenant was taken. To that important extent the plaintiff's case is stronger than that of the defendant in *Miles v. Easter* (20). Secondly, in holding that the covenant was for the benefit of the Crichel Estate, I mean the Crichel Estate as a whole—as a single agricultural estate which it was and is, and I express no opinion whether it enures for the benefit of each and every part, for example, if parts are separately sold off. That is not a question which arises in this case.

There remain certain specific arguments which were put forward, and I must shortly deal with them. (i) The plaintiffs relied to some extent on the first recital in the conveyance of 1943 and the reference in it to the vesting deed of 1928. That vesting deed stated that the Crichel Estate, there described in detail, was vested, together with other estates, in the tenant for life on the trusts of the settlement. It was suggested that this provided something within the four corners of the conveyance from which it was possible to identify the land for the benefit of which the covenant was taken. I do not accept this. The recital, as I read it, was inserted purely for the purpose of tracing the chain of title and not with reference to the restrictive covenant at all, and, even if it can be related to the covenant, it merely states what land was vested in the life tenant in 1928 and does not, by itself, indicate what the vendors held in 1943. I do not consider that this recital advances the plaintiff's argument.

(ii) It was said that, unless the identity of the land to be benefited was clearly stated in, or directly ascertainable from, the conveyance, a purchaser would be placed in an impossible position: he would never know by whom the covenant could be enforced, or whether it was enforceable at all. I am not impressed by this objection: the original covenantee is ascertainable from the document—and moreover appears on or can be ascertained from the land charges register. In a case where the covenant is sought to be enforced by an assign from him, such assign must always prove his right to sue, whether by virtue of annexation, by devolution, by assignment of the benefit of the covenant. The plaintiff may also (as in *Tulk v. Moxhay* (21)) have to show that he retains property for whose benefit the covenant was imposed. These are matters which arise in all cases where restrictive covenants are sought to be enforced otherwise than as between the original parties, and I see no greater difficulty in dealing with them in cases such as the present.

(iii) On the assumption that some extrinsic evidence can be received as to the intention to benefit land, there was read some correspondence between the second plaintiffs and Mr. Harding, or their respective representatives, prior to the conveyance of 1943, consisting of letters between Aug. 4 and Oct. 29, 1942. This correspondence, which I need not read, appears to me to show two things: first, that the sale to Mr. Harding was, as to price, on the basis of agricultural user, which was a consideration strongly relied on by LORD COTTENHAM, L.C., in *Tulk v. Moxhay* (21) as a reason for enforcing "user" covenants; and, second,

that the parties were perfectly aware, when negotiating about the restriction, that part of the land was under requisition for use as an aerodrome, and that during that period the restriction could not be enforced. They did, however, look forward to a period when the land might be given up and when, although aerodrome works had been carried out on it, it could still be used for agriculture.

(iv) Arising out of the last point, a remarkable argument was put forward, namely, that the covenant was void for perpetuity. It was put in this way. In 1943 the covenant was ineffective because of the requisition: it could only be effective on derequisition: that event was wholly uncertain, the covenant is an interest in land, and is one which is to come into existence at an uncertain date: it is, therefore, void. The rule against perpetuities has been showing remarkable vitality recently, but, in my judgment, it fails to reach this covenant. The covenant became effective when it was entered into, and all that happened was that, as regards the blue land, it was incapable of being enforced. But it was there, binding the land, all the time. This is shown by *Manchester, Sheffield & Lincolnshire Ry. Co. v. Anderson* (22), to which I shall return later. The defendants' argument seems to me to confuse right with remedy.

Question (c): Was the land capable of being benefited by the covenant? On this point, as on those last dealt with, the answer would appear to be simple. If an owner of land, on selling part of it, thinks fit to impose a restriction on user, and the restriction was imposed for the purpose of benefiting the land retained, the court would normally assume that it is capable of doing so. There might, of course, be exceptional cases where the covenant was, on the face of it, taken capriciously or not bona fide, but a covenant taken by the owner of an agricultural estate not to use a sold-off portion for other than agricultural purposes could hardly fall within either of these categories. As SARGANT, J., said in *Lord Northbourne v. Johnston & Son* (23):

"Benefit or detriment is often a question of opinion on which there may be the greatest divergence of view, and the greatest difficulty in arriving at a clear conclusion."

Why, indeed, should the court seek to substitute its own standard for those of the parties—and on what basis can it do so? However, much argument was devoted to this point, and evidence was called as to it. These I must consider.

First, it was said that a mere examination of the figures showed that the covenant could not benefit the estate: the Crichel Estate extends to some seven thousand five hundred acres, and [it was asked how such covenant could benefit the estate as a whole. In my view, there is no such manifest impossibility about this. I have already referred to the character of the estate, and I can well imagine that for the owner of it, whether he wished to retain it in his family or to sell it as a whole, it might be of very real benefit to be able to preserve a former outlying portion from development. This seems to me to be a question of fact to be determined on the evidence: and I note that, when a similar argument was placed before the court in *Re Ballard's Conveyance* (24), CLAUSON, J., while accepting it in the absence of evidence, showed it to be his opinion that evidence could have been called (25).

Then it was said that, as the blue land was already an aerodrome when the covenant was imposed, the covenant could be of no benefit, at least as regards that land. I reject this argument. The vendors may well have had to accept the prospect of user as an aerodrome, so long as the necessity continued, but to prevent the land thereafter being turned to other non-agricultural purposes may well have been a valued objective. I think that it was in this case. Next it is said that the covenant was useless because in any event there was plenty of other land in the same area in the vicinity of the estate which was free from restrictions.

(22) [1898] 2 Ch. 394. (23) [1922] 2 Ch. at p. 319; [1922] All E.R. Rep. at p. 148.

(24) [1937] 2 All E.R. 691; [1937] Ch. 473.

(25) See [1937] 2 All E.R. at p. 696; [1937] Ch. at p. 481.

I have no difficulty in rejecting this argument. Why should not a vendor protect what he can, and is such protection useless because other land (at the relevant date itself all solidly agricultural) might be desecrated? Is a covenant against using premises for a certain trade useless because adjoining premises may be so used? (Compare the *Newton Abbot* case (26).) This contention, in my judgment, fails.

Lastly, an argument was based on the first proviso to the covenant (26a). This was, in effect, that, if the vendors should sell any adjoining or adjacent portion of the estate retained by them free from any obligation to use for agricultural purposes, the purchaser was likewise to be liberated from the covenant. This, it was suggested, showed that the purchaser's covenant could not be for the benefit of the retained land. The reason, so the argument ran, was that the obvious benefit, and possibly the sole benefit, of the covenant was to reserve any development value which land in the vicinity might have for the vendors: but the existence of the proviso—which enabled the purchaser to develop if the vendors did so—prevented this benefit from arising, and ergo there was no benefit in the covenant. I find this argument altogether too subtle. The purpose of the proviso seems to me to be a much simpler one, and to have been simply to anticipate the natural grievance which the purchaser might have if his land was confined for ever to agriculture while the vendors were free profitably to develop the immediately adjoining land. As such, it is completely consistent with the vendors' overriding desire to preserve the agricultural character of their own estate and of the land sold off. There is another defence based on the proviso with which I will deal later, but this particular argument I reject.

I now examine the evidence as to the capability of the covenant to benefit the vendors' land. On this the plaintiffs called three witnesses. The first was Commander Marten, the first plaintiff's husband and the manager of the estate. Although he is an interested party, he gave his evidence on this point fairly and moderately. The others were two surveyors and land agents, a Mr. Pratt and a Mr. Eve. Neither of these gentlemen knew the estate in 1943, but they had acquaintance with it from about 1951, and their evidence was directed to showing what benefit an estate of the character of the Crichel Estate could derive from a covenant in this form. I found their evidence clear and convincing. On the defendants' side, evidence was given first by a Mr. Hayward, who for many years has been Chief Lands Officer in the Air Ministry. His evidence was mainly directed towards proof of the requisitioning and acquisition of the land, but there was a short passage in which he expressed his view on the covenant. He was a fair witness, but his experience in buying and selling agricultural estates such as the Crichel Estate was naturally limited, and I do not attribute much weight to his evidence on this point. The other witness for the defendants was a Mr. Shallcross, a qualified surveyor who has known the neighbourhood for some thirty years. His evidence must be placed in the scale. Taken as a whole, the evidence comes to this: a restriction of this character, in relation to such an estate as the Crichel Estate was at the relevant date and is at the present time, is of value in that it preserves a measure of control over adjoining land. In relation to that part of the adjoining land which, in 1943, was already being used as an aerodrome, so far from the covenant being useless, it was of positive value, because the departure from agricultural use which had already taken place inevitably gave rise to uncertainty as to the future of the land and opened the door to possible further development: the covenant prevented the door from being opened further. I think that the case for the covenant was well and clearly put by Mr. Eve in answers which I accept and adopt but forbear to read. Mr. Pratt's evidence was substantially to the same effect. Mr. Shallcross' evidence, in so far as it went the other way, was, to my mind, vitiated by his assumption that the covenant could not be of benefit to the Crichel Estate because

the blue (restricted) land was not contiguous with it: in fact, he seemed to agree that, if the covenant were to be considered in relation to the land hatched blue, which is contiguous with the Crichel Estate and is equally bound by the covenant, it could be of benefit to the estate.

It is on this general approach that, in my view, the benefit of the covenant is to be assessed, rather than in relation to particular effects which the breach of it might produce. Indeed, much of the evidence, particularly as to noise and effect on amenity, seemed to me to be more relevant to an action for nuisance, which this is not, than to the action as it is. Questions were put about sporting rights, which, though, no doubt, agreeable to put and agreeable to answer, seemed to me to add up to little that was helpful. But in so far as it is relevant to take particular matters into account, I am prepared generally to accept Commander Marten's evidence that the installation of a substantial industrial undertaking on the edge of the estate might well have concrete detrimental effects on the management of the estate, making it more difficult to provide housing for estate employees and to get or retain labour, and causing the installation of increased services in the way of roads, electrical cables, etc., which would change the character of the place. On this line of evidence I found the evidence of a witness who came from the Blandford Rural District Council of very little assistance, in spite of, or perhaps because of, the wide range of subjects on which he was invited to testify. Lastly, I should add that I reject a line of argument to the effect that development of the restricted land, by bringing with it development, or the possibility of development, of the Crichel Estate, would actually raise land values rather than diminish them. The owners of the Crichel Estate are surely entitled to set other values above those of this character of enrichment.

Question (d): Can the action be brought by the first plaintiff or by the two plaintiffs jointly? I can deal with this point quite shortly. The second plaintiffs are the original covenantees, and the first plaintiff is the person for whose benefit in equity the covenant was made. Taken together, the plaintiffs represent the whole legal and equitable interest in the covenant. The matter appears, therefore, to be completely covered by the judgment of SARGANT, J., in *Lord Northbourne v. Johnston & Son* (27), the reasoning of which I adopt. So much was not really contested by the Attorney-General, who, however, reserved the right to challenge that judgment should this case go to a higher court. This brings me to a conclusion on the first main point, and I accordingly hold that the plaintiffs are entitled to the benefit of the restrictive covenant.

The second main question is whether the blue land is subject to the burden of the restrictive covenant. Now the covenant was duly (in April, 1943) registered against the land under the provisions of the Land Charges Act, 1925, s. 10 (1), as a land charge Class D (ii), and purchasers of the land, therefore, take with notice of it: Law of Property Act, 1925, s. 198 (1). The Air Ministry, having purchased the land in 1958, is not in the position of a purchaser for value without notice, nor is the defendant company, which has no legal estate at all. It is not said that the covenant has been taken over or extinguished by any statutory procedure—as can be done under the Lands Clauses Acts. The covenant, therefore, binds the land in its present hands. This does not, of course, mean that it can necessarily be enforced at the present time against either defendant—that I shall consider shortly—but, conversely, even if it is not enforceable against either defendant, because of some statutory right which they, or one of them, may have to use the land for other than agricultural purposes, that does not prevent the covenant from continuing to bind the land. I refer to *Manchester, Sheffield & Lincolnshire Ry. Co. v. Anderson* (28). As CHITTY, L.J., put it (29): "The covenant in my opinion is not gone; but the remedy by action has been taken

(27) [1922] All E.R. Rep. at p. 147; [1922] 2 Ch. at p. 317.

(28) [1898] 2 Ch. 394.

(29) [1898] 2 Ch. at p. 404.

away". And, as it was put by LUXMOORE, J., in *Re Simeon & Isle of Wight Rural District Council* (30):

"It is, I think, settled law that, in all cases where land is subject to a burden which runs with it for the benefit of other land, a purchaser taking under compulsory powers takes the land subject to that burden, like any other purchaser, but the covenant cannot be enforced by injunction in the courts, if the breach of it is attributable to the execution of the works authorised by the statute under which it was taken, or to the exercise of the statutory powers thereby conferred on the purchaser."

The Attorney-General relied in this connexion on *Baily v. De Crespigny* (31), where a covenant was held to be unenforceable against the original covenantee after the land had been taken by a railway company. There it was held that the defendant was discharged from his covenant on the principle of the maxim "lex non cogit ad impossibilia". So here, argued the Attorney-General, the covenant could not be complied with and it is discharged. In my judgment, however, the position here is quite different. There is no question here of suing the original covenantee (namely, Mr. Harding) after an Act of Parliament has put it out of his power to comply with the covenant. The question here is a different one, namely, whether the covenant, which is of a continuing character, burdens the land even though it is for the time being in the hands of a person who may use it in whole or in part for statutory purposes. The *Manchester Railway* case (32) shows that it does. The further case relied on by the Attorney-General, *Clark v. London School Board* (33), shows nothing more than that, by procedure under the Lands Clauses Consolidation Act, 1845, an easement can be got rid of. It has no relevance to the present case.

At this point I must notice a special defence of the defendant company based on the proviso to cl. 2 of the conveyance of Mar. 25, 1943, to which I have already referred (34). This proviso, in effect, states that, should the vendors sell any part of their land immediately adjoining or adjacent to the land thereby conveyed free from any restriction as to user, the purchaser should be free from the restriction. The facts relied on to bring this proviso into operation are that on Aug. 6, 1955, the Air Ministry served on the first plaintiff a notice to treat in respect of (inter alia) a portion of the Crichel Estate which was immediately adjoining or adjacent to the land conveyed in 1943—land coloured pink on agreed plan No. 1—and this land was duly conveyed by the first plaintiff to the Air Ministry on Jan. 11, 1961, free from any restriction as to user. So, says the defendant company, the covenant is gone. The argument is hardly an attractive one. For the owner of the land burdened with the restrictive covenant to use its statutory powers compulsorily to acquire adjacent land and to oblige the owner to sell free of any restriction, and then to rely on such a compulsory sale as discharging the covenant as regards the land which it already held, would be by any standards iniquitous, and I am not surprised that the Air Ministry itself forebore to take the point. But, although the plea may look rather more respectable as coming from the defendant company, it is, in my view, no more efficacious. The answer suggested by the plaintiffs is that the word "sell" does not include a compulsory taking, and they rely on the decision of the House of Lords in *Kirkness v. John Hudson & Co., Ltd.* (35). That was a case on certain fiscal statutes, but it helps to the extent of showing that the word "sale" naturally imports a consensual sale. Here I am concerned with its use in a contractual context, and the real question is whether such a sale as this—a sale under compulsory powers to the successor in title of the original purchaser of the restricted land, as to the terms of which the vendors had no choice whatsoever—could conceivably

(30) [1937] 3 All E.R. at p. 153; [1937] Ch. at p. 535.

(31) (1869), L.R. 4 Q.B. 180.

(32) [1898] 2 Ch. 394.

(33) (1874), 9 Ch. App. 120.

(34) See p. 707, letters B to E, ante.

(35) [1955] 2 All E.R. 345; [1955] A.C. 696.

have been such a sale as was contemplated by the proviso; and the answer can only be that it was not. The object of the proviso, as I have already said, was to ensure for the 1943 purchaser equality of treatment with subsequent purchasers of parts of the estate, and to rely on it, as the defendant company seeks to do, involves a perversion of its object.

As to this, *Baily v. De Crespigny* (36) seems to me to help the plaintiffs: the present case is almost *Baily v. De Crespigny* (36) in reverse. There the court said (37):

"But where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens."

The court went on to say (38):

"The defendant when he contracted used the general word 'assigns', knowing that it had a definite meaning, and he was able to foresee and guard against the liabilities which might arise from his contract so interpreted. The legislature by compelling him to part with his land to a railway company, whom he could not bind by any stipulation, as he could an assignee chosen by himself, has created a new kind of assign, such as was not in the contemplation of the parties when the contract was entered into. To hold the defendant responsible for the acts of such an assignee is to make an entirely new contract for the parties."

The same argument can be well applied here to the word "sell". The result of this is that, whatever the position may be as regards enforceability, the plaintiffs are entitled to a declaration that the covenant binds the land.

I proceed now to the issues of enforcement and remedy, to my mind the most difficult part of the case. First, I must endeavour to state the legal position of the Air Ministry and of the defendant company under the legislation by which the ministry acquired the land, and, secondly, I must find what activities precisely are now being carried on by the defendant company on the land, and endeavour to relate those activities to the statutory purposes for which the land was acquired. There is no doubt that until July 1, 1958 (later as regards the communal site) the title to the blue land remained in Mr. Harding (or his executors) and that the Air Ministry had merely rights arising from requisition under various statutes and regulations commencing with the Emergency Powers (Defence) Act, 1939, and the Defence Regulations made under it. I need not go into this legislation because it is common ground that during the period of requisition, owing to the width of the powers conferred, in particular, by the Defence (General) Regulations, 1939, reg. 51, no action could have been taken by the plaintiffs to interfere with the user of the land by either defendant, whether or not that user was of an industrial character.

The requisition of the blue land (other than the communal site) ended on July 1, 1958, when it was acquired in fee simple by the Air Ministry under the Defence Acts. The basic statute is the Defence Act, 1842, and by subsequent legislation the powers of this Act have been made available to the Secretary of State for Air (39). These powers may be used for the purposes of the Air Force or the defence of the realm. The Acts provide, as one would expect, for the acquisition of land by purchase, but do not, so it appears, provide for such acquisition to be free from any restrictive covenant formerly binding the land. In fact, the land was conveyed to the Air Ministry, it was so conveyed subject to the covenant,

(36) (1869), L.R. 4 Q.B. 180.

(37) (1869), L.R. 4 Q.B. at p. 185.

(38) (1869), L.R. 4 Q.B. at p. 186.

(39) By the Air Force (Application of Enactments) (No. 1) Order, 1918 (S.R. & O. 1918 No. 538), made under the Air Force (Constitution) Act, 1917, the powers under the Defence Acts were extended to the Air Force.

so far as valid and subsisting. This being the position as regards acquisition of the land, the Attorney-General claims that, although the covenant may not actually be extinguished, the court cannot interfere with any user of the land for the purposes for which the land could be acquired, that is to say, the service of the Air Force or the defence of the realm. He relies, for authority to support this, on *Hawley v. Steele* (40). That was a case where land had been acquired by the War Department under the powers of the Defence Act, 1842, and was being used as a rifle range. The action was for nuisance, and the case is reported on a motion for an interlocutory injunction. SIR GEORGE JESSEL, M.R., dismissed the motion because (*inter alia*) the land was being used for a purpose authorised by the Defence Acts. In doing so, he said (41):

“... you cannot bring an action against anybody who should so use the land which has been authorized to be acquired, and therefore, if I should be of opinion that the Acts of Parliament authorize the officers of the Ordnance Department and their successor the Secretary of State for War to acquire these lands for the purpose of general instruction, and that the use made of them was a reasonable use, it seems to me no action would lie against the individual who, under the authority of the executive government, made such a use of the land. That seems to me the general proposition.”

Then, after examining the sections of the Defence Act, 1842, he said (42):

“Now, what does that mean? That must mean to be used for reasonable purposes having regard to the nature of the requirements of the military departments of the government; and if that is so, it appears to me that, except in the case of an outrageous departure from all reasonable use, it is not for a court of justice to say what is the reasonable use of land for military requirements, but it is for the departments to say that such land is wanted as a camp for exercise and instruction, such other land is wanted for a fortress, and such other land is wanted for an arsenal. In other words, I think the discretion is vested in the executive government having authority over military matters to determine for which of these various military purposes for which land may fairly be required the particular land in question is to be appropriated. It is not for the judge to say that they have made a bad selection, and that they ought to have taken Blackacre for a camp instead of a fort, that they ought to have taken Whiteacre for an arsenal instead of a camp, or that they ought to have taken Greenacre for a camp instead of a fortress. It appears to me that that would be an invasion of the authority of the military department by the judge if he interfered with such matters...”

Although that decision was on motion, the judgment is a valuable statement as to the scope of the Act, and it has this result, when applied to the facts of the present case, that, the Air Ministry having acquired this land for use as an aerodrome, the court cannot criticise the ministry's choice and say that some other land might just as well, or better, have been chosen: nor can it interfere with any reasonable use of the land for that purpose. Further, SIR GEORGE JESSEL, M.R., appears to me to have decided that the protection of the Act applies not only to the Secretary of State himself but to individuals acting under his authority, certainly to his own officers, and possibly to other individuals, provided that they are carrying out for him those functions which the Act authorises him to carry out. That case, therefore, gets me to this point: that the court cannot interfere with the use by the Air Ministry of the land as an aerodrome, or for any of the statutory purposes for which the land has been acquired. Indeed, the plaintiffs, by their counsel, disclaimed any intention so to do.

(40) (1877), 6 Ch.D. 521.

(41) (1877), 6 Ch.D. at p. 527.

(42) (1877), 6 Ch.D. at p. 528.

I must now examine the position of the defendant company, Flight Refuelling Ltd. The company, as its name indicates, is a commercial undertaking formed to develop methods of refuelling aircraft in flight. It was incorporated in 1934 and its moving spirit from the start has been, and still is, Sir Alan Cobham, a well-known personality in the aviation world. The company's operations in its chosen field date from before the war of 1939-45, and even at that stage they were of interest to the government, but connexions were also established with Imperial Airways in the field of civil aviation. During the war the company worked closely with the Air Ministry and with the ministry's research establishment at Farnborough, and after the war it found itself at an aerodrome near Littlehampton. That aerodrome had to be reconstructed and the company was compelled to move, and after a short period at Tangmere it came to Tarrant Rushton. It first arrived there in the autumn of 1947 and found that the aerodrome had been evacuated by the Royal Air Force but that there was a care and maintenance party left in charge: that was withdrawn in 1948 when the defendant company effectively took the aerodrome over. I mention these facts because they seem to point to the conclusion that the initial occupation of the aerodrome was partly at any rate for the purposes of the requirements of the defendant company, in order to enable it to carry on its business, and was not wholly for purposes of the Royal Air Force.

It was some time before the terms of the company's occupation were agreed; in fact it was not until Dec. 14, 1948, that a definition of the terms of its occupation was attempted. On that day the Air Ministry wrote confirming "the terms proposed for your licence for use of the airfield" and of certain buildings and installations. The latter were listed and it was then stated that the occupation was to be for one year certain from May 1, 1948, and thereafter terminable by six months' notice on either side, subject to

"... immediate possession if required by the Royal Air Force or other departments, in the event of a declaration of a national emergency."

A nominal rent of £500 was proposed, the company being responsible for rates; (these in fact were consistently paid by the company and were substantial in amount). There were to be provisions regarding repairs and maintenance of buildings by either side, and (in cl. 6) a covenant by the company against "subletting" without consent and other detailed provisions about insurance, water supply and consumption of electricity. These terms operated only for a period of about eighteen months and were then superseded by fresh terms.

On June 12, 1950, the Air Ministry wrote stating its proposals. The occupation was to cover "the airfield and dispersed communal site and sewage disposal works". It was to be

"... on licence until the Air Ministry shall have acquired the land. If and when the land is purchased a tenancy shall be granted extending to Nov. 14, 1954, subject to immediate possession being given if required by the Royal Air Force or some other government department in the event of the declaration of a national emergency."

It was proposed that "consideration money under the licence and the rent under any tenancy" should be at the rate of £6,000 per annum from Nov. 15, 1949, subject to a special rebate for the first year. The company was to be responsible for all repairs to the airfield and buildings and was to "keep and leave the same in a good and tenantable state of repair upon the termination of the occupation". There was again a provision against "subletting" and for payment of rates and other ancillary provisions. These proposals were accepted by the company, subject to certain minor modifications which had been agreed, on May 14, 1952. On Sept. 11, 1954, the Air Ministry wrote to the company saying that the Secretary of State had decided to proceed with the purchase of the airfield, and when the purchase was completed to negotiate with the company for the grant of a

lease. On Nov. 12, 1954, the Air Ministry wrote that, no purchase of the land having been made, the occupation was to continue on licence on the existing terms. The present position is that, although the land was purchased by the Air Ministry, on July 1, 1958, and although there have been negotiations for a lease, to which I shall have to refer, no lease has been granted and the company is still holding on the terms of the "licence".

As to the so-called "licence", the following comments may be made. First, it is extremely like a lease. It is clear that, at any rate from November, 1949, the defendant company was effectively in occupation of the whole airfield and buildings, with some minor exceptions, and that ever since 1950 the company has been there under an assurance that the ministry intended to buy the site and to grant a lease to the company. Sir Alan Cobham had, in 1953, asked for a lease for twenty-one years, and this seems to have been acceptable to the ministry. Under the "licence" the company was liable for rates, was prevented from subletting, and had to keep in good and tenantable repair. The plaintiffs are, in my view, justified in describing this as either an actual tenancy or, at the least, as a yearly licence closely analogous to a tenancy. Secondly, there was no restriction on the company in either licence agreement as to user of the "licensed" premises. In fact, when the company at a later stage began to use part of the premises for making carpet machinery, the ground on which the Air Ministry objected was that this involved a breach of the covenant against subletting. Thirdly, the agreements contain no obligation on the part of the company to do any act "for the service of the Royal Air Force or the defence of the realm". Although it is claimed that the airfield is required for immediate operational use, if needed, and that the company was the instrument through which this was to be achieved, the obligations of the company only extended to "good and tenantable repair".

The position may be summed up by saying that the defendant company was given rights over the airfield in the nature of a tenancy, paying a very substantial rent: that the company was left free to carry on its own business: that it undertook the maintenance of the airfield, and that the Air Ministry was empowered to resume occupation in an emergency. The company was in a position to, and, no doubt, it expected to, carry out work, for reward, for the Air Ministry and other government departments while it was there, but the carrying out of this work, other than the maintenance of the airfield, was not part of the terms of occupation; nor was it something which the company was bound to do.

What, in fact, did the company's activities consist of? Broadly they fell, at all material times, under four headings: (i) maintaining the airfield and its facilities; (ii) design and development of flight refuelling equipment and the fitting of this equipment to Royal Air Force aircraft; (iii) work on "Meteor drones"; and (iv) miscellaneous. I must say something about each of these activities. As to the first, it is not really disputed that this work can be described as work done for the service of the Royal Air Force and the defence of the realm. Evidence was given, which I accept, that the maintenance of this airfield on an operational basis was necessary for the defence of the realm and that this work was done largely, if not entirely, by the company. It is work directly related to the immediate purpose for which the airfield was acquired and it was not seriously suggested that it ought to be stopped.

As to the second, the evidence is not so clear. On June 12, 1953, the Air Ministry wrote to the company indicating its willingness to grant a lease, but in terms which suggested that the company's operations were regarded as industrial operations with which other non-service departments (for example, the Board of Trade) were concerned. On Mar. 9, 1954, the Under Secretary of State, writing to Mr. Crouch, M.P., after referring to a flying school which the company had been running on the Air Ministry's behalf, said this:

"The school is, however, by no means the only work which [the defendant company] undertake[s] at Tarrant Rushton. I understand [it carries] out,

on [its] own account, research and development of flight refuelling, the supply of pressure refuelling equipment to all major aircraft constructors and airlines and the supply of flight refuelling components to the U.S. Government. In addition, as sub-contractors to main contractors to the Ministry of Supply, [the company has] at present a very substantial range of work covering the construction of airframe components repair and overhaul of aircraft, instruments, radio and electrical equipment, and the modification and conversion of aircraft. While I cannot speak for [the company], either as to the continuance of [its] activities at Tarrant Rushton or [its] need to expand the accommodation [the company] at present rent[s], I should expect to find that, because of [its] activities apart from the advanced flying school, [the company] would not wish to withdraw from the airfield when our contract ceases."

This again seems to suggest that the flight refuelling work was regarded simply as industrial work which the defendant company was doing on its own account under contract with (among others) the Ministry of Supply.

In March or April, 1954, the Under Secretary of State, again writing to Mr. Crouch, M.P., about the future of Tarrant Rushton, said that, although the existing use of the airfield by the Royal Air Force was due to end shortly, the airfield still had "a most important part in our plans". It was said that the ministry intended to buy the site "for a defence need" and that the defendant company would be "acting as caretakers of the airfield until we need it again for defence purposes". The company had done so since 1948 to the ministry's satisfaction. He added that he had heard that the company was "intending to introduce one or two industrial sidelines" into Tarrant Rushton, but this was to be entirely on the company's own responsibility as regards planning, etc. This letter seems, on the face of it, to suggest that the only defence need was the maintenance of the airfield as such, and that the ministry was not concerned with the other industrial activities of the defendant company. There is, however, a reference to "our existing Royal Air Force commitment", which might be said to cover, if necessary, some of the defendant company's other activities. But on Aug. 6, 1954, the Secretary of State is reported as having said, at a meeting on the airfield, at which the National Farmers Union were voicing their protest against the threatened incursion of industry, that in 1947 it was

"... urgently necessary to find accommodation for [the defendant company] in view of the vital importance of [its] pioneer work on flight refuelling, and Tarrant Rushton was considered the most suitable airfield then available."

He added later that the work done there should be "broadly related to defence needs".

The witnesses called at the trial all related the company's work on flight refuelling to defence needs. Air Commodore Magill, who is Director of Bomber and Reconnaissance Operations in the Air Ministry, said that "the project is essential to the defence planning". He said that flight refuelling equipment is being fitted to certain bombers and fighter aircraft in the Royal Air Force, but did not give any details as to the work actually done at Tarrant Rushton. He said that any suggestion that the defendant company should not have that airfield available to it would be of the very greatest concern to the Air Ministry: any move would lead to delay in production and development. Mr. Leonard Williams, an assistant secretary in the Ministry of Aviation and formerly in the Ministry of Supply, said that the defendant company had built up a unique expertise and engineering "know-how" in this field and that any move would involve delay. As to the business relations between the defendant company and his ministry, he said that, when the Air Ministry decides that flight refuelling equipment should be fitted to any type of aircraft, his department places a development contract with the company and the company carries out the work at Tarrant

Rushton, using for this purpose two Canberra aircraft, the property of the Ministry of Aviation, which are lent to the company. These Canberras are used to test the working of the system in actual flight conditions from the airfield. The point of importance, said this witness, was that the design staff and the design workshops are near the runway, and this makes the whole procedure efficient and more economical. The equipment itself is not normally fitted to the aircraft at Tarrant Rushton, but is sent away to the aircraft manufacturer. Sir Alan Cobham, the chairman and managing director of the defendant company, substantially confirmed this evidence. He described this head of work as overhaul and maintenance of all the flight refuelling equipment that exists in the Royal Air Force: that comes to Tarrant Rushton and is sent back to the various squadrons. Then there is the development of new types of refuelling, for which purpose special testing equipment is constructed and used. This equipment is then flight-tested on the airfield. As the result of this work a considerable "know-how" is developed, and numerous pieces of equipment such as switches, valves and connectors are developed which can be used on Royal Air Force aircraft and also for refuelling on the ground and for civil aircraft. That is the second category of work done by the defendant company on the airfield, and it amounts at the present time to about thirty per cent. of the total in money terms.

The third category of work is described as the refurbishing and equipment of "Meteor drones". Translated into the vernacular, this means that the company receives from the Air Ministry a type of aircraft called the Meteor, which it then proceeds to take to pieces and reconstruct as an aircraft capable of flying by remote control. This involves the insertion of electric or electronic apparatus, some of which is bought from outside, but which is fitted and tested by the company at Tarrant Rushton. When the metamorphosis of the Meteors into drones is complete, they are tested on the airfield, the control being operated from special huts, and it appears that a long runway is necessary for the testing. The drones have an important service role, being used as targets for fighter aircraft to shoot at, and for guided weapons. This particular work has been done by the company since 1953, and a total of over £2,000,000 has been spent on it. The work is on a declining scale because the supply of Meteors is limited, and Mr. Williams' estimate was that there might be another three years' further work in this field. This category of work accounts for about another forty per cent. of the defendant company's activities in money terms.

The fourth and miscellaneous heading includes three main subdivisions. One consists of work on Belgian service aircraft. This is done by direct arrangement with the Belgian government, and the Ministry of Aviation does not have any hand in it. The aircraft are flown from Belgium, repaired, modified and tested at Tarrant Rushton and returned to Belgium. They are said to form part of the defence resources of the North Atlantic Treaty Organisation, but I was given no particulars of the nature of this organisation or how these aircraft were related to it. Another subdivision consists of nuclear work. This, it appears, arises out of the "know-how" acquired by the company in the manipulation of fluids and gases, and research, development and production are undertaken for the Atomic Energy Administration and other concerns. No government department appears to be directly concerned in this activity. The remaining subdivision consists of commercial activities to do with valves and other equipment, which is either identical with or similar in character to flight refuelling equipment, but which is capable of general use in industry. The proportions represented by these activities are variously stated as about seven to ten per cent. on the Belgian aircraft, about five to ten per cent. on the nuclear work, and the rest about ten per cent. on valves, adding up to about twenty-two to thirty per cent.

To complete the analysis of the company's activities, it may be useful to add some references to the geographical layout of the airfield. With the aid of a plan and two schedules of user, it is possible to ascertain the precise purpose for which each building is used, not only on the restricted land but also on the white

land, which is free from restriction. Without going into too much detail, the following facts may be stated. (i) The main runway (No. 1) is for rather more than half its length on blue land and for the rest on white. Runway No. 2, which is shorter and runs from east to west, is wholly on white or pink (also unrestricted) land. (ii) Although all four hangars and most of the buildings are in the company's occupation, there are a few huts on the blue land—mainly on the communal site—occupied by the Royal Air Force. (iii) The technical site, which is split between blue and white, is in appearance and organisation a single site. The division between the two portions can be detected, but there is no effective separation. There is one building which straddles the boundary. (iv) The nuclear activities are mainly carried on in a single hut (No. 1000) on the blue part of the technical site near the boundary, but some assembly and testing is done on the white portions. (v) Some new buildings have been erected and paid for by the defendant company, mainly on the white land but also on the blue (technical site). (vi) The work on the Belgian aircraft is at present done mainly in the hangar (No. 4) on the blue land. (vii) As one would expect, a number of buildings, for example those connected with administration, design and testing, are used for all the company's activities indifferently, and it would, no doubt, be impossible to segregate out of them any specifically service uses.

On these facts I have now to consider the position of the defendant company in relation to the restrictive covenant. The activities of the company taken as a whole, are quite clearly industrial activities and are admitted to be such in the company's defence. They are undertaken by the company in the normal course of carrying out the purposes for which it exists. They are equally clearly activities in breach of the restrictive covenant. But a number of arguments is put forward on the company's behalf why the covenant should not be enforceable against the company. By the Attorney-General it was said that the company was on the airfield to do work of national importance, and work for the service of the Royal Air Force and the defence of the realm; that it was essential that the company should be kept there in the national interest: that the company's work did not cease to be for these purposes if the company managed also to find outlets for its products in industry: that, applying the test laid down in *Hawley v. Steele* (43), it should be found that the company was not doing anything outrageous and that its activities should not be interfered with in any way. For the company it was argued that, the Crown having acquired the land under the Defence Acts, for the service of the Royal Air Force and the defence of the realm, user for those purposes should be considered as permitted by the Acts, both by the Crown itself and also by its licensees or its contractors: that the bulk of the company's work was for defence purposes, that is to say, the maintenance of the airfield, the flight refuelling work and the conversion of the Meteor drones: that the rest of the company's activity fitted in with the statutorily protected activity and could not easily be distinguished from it. Any attempted distinction between the statutory activity and outside activity would involve, it was said, inquiries and investigations which would be troublesome in practice and possibly contrary to the public interest. For the plaintiffs, on the other hand, it was said that, although the Air Ministry had acquired the land under statutory powers, it had in effect, or in any event such was its intention as soon as this action was out of the way, put the defendant company into effective occupation of the airfield for the purpose of enabling the company to pursue its own ends; that, no doubt, the company would seek and do work for the Air Ministry, and other departments, but that the company was in this respect no different from any other commercial undertaking which accepts or solicits government contracts. The mere fact that industrial work is carried out under contract from the government, or a service department, does not alter the character of work and does not make it work for the statutory purposes for which the land was acquired so as to be protected by statutory authority.

The task of choosing between these approaches to the facts is evidently not an easy one: the difficulty in doing so derives from the lack of clarity and sharpness in the action taken by the Air Ministry over the years. From the initial period when possession of the airfield was taken for indisputably defence purposes, one passes gradually over fifteen years, to a stage when the Air Ministry, no longer needing the airfield for immediate operational purposes, desires to have it available for any emergency and decides that the most economical method of so doing is to make use of a commercial company which is willing to pay a substantial rent for the right to use the airfield and its facilities for its own purposes, some of those purposes being of direct and others of indirect interest to the ministry itself. But considering the position as it now stands, I am of opinion that none of the three alternative contentions ought to be wholly accepted and that the true position is an intermediate one. I cannot accept the general argument that it is enough to show that the defendant company's presence on the airfield is in the national interest. That may be so, but it does not follow that the company's activities should not be circumscribed, even if to do so might involve, for the company or even for the Air Ministry, a less economical method of operation. I see no legal basis on which a mere plea of national interest can be an answer to a claim to enforce a restrictive covenant. Nor do I accept the company's argument that, once it is shown that the bulk of its work is within the statutory authority, I should take no notice of other activities which are outside it. Both of these arguments, in my judgment, seek to extend the statutory protection too far.

On the other hand, I think that the plaintiffs go too far the other way when they invite me to deal with the case as if the company were merely occupying the site under a lease and carrying out contracts for a government department. That seems to me to overlook the point that the airfield has been acquired under statutory powers and must be taken to have been so acquired to enable certain statutory purposes to be fulfilled. In the ultimate analysis, the question for the court appears to me to be this: How much of the company's activity should be treated as done for the purposes for which the airfield may be considered to have been acquired? And in answering this question the court must, as was said in *Hawley v. Steele* (44), adopt a broad approach and must take great care not to embark on inquiries or to make distinctions in a matter which is essentially for the administrative discretion of the government.

Applying these tests, and accepting, as I think that I must accept, the evidence of the ministry's witnesses as to the needs of the service and the requirements of defence, I have already said that the company's work in maintaining the airfield and keeping it ready for operational use is clearly and immediately within the statutory purposes. The work on flight refuelling of service aircraft and on "Meteor drones" appears on balance to me to be equally so. No doubt, this work could be done elsewhere: possibly the work on the "Meteor drones" could be done by other firms (though, in fact, none does it); but, given the fact, which again I accept, that an airfield on the spot is necessary to enable each of these categories of work to be done, the Secretary of State would have been justified in acquiring under the Defence Acts an airfield to enable them to be done, and he must equally, in my judgment, be entitled, having acquired an airfield, to authorise them to be done on the airfield so acquired. It cannot, in my view, make any difference that, instead of doing this type of work himself, he commits it to an individual or a company, nor that, having chosen his instrument, he uses the latter as an independent contractor rather than as an agent, nor that, to enable the contractor to do the job, he grants him a lease or a licence. In all cases the land is being used for the statutory purposes for which it is acquired and such user is protected from attack.

The protection of the statute, therefore, in my judgment extends to the company's work on flight refuelling for the Royal Air Force and to the work on "Meteor drones". Moreover, I think that, in so far as the company manufactures and sells flight refuelling equipment for other users, it should not be deprived of the protection so long as this activity represents but a reasonable concomitant of its work for the services. It would be unreasonable, in my judgment, and not in accordance with the principles stated so clearly in *Hawley v. Steele* (45) to permit the company to store any products made surplus to the requirements of the services while forbidding it to sell them to other consumers. It is a question of degree, no doubt, at what point the company's production assumes the dimensions of a separate activity, but I am content to hold that on its present scale that portion of the flight refuelling activity which is beyond what is needed for service purposes ought not to be prohibited.

That leaves the nuclear work and that done for the Belgian Air Force. Neither of these, in my judgment, falls within the statutory protection, even when extended as generously as I have thought right to extend it: the first obviously not, the second because there is not a sufficient connexion, on the evidence, between it and the purposes for which the airfield was acquired: it is simply a case of the company, by its independent initiative, going out and securing a contract which it is profitable to acquire. As to these two activities, therefore, I have seriously to consider whether the plaintiffs should be granted an injunction to restrain them. Before I do so, I must consider what are the company's intentions with regard to the future. Is there a real and substantial threat to extend the company's industrial activities, or, as was submitted to me by the defendants, is there no real risk of that? The answer to this question may well have an effect on the action which the court may take with regard to the company's present work.

There is a good deal of material in the massive volumes of disclosed correspondence which bears on this point, but I do not consider that I need go through it in detail. I find that the following facts are substantially beyond dispute. The company, which has been holding the restricted land on licence, has almost from the beginning of its tenure counted on being granted a lease, and at any rate since 1950 has been all but promised a lease so soon as the Air Ministry acquired the land by purchase. Discussion on the terms of the lease has been going on since March, 1958, and draft terms have been passing and repassing between the parties. The Air Ministry appears to be willing to grant a term of twenty-one years (with breaks after the seventh or fourteenth year) and debate has mainly centred on two matters, namely, the scope of the restriction to be imposed on the company's user of the demised premises and the maximum number of persons to be employed by the company on the demised premises. As to user, the Air Ministry in February, 1959, showed itself willing to permit the manufacture, maintenance and repair of aircraft and aircraft components (not limited to service aircraft), and the manufacture, maintenance and repair of apparatus and equipment for the transmission of fluids and research and development in connexion with any of these activities. It was also prepared to allow up to one thousand one hundred employees. Sir Alan Cobham has been endeavouring to improve on both of these: in April, 1960, he asked the ministry to allow him to go up to one thousand five hundred employees, and in March, 1959, with the object of getting "further freedom of action", he put forward a draft clause as to user which would have permitted the company to do any design, development and manufacture "within the company's scientific bracket". Sir Alan gave evidence, and was cross-examined on his intentions at some length. Some of the expressions used from time to time by himself or his staff indicating a desire to expand the commercial side of his activities, or in one case by a reporter for a newspaper, he was inclined to disclaim or discount as "salesmanship", "wishful thinking",

"exploring", "a licence in my mode of expression", or as related to a temporary emergency, and I have no doubt that Sir Alan, who has had long experience in contest for his company with landlords and government departments, knows that there are occasions when it is a mistake to understate one's case. I take some, at any rate, of his evidence to have been given in the same spirit, and I think that I should be underestimating his ability and resource as a businessman if I did not credit him with every desire to expand the company's field of operations. He frankly admitted that he wished the company to expand; he has been warned—and a revealing letter of July 23, 1958, shows that he has taken the warning to heart—that the flow of defence contracts is likely to fall off: he knows that the supply ministries are positively encouraging companies such as his to diversify, and he has expressed his expectation that the proportion of the company's work in general industry will greatly increase. It is true that he said that this fresh industrial work was to be done by a new company, Sir Alan Cobham, Ltd., and not by the defendant company, but it was brought out that the new company is a one hundred per cent. subsidiary of the defendant company and was formed since the writ in the action. I found this argument rather naïve. I have already referred to the fact that the Meteor drones contract is likely to run out in three years. It is apparent that the company hopes and intends, if it can, to obtain a secure tenure of the airfield through a lease and considerably to expand its non-service activity. The ministry's policy is one of encouragement to diversify, rather than the opposite. It may well be, of course, that the company may, as a matter of economics, find it more practical to transfer its civilian work, or some of it, elsewhere instead of bringing it to Tarrant Rushton. Sir Alan Cobham has said that this is what he intends, but I have no doubt that Sir Alan wishes to be entirely free, if it suits the company, to expand at Tarrant Rushton (as he wrote on June 18, 1959, "to do what we like"). I should be surprised if his intentions were different. There exists, therefore, in my judgment, a perfectly definite threat that what I may call "non-statutory activities" at Tarrant Rushton will be extended and greatly extended. I think that the plaintiffs are entitled to be protected against this threat, and, indeed, that it is for the sake of this protection that this action has mainly been brought.

That brings me to the question of relief which I now have to consider in relation (a) to the existing non-statutory activities and (b) to the future. Unfortunately, there are issues left even at this stage. There is raised in the company's defence a plea of laches—an analogous plea in the Air Ministry's defence has been abandoned. If this means what it says, it is not made out: it is common ground that no action could have been taken by the plaintiffs to enforce the covenant during the period of requisition. This expired on July 1, 1958, and the writ was issued on Apr. 1, 1959. The interval is quite insufficient to support the plea. But a more substantial defence was raised on the facts, and, even though it is not specifically pleaded, it may go to the right to obtain equitable relief. The plaintiffs, it is said—and Commander Marten admitted as much—never drew the attention of the company to the existence of the restrictive covenant and the first the company knew about it was on the issue of the writ. It was, of course, on the land charges register, and s. 198 of the Law of Property Act, 1925, provides that entry on the register is to be notice to all the world: nevertheless, I think that I must take the plaintiffs' silence into account. It cannot be said that this silence amounts to acquiescence, because the plaintiffs were consistently opposing the continuance of the airfield and of the company's industrial activities, though this opposition was not based on the covenant; but it is claimed that, had the covenant been mentioned, the company's action might have taken a different course at some points.

Three matters were referred to. First, the company's general expenditure, which over ten years, amounted to some £285,000. This expenditure was not, as I understand it, mainly capital expenditure, but maintenance or repairing expenditure undertaken year by year and, no doubt, offset by earnings, and I

am not persuaded that it would have been any different if the company had been aware of the covenant—if only because, during the greater part of the period, the company was immune from it. Secondly, a faint suggestion was made that the company would not have sold a factory which it possessed at Bournemouth if it had known of the covenant. The facts, however, with regard to this were that the company received an advantageous offer for the factory which it felt it could accept because it had acquired a superior site at Wimborne. Sir Alan did not commit himself to a statement that he would not have sold had he known of the covenant. Thirdly, it was said that, had the company known of the covenant, it would have taken care to place its non-protected activities, or even all its activities, on the white land where they could not be touched. I think that there is substance in this contention, but limited substance. The two non-statutory activities which may have been affected are the nuclear work, the main part of which is on the blue land in hut No. 1000, and the work for the Belgian Air Force which is done in hangar No. 4, also on blue land. The hangar could not be moved, but the work could have been transferred, and still can be, no doubt with some dislocation. Hut No. 1000 could be moved or its installations transferred, probably with more dislocation. In respect of both of these activities I am reluctant, in the circumstances, to grant an injunction which would compel their immediate removal. I go further, and say that I am not willing, on the basis of the use to which these buildings are being put at the present time, to order their removal at all. The only effect of such an order would be to cause another hangar or hut, as the case may be, to be used on unrestricted land, and nothing whatever would be gained from the plaintiffs' point of view by so doing. The weapon of an injunction should not be used where no practical purpose would be served. On the other hand, I think that the plaintiffs are entitled to be protected against any extension of these uses and against any further development of purely industrial activities on the restricted land.

The conclusions to which I have come, therefore, are these. (i) The plaintiffs are entitled to the benefit of the covenant and the covenant burdens the blue land: The plaintiffs are entitled to a declaration accordingly against both defendants. (ii) To the declaration to be granted there should be added two provisos: (a) as regards the blue land other than the communal site, that nothing therein shall be taken to prevent the user of this land by either defendant for the service of the Royal Air Force or the defence of the realm; (b) as regards the communal site, that nothing therein shall be taken to prevent the user of this land for any purpose for which it may lawfully be used in accordance with such statutes and regulations relating to the requisitioning of land as were in force at the date of the writ. (iii) An injunction will be granted against the defendant company restraining it from using the blue land other than the communal site otherwise than for agricultural purposes. To this there will be added two provisos, one corresponding to that referred to under (ii) (a) above, that is to say that nothing shall be taken to prevent the user of this land for the service of the Royal Air Force or the defence of the realm, the other to the effect that nothing herein shall be taken to prevent the use of hangar No. 4 or of hut No. 1000 for the purposes for which those buildings respectively were in fact used at the date of the writ.

Declarations and injunction accordingly. No order as to costs.

Solicitors: *Lewis & Lewis and Gisborne & Co.*, agents for *Preston & Redman*, Bournemouth (for the plaintiffs); *Lovell, Son & Pitfield*, agents for *J. & W. H. Druitt*, Bournemouth (for the defendant company); *Treasury Solicitor*.

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

DIRECTOR OF PUBLIC WORKS AND ANOTHER v. HO PO SANG AND OTHERS.

[PRIVY COUNCIL (Lord Denning, Lord Morris of Borth-y-Gest and Mr. L. M. D. de Silva), February 20, 21, 22, 23, May 15, 1961.]

Privy Council—Hong Kong—Statute—Repeal—Crown lease—Particulars and conditions for new lease agreed in writing—Necessity of Crown lessee obtaining re-building certificate under Landlord and Tenant Ordinance—Repeal of relevant provisions of ordinance after notice of intention to grant re-building certificate but before certificate granted—Whether lessee possessed a right under the ordinance which remained unaffected by the repeal—Landlord and Tenant Ordinance (Laws of Hong Kong, revised edition 1950, c. 255, as amended), s. 3A-s. 3E—Interpretation Ordinance (Laws of Hong Kong, revised edition 1950, c. 1), s. 10 (b), (c).

Statute—Repeal—Savings—Accrued right or privilege—Anything done—Landlord and Tenant Ordinance (Laws of Hong Kong, revised edition 1950, c. 255, as amended), s. 3A-s. 3E—Interpretation Ordinance (Laws of Hong Kong, revised edition 1950, c. 1), s. 10 (b), (c).

K. held a Crown lease in respect of certain premises in Kowloon, Hong Kong, which expired in December, 1951. There were tenants and sub-tenants of the premises. K. applied for renewal of his lease, and by a memorandum of agreement in June, 1955, it was agreed between himself and the Director of Public Works that K. was to develop the site by erecting buildings on it within a certain time. K. was then to have a new lease or leases on terms which, effectively, would give him a period of seventy-five years from December, 1951. The erection of the new buildings necessitated the demolition of the then existing buildings, which were premises subject to the Hong Kong Landlord and Tenant Ordinance. By s. 3A (1) of that ordinance*, when a Crown lessee wished to demolish existing buildings subject to the ordinance, he could recover vacant possession of the premises after the giving by the Director of Public Works of a re-building certificate. By s. 3B (2), when the Director of Public Works gave notice of his intention to grant a re-building certificate, the lessee could serve a notice in the prescribed form on the tenants who could, within three weeks of such notice, appeal by way of petition to the Governor in Council against the proposal of the Director of Public Works to give a re-building certificate. The lessee, in that event, could present a cross-petition. By s. 3D (2), every petition and cross-petition was to be taken into consideration by the governor who had an absolute discretion to direct that a re-building certificate should be given or should not be given. By s. 3E (1), when a re-building certificate was given by the Director of Public Works, the lessee could serve a notice to quit on persons in occupation, after which he could claim vacant possession. In 1956 K. applied to the Director of Public Works for a re-building certificate who duly gave notice of his intention to give such certificate. K. served notices of the director's intention and the tenants and sub-tenants appealed by way of petition to the Governor in Council. This was followed by a cross-petition by K. On Apr. 9, 1957, no decision had been taken by the Governor in Council in regard to the petitions and cross-petition, but on that day s. 3A-s. 3E of the Landlord and Tenant Ordinance were repealed without any express provision which enabled consideration to be given to any pending petitions or cross-petitions or which permitted the subsequent giving of any re-building certificate. By the Interpretation Ordinance, s. 10, the repeal of any enactment was not to " (b) affect the previous operation of . . . anything duly done . . . under any enactment so repealed; or (c) affect any right . . . acquired . . . under

* Sections 3A-3E are set out at p. 724, post.

any enactment so repealed". In October, 1957, the governor directed that a re-building certificate be given, and it was issued by the Director of Public Works. K., claiming to be entitled to follow the procedure laid down in the Landlord and Tenant Ordinance, served notice to quit on the tenants and sub-tenants. The tenants and sub-tenants sought a declaration that, after the repeal of s. 3A-s. 3E of the Landlord and Tenant Ordinance, the Director of Public Works had no legal authority to issue a re-building certificate.

Held: (i) K. had not had on Apr. 9, 1957, any accrued right or privilege within s. 10 (c) of the Interpretation Ordinance because—

(a) the fact that the Director of Public Works had given notice of intention to grant a re-building certificate did not confer any right thereto on K., since various conditions had remained to be satisfied before the certificate could be granted, so that K. had no more than a hope that it would be granted (see p. 730, letters A and E, post).

(b) any entitlement of K. to have the matter considered by the Governor in Council was not an accrued right or privilege within s. 10 (c) (see p. 731, letters B and C, post).

Dictum of LORD HERSCHELL, L.C., in *Abbott v. Minister for Lands* ([1895] A.C. at p. 431) considered.

Hamilton Gell v. White ([1922] 2 K.B. 422) distinguished.

(ii) although the repeal of s. 3A-s. 3E of the Landlord and Tenant Ordinance did not invalidate any step that K. had taken towards getting a re-building certificate, for any such step was a thing done within s. 10 (b) of the Interpretation Ordinance, yet the repeal rendered all such steps abortive for it destroyed the prospect of such steps leading to the grant of a re-building certificate (see p. 732, letter G, post).

Appeal dismissed.

[**Editorial Note.** Section 10 of the Interpretation Ordinance of Hong Kong corresponds with s. 38 of the Interpretation Act, 1889. Perhaps the decision in the present case can conveniently be summarised by saying that liberty to apply for a right is not itself an accrued right or privilege.

As to savings on repeal of a statute, see 31 HALSBURY'S LAWS (2nd Edn.) 562, para. 761.

As to the disturbance by a new statute of rights asserted under prior statutes, see 31 HALSBURY'S LAWS (2nd Edn.) 516, 517, paras. 671, 672; and for cases on the subject, see 42 DIGEST 701, 702, 1169-1183.

For s. 38 of the Interpretation Act, 1889, see 24 HALSBURY'S STATUTES (2nd Edn.) 229.]

Cases referred to:

Abbott v. Minister for Lands, [1895] A.C. 425; 64 L.J.P.C. 167; 72 L.T. 402; 42 Digest 702, 1180.

Boddington v. Wisson, [1951] 1 All E.R. 166; [1951] 1 K.B. 606; 2 Digest (Repl.) 146, 1131.

Briggs v. Dryden (T.) & Sons, *Talbot v. Vickers, Ltd.*, [1925] 2 K.B. 667, 682; 95 L.J.K.B. 275; 133 L.T. 409, 415; 18 B.W.C.C. 163; 34 Digest 458, 3752.

Hamilton Gell v. White, [1922] 2 K.B. 422; 91 L.J.K.B. 875; 127 L.T. 728; 42 Digest 776, 2048.

Heston and Isleworth Urban Council v. Grout, [1897] 2 Ch. 306; 66 L.J.Ch. 647; 77 L.T. 118; 26 Digest (Repl.) 610, 2644.

Moakes v. Blackwell Colliery Co., Ltd., [1925] 2 K.B. 64; 94 L.J.K.B. 723; 132 L.T. 819; 18 B.W.C.C. 100; 34 Digest 410, 3340.

Reynolds v. A.-G. for Nova Scotia, [1896] A.C. 240; 65 L.J.P.C. 16; 74 L.T. 108; 42 Digest 702, 1190.

Appeal.

Appeal by the Director of Public Works and Kwong Siu Kau from a judgment of the Supreme Court of Hong Kong (Appellate Jurisdiction) (BLAIR-KERR and MILLS-OWENS, JJ.), dated Dec. 31, 1959, allowing an appeal by the respondents, tenants and sub-tenants of property in Kowloon, Hong Kong, from a judgment of the Supreme Court of Hong Kong (Original Jurisdiction) (GREGG, J.), dated July 13, 1959. The respondents by writ dated Dec. 10, 1957, had sought, among other relief, a declaration that the Director of Public Works was no longer empowered to issue a re-building certificate under s. 3A, since repealed, of the Landlord and Tenant Ordinance, 1947, c. 255, as amended, in respect of the property. The facts are set out in the judgment of the Board.

Peter Foster, Q.C., and *Raymond Walton* for the appellants.

B. A. Bernacchi, Q.C. (Hong Kong), and *J. L. Knox* for the respondents.

LORD MORRIS OF BORTH-Y-GEST: This is an appeal from the judgment of the Supreme Court of Hong Kong (Appellate Jurisdiction) (BLAIR-KERR and MILLS-OWENS, JJ.) of Dec. 31, 1959, by which they allowed an appeal by the plaintiffs in the action (the respondents) from a judgment of the Supreme Court of Hong Kong (Original Jurisdiction) (GREGG, J.) of July 13, 1959, by which the claims of the plaintiffs in the action were dismissed. There were two groups of plaintiffs. The first plaintiffs are the tenants of property known as Nos. 230, 232, 234 and 236, Temple Street, Kowloon, in the colony of Hong Kong. The second plaintiffs are the sub-tenants of those premises. In this judgment, they may respectively be referred to as the tenants and the sub-tenants. The action was brought against two defendants (the appellants). The first, who may be referred to as the director, is the Director of Public Works of the colony of Hong Kong. The second defendant, Kwong Siu Kau, may be referred to as the lessee. He had held a Crown lease in respect of the above-mentioned premises. The tenants were his tenants. His Crown lease expired on Dec. 24, 1951. He had, however, applied on Apr. 9, 1950, for a renewal of his lease. Negotiations took place between him and the director as to the particulars and conditions for the grant of a new Crown lease. These were agreed and were reduced to writing. A memorandum of agreement was signed by the director and by the lessee on June 7, 1955. The lessee had continued to pay rent down to that date; he had paid at the rate prescribed by the terms of his expired Crown lease. Stating the matter very generally, the new terms provided that the lessee was to develop the site by erecting buildings on it within a certain time. The buildings were to involve a certain minimum expenditure. The lessee was then to have a new lease or leases on terms which, effectively, would give him a period of seventy-five years from Dec. 24, 1951. A premium was to be payable, and the rent was to be higher than before. It has been assumed for the purposes of the litigation that the erection of the buildings contemplated by the new agreement would necessitate the demolition of the then existing buildings, and that such buildings were premises which were subject to the Landlord and Tenant Ordinance (c. 255). Before the lessee could proceed to demolish the existing buildings, he would need to have vacant possession. There were provisions in the ordinance under which, in certain circumstances, the director could give a re-building certificate. If such a certificate were given to a lessee, he was enabled, on taking certain steps, to call on those in occupation to quit. The parts of the ordinance containing those provisions were repealed as from Apr. 9, 1957. Before that date, steps had been taken with a view to obtaining a re-building certificate, and one of the questions raised in the appeal is whether, despite the repeal, the provisions of the Interpretation Ordinance enabled the procedure to be followed through to a conclusion so as to result in the giving of a valid re-building certificate after Apr. 9, 1957.

The Landlord and Tenant Ordinance (c. 255) was amended by Ordinance No. 22 of 1953 by the addition, *inter alia*, of s. 3A-s. 3E. There was a further

amendment (to s. 3A (1)) by Ordinance No. 11 of 1954. Section 3A, so far as material, reads as follows:

"(1) Whenever any person becomes liable to the Crown under a building covenant compliance wherewith involves the demolition of premises subject to this ordinance of which premises such person is in law or equity the lessee of the Crown, vacant possession of such premises shall, subject to the provisions of this section and of ss. 3B, 3C, 3D and 3E, be recoverable by such lessee upon the expiration of two months from the giving of a certificate by the Director of Public Works (in this ordinance referred to as a re-building certificate) that in the opinion of the Director of Public Works it is reasonable that such building covenant should be complied with and that such person should be given vacant possession of the premises.

"(2) After due consideration of an application for a re-building certificate, the Director of Public Works shall deliver written notice to the applicant of his intention either to give or not to give such certificate.

"(3) No re-building certificate shall be given until the applicant has proved to the satisfaction of the Director of Public Works that he has complied with s. 3B, nor until after the time for any appeal provided for by that section has expired nor, in the event of any such appeal being made, until it has been determined.

"(4) This section shall apply notwithstanding any agreement or condition that the Crown lease will not be granted until the building covenant which would bring sub-s. (1) into operation has been fulfilled."

Section 3B reads:

"(1) Where, pursuant to the provisions of sub-s. (2) of s. 3A, the Director of Public Works gives notice of his intention to grant a re-building certificate, the applicant may, within three weeks after receipt of such notice, serve in manner specified in s. 32 notice in the prescribed form upon each tenant in occupation of the premises to which his application relates of the intention of the Director of Public Works to give a re-building certificate.

"(2) Any such tenant may, within three weeks after service upon him of such notice, appeal by way of petition to the Governor in Council against the proposal of the Director of Public Works to give a re-building certificate, and any tenant so appealing shall, within the said period, serve upon the applicant a copy of his petition.

"(3) Any applicant for a re-building certificate who is served with a copy of a petition pursuant to the provisions of sub-s. (2) may, within fourteen days after such service, present a cross-petition to the Governor in Council, and in such event shall serve a copy of such cross-petition upon the tenant who has so appealed."

Section 3C dealt with the situation where the director gave notice of his intention not to give a re-building certificate and laid down procedure which, in that event, *mutatis mutandis*, corresponded with the procedure prescribed by s. 3B. Section 3D reads as follows:

"(1) . . .

"(2) No person lodging a petition or cross-petition as aforesaid shall be entitled to appear before the Governor in Council, but every petition and cross-petition lodged in due time shall be taken into consideration by the Governor in Council who may direct that a re-building certificate be given or be not given as he may think fit in his absolute discretion.

"(3) The decision of the Governor in Council shall be final."

Section 3E reads:

"(1) Within one month after the giving of a re-building certificate by the Director of Public Works, it shall be lawful for the lessee, notwithstanding

any contractual tenancy, to serve in manner specified in s. 32 a notice in the prescribed form calling upon all persons in occupation of the premises peaceably to quit the same on or before the expiration of the prescribed period of two months from the giving of the said certificate: Provided that where a new contractual tenancy exists in respect of which the period of notice to be given exceeds one month the prescribed period of two months shall be extended if necessary to enable notice in the prescribed form to operate as a notice to quit under the contractual tenancy, which such notice shall in such case be deemed to be.

“(2) Upon the expiration of the prescribed period the person who is in law or in equity the lessee of the Crown shall be entitled to vacant possession of the premises to which the re-building certificate relates in like manner and with the like remedies as if an order for possession thereof had been made under s. 18, and the provisions of s. 24 shall apply upon production of the re-building certificate and of a statutory declaration that the provisions of sub-s. (1) have been complied with, in like manner as they apply upon production of a copy of an order of a tribunal under s. 24.”

In the definition section of the ordinance (s. 2), it is provided that:—“lease” or “tenancy agreement” includes every agreement for the letting of any premises, whether oral or in writing. One part of the definition of “tenant” is that it includes a sub-tenant.

Further mention must now be made of the terms of the agreement made between the director and the lessee in 1955. The document of June 7, 1955, recorded the “Particulars and conditions for the grant of a new Crown lease of Kowloon Inland Lot No . . .” The particulars were as follows:

“First Schedule

PARTICULARS OF THE NEW LOT

Registered No.	Situation	Boundaries	Area in sq. ft.	Annual Rental	Premium
Kowloon Inland Lot No. 6516	Temple Street, Kowloon	As per plan signed by the lessee Area coloured red	2,950	From 25.12.51 \$270.00	\$70,800.00

Second Schedule

PARTICULARS OF THE OLD LOT TO BE SURRENDERED

Kowloon Inland Lot No. 63 Sec. A.R.P.”

There followed certain general and special conditions. The first three general conditions were as follows:

“(1) A surrender to the Crown of the old lot together with all rights of way and other rights and easements (if any) used and enjoyed therewith shall be executed by the lessee at his own expense and without payment or compensation such surrender to be made when required by and in a form to be approved by the land officer.

“(2) The lessee shall pay into the Government of Hong Kong the sum of \$70,800.00 as premium for the grant of the new Crown lease by instalments (incorporating interest at five per cent. per annum) in accordance with special condition (b) hereinafter contained.

“(3) Crown rent for the new lot commencing from the date of this agreement shall be as specified in Sch. I and shall be payable by equal half-yearly payments on June 24 and December 25 the first half year's rent or a due proportion thereof being payable on the next half-yearly date following the date hereof.”

Provided that the conditions were complied with to the satisfaction of the director and the land officer, the lessee was to be entitled to a lease of the new lot for a term of 150 years from Dec. 25, 1876, and it was provided (see condition 4 (b)) that, in the event of more than one building being erected on the lot, the lessee would be required to take up a separate lease for the site of each separate building. General condition 4 (c) was in the following terms:

"Pending the issue of such new lease the tenancy of the new lot shall be deemed to be upon and subject to and such new Crown lease when issued shall be subject to, and contain, all exceptions, reservations, covenants, clauses and conditions as are contained in the existing lease or agreement for tenancy under which the same is held as varied modified or extended by the general and special conditions herein contained, and a covenant to provide for the payment by instalments of the balance of the premium then remaining unpaid."

The exact boundaries of the new lot were to be determined by the director before the issue of the Crown lease. The first part of general condition 6 (a) was as follows:

"The lessee of the lot shall develop the same by the erection thereon of the building(s) specified in special condition (c) with such materials as may be approved by the Director of Public Works, and in all other respects in accordance with the requirements of the special conditions and the provisions of all ordinances, byelaws and regulations relating to buildings or sanitation as shall or may at any time be in force in the colony, such buildings to be completed before the expiration of twenty-four calendar months from the date hereof and shall expend thereon a sum of not less than \$200,000.00 (such sum to exclude moneys spent on site formation, foundations, access roads, and other ancillary works) . . ."

It was further provided (by general condition 6 (b)) that the fulfilment by the lessee of his obligations under the general and special conditions was to be deemed to be a condition precedent to the grant or continuance of the tenancy. General condition 9 gave the Crown a right to retain any premium that the lessee might have paid, and to re-enter and take possession of the new lot without payment or compensation to the lessee in respect of the value of the land or any buildings on it if the lessee neglected or failed to comply with any of the general or special conditions.

Special condition (a) was in the following terms:

"The lessee, his executors, administrators and permitted assigns shall not assign, underlet or part with the possession of or otherwise dispose of the new lot or any part thereof or any interest therein or enter into any agreement so to do unless and until he has in all respects observed and complied with the general and special conditions to the satisfaction of the Director of Public Works and the land officer and shall not mortgage or charge the new lot except by way of a building mortgage in connexion with the development thereof. The form of building mortgage shall be approved by the land officer and every assignment, mortgage, charge, sub-letting or other alienation of the new lot or any part thereof shall be registered at the land office."

The memorandum of agreement was signed by the lessee and by the director and was in the following terms:

"Memorandum of Agreement

Between Kwong Siu Kau () of No. 44 Bonham Strand ground floor Hong Kong merchant (the lessee) of the one part and the Director of Public Works for and on behalf of the governor of the other part

Whereby *It Is Agreed* that the lessee shall surrender the lot and premises set out in Sch. II of the foregoing particulars and shall be entitled to a

lease of the new lot described in Sch. I subject to and on the terms and conditions hereinbefore contained.

C/R No. 5206

Dated June 7, 1955."

More than a year after the signing of the memorandum of agreement, the lessee made application (on June 11, 1956) to the director for a re-building certificate. He made such application in reliance on the provisions of s. 3A of the ordinance. In order that the lessee should be entitled to rely on those provisions, the position would have to be (i) that the lessee was liable to the Crown under a building covenant, (ii) that compliance with the covenant involved the demolition of premises subject to the ordinance and (iii) that the lessee was in law or equity the lessee of the Crown in respect of the premises. It may here be said that the tenants and sub-tenants asserted in the action that there was no "covenant" to build and, furthermore, they said, as will be more particularly mentioned later, that the memorandum of agreement was void and of no effect in that it was not made by the governor under the public seal of the colony.

The application of June 11, 1956, having been made by the lessee, the director took it into consideration and, on July 20, 1956, he delivered written notice to the lessee of his intention to give a re-building certificate (see s. 3A (2) of the ordinance). The lessee then complied with the requirement indicated in s. 3B (1), and served notices of the director's intention. The tenants and sub-tenants then appealed by way of petition to the Governor in Council. There followed a cross-petition by the lessee to the Governor in Council. (See s. 3B (2) and (3).) The requirements as to time were in each case satisfied. If, for present purposes, it is assumed that the agreement of June 7, 1955, was not void, and if it is assumed that the lessee brought himself within the wording of s. 3A (1), the position then was that a decision as to the granting of a re-building certificate rested within the absolute discretion of the governor. When the two years' period from June 7, 1955, was nearing its termination, the government, on Mar. 20, 1957, granted to the lessee (subject to some variation of other terms) an extension of time to June 28, 1958, within which to fulfil his obligations to build.

By Apr. 9, 1957, no decision had been taken by the Governor in Council in regard to the petitions and the cross-petition presented to him. Then, by the Landlord and Tenant (Amendment) Ordinance, 1957 (No. 14 of 1957), which was to be deemed to have had effect as from Apr. 9, 1957, s. 3A, s. 3B, s. 3C, s. 3D and s. 3E of the Landlord and Tenant Ordinance above referred to were repealed. There was no express provision which enabled consideration to be given to any pending petitions or cross-petitions, or which permitted the subsequent giving of any re-building certificate.

In view of this repeal, on Apr. 9, 1957, the issue was raised in the action whether the provisions of the Interpretation Ordinance became applicable, which read:

"10. The repeal of any enactment shall not— . . (b) affect the previous operation of any enactment so repealed, or anything duly done or suffered under any enactment so repealed; or (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or . . . (e) affect any investigation, legal proceeding or remedy in respect of any such right . . ."

It will be observed that the provisions cited correspond with provisions contained in s. 38 of the Interpretation Act, 1889.

The subsequent events were that, on some date before Oct. 12, 1957 (but after the repeal of s. 3A to s. 3E), the governor directed that a re-building certificate be given. On Oct. 12, the director gave the lessee a re-building certificate under s. 3A (1), by which he certified that, in his opinion, it was

reasonable that the building covenant relating to 230-236, Temple Street, should be complied with, and that the lessee (who was referred to as "the Crown lessee of this lot") should be given vacant possession. Thereupon the lessee, claiming to be entitled to follow the procedure which had been set out in s. 3E (1), served notice to quit in prescribed form calling on all persons in occupation of the premises to quit within two months, and after the expiration of that time he claimed to be entitled to vacant possession of the premises. The tenants and sub-tenants thereupon commenced proceedings (on Dec. 10, 1957) against the director and the lessee. They presented three main contentions, viz. (i) that, after the repeal of s. 3A to s. 3E, the director had no legal authority to issue a re-building certificate; (ii) that the purported agreement of June 7, 1955, was null and void in that it was contrary to art. 13 of the letters patent of the colony of Hong Kong in that it was a disposition of land not under the hand of the governor and that, consequently, s. 3A never applied or came into operation so as to authorise the director to issue a re-building certificate; (iii) that, in the alternative, even if the re-building certificate was validly issued, the sub-tenants were protected from eviction under the provisions of the Landlord and Tenant Ordinance and (under s. 23) became direct tenants of the lessee. The plaintiffs asked for relief in the form of declarations and injunctions appropriate to their contentions.

Article XIII of the letters patent dated Feb. 14, 1917, constituting the office of Governor and Commander-in-Chief of the Colony was in the following terms:

"The governor, in our name and on our behalf, may make and execute, under the public seal of the colony, grants and dispositions of any lands which may be lawfully granted or disposed of by us. Provided that every such grant or disposition be made in conformity either with some law in force in the colony or with some instructions addressed to the governor under our sign manual and signet, or through one of our principal secretaries of state, or with some regulation in force in the colony. Nothing in this article shall be construed as preventing the enactment of laws by the legislature of the colony regarding the making and execution of such grants and dispositions."

By the Hong Kong Letters Patent, 1960, a new art. XIII was substituted for the article as just quoted, but in this litigation it is the article as it formerly stood that applies.

The learned judge (GREGG, J.) in the Supreme Court held that the agreement of June 7, 1955, was not technically an express "grant or disposition" of land as was contemplated by art. XIII, but was rather in the nature of a binding preliminary agreement for a lease of Crown land which gave no right of assignment, and which did not need to be signed by the governor himself under the public seal of the colony. He held that the re-building condition in condition 6 of the agreement was a "covenant" for the purposes of s. 3A of the principal ordinance. Though there had been a repeal of s. 3A to s. 3E, he considered that the lessee's position was preserved by s. 10 of the Interpretation Ordinance, firstly, because the application for a re-building certificate constituted something "duly done" under the repealed sections and, secondly, because it amounted to an acquired right within s. 10 (c) to have his claim determined and that, in the result, the re-building certificate was validly given. Lastly, the learned judge held that an order for "possession" under s. 18, as referred to in s. 3E (2) of the ordinance, could only mean, having regard to the wording of s. 3E and s. 3A, an order for vacant possession, which meant an order ejecting all tenants including sub-tenants. Holding, therefore, that the lessee was entitled to vacant possession of the premises, he dismissed the action with costs.

The tenants and sub-tenants successfully appealed against this decision. The judgments in the Appellate Division were delivered on Dec. 31, 1959. BLAIR-KERR, J., held that no particular right was conferred by s. 3A (1) of the

ordinance, and that the existence of a building covenant gave a lessee no more than a privilege to apply under the procedure set out and that the fact that there had been an application for a re-building certificate did not give the applicant a "right" to the continuance of the procedure after a repeal and that he had no "right acquired" or "accrued". MILLS-OWENS, J., held that, at the date of the repeal of the relevant sections of the ordinance, the lessee had no vested right, but had a mere hope or expectation of obtaining a re-building certificate, and that the fact that the director had given notice of his intention to issue a re-building certificate did not improve the lessee's position. The learned judge considered that, when s. 3A to s. 3E were repealed, the position of a landlord of protected premises became as it was before those sections were enacted in 1953; if he wished to re-build he could, in general, only secure vacant possession on obtaining an order which would invariably be conditional on the payment of compensation to the tenants. Both learned judges were of the opinion (agreeing with GREGG, J.) that, if the re-building certificate had been validly issued, the resulting steps taken by the lessee would have enabled him to secure vacant possession against the sub-tenants as well as against the tenants. In regard to the questions whether the agreement of June 7, 1955, was or was not a "disposition of land" and whether it was competent for the director to enter into the agreement on behalf of the governor, MILLS-OWENS, J., held (with the concurrence of BLAIR-KERR, J.) that the agreement was a purported "disposition" within art. XIII, which it was not competent for the director to enter into on behalf of the governor in the absence of enabling legislation. He further held that the receipt of instalments of the premium and rent paid by the lessee was insufficient to amount to a ratification by the governor of the agreement if it was originally void.

Before their Lordships' Board, the appellants submitted two main contentions. In the first place, they submitted that the agreement of June 7, 1955, was valid and effective as between the parties to it, at least to the extent to which there was thereby imposed on the lessee an obligation to re-develop. They submitted that the agreement was merely an agreement for a lease, and was not a "disposition of land" within the meaning of art. XIII, and would not become a disposition until the lessee had established his right to specific performance. If, however, because of the provisions of art. XIII, the agreement was not originally binding on the Crown, they submitted that, by the acceptance and collection of rent and of the other moneys due under the provisions of the agreement, the agreement had been ratified by the Crown. Alternatively, they submitted that, even if the agreement was void as a disposition of land, the obligation to re-develop was valid and attached to the yearly tenancy of the premises which by possession and the payment of rent was established in favour of the lessee. In the second place, they submitted that the lessee had an accrued right to possession under the ordinance prior to the repeal of s. 3A to s. 3E and that, in consequence of the provisions of the Interpretation Ordinance, that right survived the repeal. There was, they submitted, an accrued right in the lessee in certain events which, in fact, happened, to have vacant possession of the whole of the premises; and there was an accrued right in the lessee to have his application for a re-building certificate determined in accordance with the provisions of s. 3A to s. 3E.

It becomes necessary to consider whether, on April 9, 1957, the lessee possessed some "right" under the ordinance which, by reason of the provisions of the Interpretation Ordinance, remained unaffected by the repeals which had effect as from that date. This can be considered on the assumption (for the purposes of dealing with this point) that the lessee could bring himself within the provisions of s. 3A (1), i.e., if it is assumed (a) that the lessee became liable to the Crown under a building covenant, (b) that compliance with the covenant involved the demolition of premises, (c) that such premises were subject to the ordinance and (d) that, in respect of such premises, the lessee was in law or in equity the lessee of the

Crown. It was submitted on behalf of the lessee that, after the director had given notice (see s. 3A (2)) of his intention to give a re-building certificate, some kind of a right (even though one that might be defeated) to such a certificate was then acquired by the lessee. Their Lordships cannot accept this view. After the director gave notice of his intention to issue a certificate, there could have been no giving of it until certain conditions were satisfied. The lessee was under obligation to give notices as required by s. 3B (1). Had there been no appeals by tenants and sub-tenants and had the time for appeals expired, the director would then have been in a position to give a certificate. Had those been the circumstances then, inasmuch as the director had indicated what his intention was, doubtless he would in fact have given his certificate. But the ordinance did not impose an obligation on the director to give a certificate in accordance with his declared intention; it merely provided that he could not follow up his declared intention unless and until certain conditions were satisfied. Though, in the events that happened, this point does not call for decision, it would not seem that, in any circumstances, any right to a certificate could arise at least until, after notices given, the time for appeals by tenants and sub-tenants went by without there being any appeal. In a case, however, where (as in the present case) the giving of notices under s. 3B (1) resulted in appeals by way of petition to the governor, followed by a cross-petition to the governor presented by the applicant, then any decision as to the giving of a re-building certificate no longer rested with the director. In the present case, the position on Apr. 9, 1957, was that the lessee did not and could not know whether he would or would not be given a re-building certificate. Had there been no repeal, the petitions and cross-petition would in due course have been taken into consideration by the Governor in Council. Thereafter there would have been an exercise of discretion. The governor would have directed either that a certificate be given or be not given, and the decision of the Governor in Council would have been final. In these circumstances, their Lordships conclude that it could not properly be said that, on Apr. 9, the lessee had an accrued right to be given a re-building certificate. It follows that he had no accrued right to vacant possession of the premises. It was said that there were accrued rights to a certificate, and, consequently, to possession, subject only to the risk that these rights might be defeated, and it was said that, in the events that happened, the rights were not defeated. In their Lordships' view, such an approach is not warranted by the facts. On Apr. 9 the lessee had no *right*. He had no more than a *hope* that the Governor in Council would give a favourable decision. So the first submission fails.

The further and, perhaps, more attractive submission which was presented on behalf of the lessee was that, on Apr. 9, he had an accrued right to have the matter taken into consideration by the Governor in Council, and that such right was (by reason of the Interpretation Ordinance) unaffected by the repeal, and that, consequently, the Governor in Council necessarily acted after Apr. 9 and that, in the result, a re-building certificate of full validity was issued, which led to entitlement to vacant possession of the premises. These submissions raise an interesting question. At the time of the repeal, all the procedure under s. 3A and s. 3B had been followed, and it can properly be said that the stage had been reached when the lessee could expect and was entitled to have the petitions and cross-petition considered in due course by the Governor in Council and to have a decision reached. Could such expectation or entitlement be regarded as a right or a privilege, either acquired or accrued, within the meaning and intendment of the Interpretation Ordinance? Or was such expectation or entitlement something that necessarily came to an end at the time of the repeal? There might have been some express provision in the 1957 repealing ordinance by which it could have been ordained that petitions and cross-petitions awaiting consideration should receive such consideration in spite of the repeal, and that, subsequently, an effective re-building certificate could be given. The argument for the lessee is that the provisions of the Interpretation Ordinance made any such

A express enactment unnecessary. The argument for the tenants and sub-tenants is that the repeal of s. 3A to s. 3E put an end to certain special methods of obtaining vacant possession without paying compensation in cases where lessees of the Crown had obligations under building covenants. The tenants and sub-tenants did not concede that, assuming that a valid re-building certificate had been given immediately before Apr. 9, the steps under s. 3E could thereafter have been
 B taken so as to result in a right to vacant possession; they recognised, however, that very different considerations might in such circumstances apply. The question so raised does not arise for decision.

Was the lessee, therefore, possessed on Apr. 9 of a "right" (or privilege) within the meaning of the Interpretation Ordinance? In their Lordships' view, the entitlement of the lessee in the period prior to Apr. 9 to have the petitions and cross-petition considered was not such a "right". On Apr. 9 the lessee was quite unable to know whether or not he would be given a re-building certificate, and, until the petitions and cross-petition were taken into consideration by the Governor in Council, no one could know. The question was open and unresolved. The issue rested in the future. The lessee had no more than a hope or expectation that he would be given a re-building certificate, even though he may
 D have had grounds for optimism as to his prospects. It is to be observed that, under s. 10 (e), a repeal is not to affect any investigation, legal proceeding or remedy "in respect of any such right". The right referred to is the right mentioned in s. 10 (c), i.e., a right acquired or accrued under a repealed enactment. This part of the provisions in para. (e) of s. 10 does not and cannot operate unless there is a right as contemplated in para. (c). It may be, therefore, that, under some
 E repealed enactment, a right has been given but that, in respect of it, some investigation or legal proceeding is necessary. The right is then unaffected and preserved. It will be preserved even if a process of quantification is necessary. But there is a manifest distinction between an investigation in respect of a right and an investigation which is to decide whether some right should or should not be given. On a repeal, the former is preserved by the Interpretation Act. The
 F latter is not. Their Lordships agree with the observation of BLAIR-KERR, J., that:

"It is one thing to invoke a law for the adjudication of rights which have already accrued prior to the repeal of that law; it is quite another matter to say that, irrespective of whether any rights exist at the date of the repeal, if any procedural step is taken prior to the repeal, then, even
 G after the repeal the applicant is entitled to have that procedure continued in order to determine whether he shall be given a right which he did not have when the procedure was set in motion."

A consideration of the authorities confirms their Lordships in the view which has been expressed. A case much relied on on behalf of the lessee was *Heston and Isleworth Urban Council v. Grout* (1). In that case, notices had been given to
 H frontagers in a private street requiring them to sewer and make up. That was in October, 1891. The notices had been given under the authority of s. 150 of the Public Health Act, 1875, which empowered the local authority, in the event of the notices not meeting with compliance, to execute the works themselves (if they thought fit) and to recover the expense from the frontagers according to the frontage of their premises. Default was made by the owners in complying with the
 I notice, and the local authority resolved to do the work by means of a loan. In 1892, they applied to the Local Government Board for power to raise a loan in order to execute the improvements. Sanction to the raising of a loan was delayed and in June, 1894—nearly three years after the giving of the notices—the local authority resolved to adopt the Private Street Works Act, 1892, which, by s. 25, provided that, from its adoption in any district, s. 150 of the Public Health Act, 1875, should not apply to that district. The Act of 1892 was adopted as from

Aug. 1, 1894. The loan was sanctioned in November, 1894, and the work was subsequently done by contractors who contracted with the local authority. The expense was apportioned, and the local authority took out an originating summons to obtain a declaration that a particular apportioned sum was due from a frontager. The claim succeeded before NORTH, J., and his decision was affirmed in the Court of Appeal. In his judgment, LINDLEY, L.J., referred to the Interpretation Act, 1889, and continued (2):

"But that Act appears to me to apply; for I cannot help thinking that when s. 150, by force of s. 25 of the Act of 1892, ceases to apply to this district as from Aug. 1, 1894, that is a repeal of s. 150 as from that day so far as regards this district. That, I think, lets in the provision contained in the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 38, which says: '(2) Where this Act, or any Act passed after the commencement of this Act, repeals any other enactment, then, unless the contrary intention appears, the repeal shall not . . . (b) affect the previous operation of any enactment so repealed, or anything duly done or suffered under any enactment so repealed.' That to my mind preserves that notice and the effect of it. Then s. 38 goes on to say: 'or (c) affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed.' If there would otherwise be any doubt about the question, it appears to me that those enactments are amply sufficient to remove such doubt. I cannot come to the conclusion which [counsel for the defendant] have urged upon us, that the true construction of the Act of 1892 is to render the previous notice and everything done under it absolutely futile for future purposes. Of course, after the Act of 1892 comes into force in this district, no fresh notice under s. 150 can be given, and no notice can be given involving the consequences mentioned in that section; but it appears to me that the Act of 1892 does not at all affect the validity of a notice given before it came into operation in a district."

In that case, the position on Aug. 1, 1894, was that the frontagers, being in default, were under a liability and the local authority had a right. The liability of the frontagers was none the less a liability, even though no claim in money could be presented against them unless and until the local authority executed the works. So, also, the local authority possessed rights on Aug. 1, 1894. They possessed rights against the frontagers even though they could present no money claims unless and until they executed the necessary works. The position in the present case is different. The validity of "anything duly done" before Apr. 9, 1957, was not affected by the repeal. Accordingly, the procedural steps which had been taken as a preliminary to obtaining a decision of the governor were not invalidated; they were, however, rendered abortive, for the repeal ended the hope or possibility of being given a re-building certificate. The lessee enjoyed no right which was kept alive. He did not have any right even of a contingent nature. He was not in the position of the local authority in the case just cited, for they possessed an existing right (corresponding with an existing liability in the frontagers)—even though the enforcement of the right depended on their taking certain steps.

Reliance was also placed on a passage occurring in the judgment of the Board in *Abbott v. Minister for Lands* (3). The Lord Chancellor (LORD HERSCHELL) said:

"It may be, as WINDEYER, J., observes, that the power to take advantage of an enactment may without impropriety be termed a 'right'. But the question is whether it is a 'right accrued' within the meaning of the enactment which has to be construed. Their Lordships think not, and they are confirmed in this opinion by the fact that the words relied on are found in conjunction with the words 'obligations incurred or imposed.' They think

(2) [1897] 2 Ch. at p. 313.

(3) [1895] A.C. at p. 431.

that the mere right (assuming it to be properly so called) existing in the members of the community or any class of them to take advantage of an enactment, without any act done by an individual towards availing himself of that right, cannot properly be deemed a 'right accrued' within the meaning of the enactment."

Reliance was placed on behalf of the lessee in the present case on the words "without any act done by an individual towards availing himself of that right", and it was argued that, in the present case, steps had been taken by the lessee which could be regarded as acts done towards availing himself of a right to have a re-building certificate. In *Abbott v. Minister for Lands* (4), the point now being discussed in the present case did not arise, and their Lordships cannot ascribe to the words quoted above the wide significance suggested on behalf of the lessee. In the present case, the lessee had taken procedural steps in the hope of being able to obtain a re-building certificate, but at the date of the repeal he had no accrued right.

Reynolds v. A.-G. for Nova Scotia (5) does not assist the lessee. In that case, the appellants had a licence under a section of a statute and, after a repeal of the section, applied under it for a renewal of their licence. It was held that the power to renew had gone and that, even if the repealing provision could be so construed as not to interfere with accrued rights, the appellants had under the repealed section a privilege to get an extension but no accrued right. *Hamilton Gell v. White* (6) furnishes an example of an accrued right, and the facts are in contrast with the facts in the present case. In that case, the landlord of an agricultural holding gave his tenant notice to quit; he gave it because he wished to sell. The tenant then became entitled to compensation on the terms and subject to the conditions of s. 11 of the Agricultural Holdings Act, 1908. The tenant duly complied with one condition. He duly gave notice of his intention to claim compensation. Another condition was that he should make his claim within three months of quitting. But, before the time for him to quit arrived, s. 11 was repealed. He did, nevertheless, make his claim within three months of quitting. It was held that his claim could proceed, and that he could recover compensation under s. 11. He had an accrued right which resulted from the fact of the landlord having given a notice to quit in view of a sale. The conditions imposed by s. 11 were conditions not of the acquisition of the right but of its enforcement. As he had an accrued right, it was preserved by the operation of the Interpretation Act, 1889, and, further, as he had an accrued right, the repeal did not affect the investigation in respect of that right. The investigation was by arbitration. SCRUTTON, L.J., said (7):

"In the course of that arbitration he would no doubt have to prove that that right in fact existed, that is to say that the notice to quit was given in view of a sale, and he would also have to prove the measure of his loss. But he was entitled to have that investigation, which had been begun, continue, for s. 38 expressly provides that the investigation shall not be affected by the repeal."

"The difference between that case and the present is that, in that case, a right existed and the investigation, which was unaffected, was an investigation in respect of it; whereas in the present case no right existed or had accrued, and the intended investigation which had not taken place before the time of the repeal (i.e., the consideration by the Governor in Council) was an investigation in order to decide whether a right should or should not be given. It was not itself a right or privilege which was preserved by the Interpretation Ordinance.

Their Lordships have considered other decisions such as *Moakes v. Blackwell Colliery Co., Ltd.* (8), *Briggs v. T. Dryden & Sons*, *Talbot v. Vickers, Ltd.* (9),

(4) [1895] A.C. 425.

(5) [1896] A.C. 240.

(6) [1922] 2 K.B. 422.

(7) [1922] 2 K.B. at p. 430.

(8) [1925] 2 K.B. 64.

(9) [1925] 2 K.B. 667, 682.

and *Boddington v. Wisson* (10), and can find no support for any view contrary to that which their Lordships have expressed. A

The result is, therefore, that when s. 3A, s. 3B, s. 3C, s. 3D and s. 3E were repealed on Apr. 9, 1957, the lessee had no right to vacant possession under those sections; and he could only recover possession under the sections remaining in force which provide for compensation.

As their Lordships' conclusion on this issue is decisive of the appeal, it is not necessary to express any final view in regard to the other issues. The issue in regard to art. XIII depends on an examination of the nature and contents of the agreement of June 7, 1955—an agreement which is peculiar to this case. If that agreement were no more than an agreement thereafter to grant a lease, their Lordships would not regard it as being a grant or disposition of land. It is one thing to make a grant or disposition of land. It is quite another thing to enter into an agreement to make thereafter a grant or disposition of land. A mere agreement thereafter to grant a lease would not, their Lordships conclude, be a grant or disposition within art. XIII. This, however, does not conclude this case because there can be no doubt that there are many provisions in the document of June 7, 1955, which might be said to amount to an immediate grant of a present interest in land which was of such a substantial character as to be a grant or disposition of land. Thus, the document provided for a surrender of what was called the "old lot". The lessee became entitled to occupy the "new lot". That new lot had boundaries as designated in a plan which the lessee signed. He became obliged to pay rent at a new rate. He became obliged to pay a first instalment of \$3,900 of a total premium of \$70,800 within fourteen days of June 7, 1955, to pay a second instalment (of \$3,900) on Dec. 25, 1955, and to pay subsequent instalments annually. He further became under obligation to build. He had a period of two years within which to build. (That period was later extended.) When he had built, he would become entitled to a long lease or leases. He had security on specified terms until he built; after he had built, he was to be granted a formal lease on the terms which were in great detail set out in the written agreement. By conferring on him these large rights for this substantial period, the agreement might itself be a grant or disposition of land. But their Lordships feel that it is unnecessary to come to a final conclusion on this point because, for the reasons earlier given, it follows that, on Oct. 12, 1957, there was no validity in what purported to be a re-building certificate which was given to the lessee. B E

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the respondents' costs of the appeal. F

Appeal dismissed. G

Solicitors: *Charles Russell & Co.* (for the appellants); *A. Kramer & Co.* (for the respondents).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

R. v. NAISMITH.

[COURTS-MARTIAL APPEAL COURT (Ashworth, Paull and Elwes, JJ.), May 17, 1961.]

Court-Martial—Charge—Civil offence—Causing grievous bodily harm with intent to maim, disfigure or disable—Duplicity—Whether charge bad for duplicity—Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 18—Army Act, 1955 (3 & 4 Eliz. 2 c. 18), s. 70—Indictment Rules, 1915 (Sch. 1 to Indictments Act, 1915), r. 5 (1)—Rules of Procedure (Army), 1956 (S.I. 1956 No. 162), r. 15 (1), (4).

The appellant was charged before a court-martial with committing a civil offence contrary to s. 70 of the Army Act, 1955*, viz., causing grievous bodily harm to one H. with intent to maim, disfigure or disable him contrary to s. 18 of the Offences against the Person Act, 1861†. After the charge had been read over to the appellant by the judge advocate his counsel submitted that it was bad for duplicity, in that it charged more than one offence and r. 15‡ of the Rules of Procedure (Army), 1956, provided that each charge should state one offence only. On appeal against conviction,

Held: the charge was not bad for duplicity because—

(i) s. 18 of the Offences against the Person Act, 1861, created one offence and the various intents mentioned in s. 18 specified variations in the method by which the offence might be committed, but did not create separate offences.

(ii) the charge would have been good as a count in an indictment before a civil court by virtue of r. 5 (1) of the Indictment Rules, 1915§, and since, by virtue of r. 15 (4) of the Rules of Procedure (Army), 1956, a charge was sufficient if framed in a way that would be sufficient before a civil court, the form of the charge in the present case was good for the purposes of trial by court-martial.

Appeal dismissed.

[As to military offences, see 28 HALSBURY'S LAWS (2nd Edn.) 593, para. 1220, and as to causing grievous bodily harm, see 10 HALSBURY'S LAWS (3rd Edn.) 734, para. 1409.

For the Offences against the Person Act, 1861, s. 18, see 5 HALSBURY'S STATUTES (2nd Edn.) 793.

For the Army Act, 1955, s. 70, see 35 HALSBURY'S STATUTES (2nd Edn.) 489.]

Appeal against conviction by general court-martial.

The appellant, John Naismith, a private soldier in No. 17 Rear Vehicle Depot, Royal Army Ordnance Corps, was charged at a general court-martial sitting at Moenchengladbach in Western Germany on July 6, 1960, with another soldier, Private Chisholm of the same unit, with committing a civil offence contrary to s. 70 of the Army Act, 1955, that is, causing grievous bodily harm to George

* Section 70, so far as material, reads: "(1) Any person subject to military law who commits a civil offence, whether in the United Kingdom or elsewhere, shall be guilty of an offence against this section.

"(2) In this Act the expression 'civil offence' means any act or omission punishable by the law of England or which, if committed in England, would be punishable by that law; and in this Act the expression 'the corresponding civil offence' means the civil offence the commission of which constitutes the offence against this section."

† Section 18, so far as material, provides: "Whosoever shall unlawfully and maliciously by any means . . . cause any grievous bodily harm to any person . . . with intent . . . to maim, disfigure, or disable any person, or to do some other grievous bodily harm to any person . . . shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . ."

‡ Rule 15, so far as material, states: "(1) Each charge shall state one offence only" . . . "(4) The statement of an offence, if it is not a civil offence, shall be in the appropriate form set out in sch. 2 to these rules, if it is a civil offence in such words as sufficiently describe the offence."

§ Rule 5 (1) of the Indictment Rules is set out at p. 737, letter C, post.

Richard Hopkinson with intent to maim, disfigure or disable him contrary to s. 18 of the Offences against the Person Act, 1861. After the charge had been read out by the judge-advocate, the appellant's counsel submitted that it was bad for duplicity. He submitted that r. 5 (1) of the Indictment Rules, 1915, under which such a charge would be permissible in the case of a civil indictment, did not apply to charges under the Army Act, 1955, which were governed by r. 15 of the Rules of Procedure (Army), 1956 (S.I. 1956 No. 162). He contended that r. 5 (1) of the Indictment Rules would not have been necessary had it not been that such a charge would otherwise have been bad and that the invalidity of the charge in question was not cured by r. 15 of the Rules of Procedure, which merely stated that each charge was to state one offence only. The judge-advocate stated that in his view the statement in the *MANUAL OF MILITARY LAW*, c. 6, p. 133, para. 9 (d)* was sound and advised the court to overrule the objection, which the court, accordingly, did. The trial then proceeded and the appellant was convicted on July 7, 1960, and sentenced to three years' imprisonment and to be dismissed Her Majesty's service with ignominy. This finding and sentence of the court-martial was promulgated on July 28, 1960.

The appellant applied for leave to appeal against his conviction and on Mar. 17, 1961, the court (EDMUND DAVIES, WINN and WIDGERY, JJ.) granted leave. The cases cited below were quoted in argument on the appeal†.

A. B. Dawson for the appellant.

E. Garth Moore for the Crown.

ASHWORTH, J., delivered the following judgment of the court: This appellant was charged before a court-martial on a charge sheet which contained the following entry:

"Charge: Committing a civil offence contrary to s. 70 of the Army Act, 1955, that is to say causing grievous bodily harm with intent contrary to s. 18 of the Offences against the Person Act, 1861, in that on May 5, 1960, he caused grievous bodily harm to George Richard Hopkinson with intent to do him grievous bodily harm or to maim, disfigure or disable him."

It is now alleged on behalf of the appellant in support of this appeal that that charge was bad on the face of it on the ground of duplicity.

Counsel for the appellant, who has said everything that could be said on his behalf, starts his argument by reference to r. 15 (1) of the Rules of Procedure (Army), 1956, which states: "Each charge shall state one offence only", and all that one can say by examination of the charge sheet is that it is plain that more than one offence is charged. It then becomes necessary to look at s. 18 of the Offences against the Person Act, 1861, to see what it provides. I need not read the section in full but, as it seems to this court, that section provides for three species of assaults, and provides for a number of possible intents with which those assaults may have been committed. It is urged on behalf of the appellant that by a process of arithmetic one may find enmeshed in the provisions of that section something like fifteen or twenty possible alternative offences.

It seems to this court that the proposition with which counsel for the Crown started his argument is the right approach. That approach is to keep in mind the distinction between a section creating two or more offences and a section creating one offence but providing that that offence may be committed in more than one way. In the present instance, as it seems to this court, so far as the

* Paragraph 9 (d), which refers to a charge similar to that set out at letter E, supra, reads "The specimen charge set out below is not bad for duplicity despite the provisions of Rules of Procedure 15, because where an enactment constituting an offence states that offence to be the doing of, or omission to do, any act with any one of several different intentions, the intentions stated in the alternative in the enactment may be stated in the alternative in a charge relating to that offence".

† I.e., *R. v. Aspinall*, (1876), 2 Q.B.D. at p. 56 (per BRETT, J.A.); *Cotterill v. Lempriere*, (1890), 24 Q.B.D. 634; *R. v. Molloy*, [1921] 2 K.B. 364; *Bastin v. Davies*, [1950] 1 All E.R. 1095.

intents specified in s. 18 are concerned, they are variations of method rather than creations of separate offences in themselves. It is probably true to say that the species of assault mentioned in that section, of which there are three, are each in themselves different offences, that is to say, wounding, causing grievous bodily harm and shooting, but that difference does not affect the result of this case in the least because the only act or species of assault alleged was causing grievous bodily harm. The duplicity, if there be any, is said to arise out of the alternative intents which were mentioned in the particulars. If this were a matter to be tried at assizes, there is no doubt but that an indictment containing a count *mutatis mutandis* with this charge sheet would be perfectly good. Rule 5 (1) of the Indictment Rules, 1915, was inserted to cover this sort of case. It says:

“Where an enactment constituting an offence [I pause to emphasise the singular] states the offence to be the doing or the omission to do any one of any different acts in the alternative, or the doing or the omission to do any act in any one of any different capacities, or with any one of any different intentions, or states any part of the offence in the alternative, the acts, omissions, capacities, or intentions, or other matters stated in the alternative in the enactment, may be stated in the alternative in the count charging the offence.”

I emphasise again that it is the count charging the offence, albeit there are alternatives stated in that count. It is a single charge and a single offence. Therefore, if this charge had been a matter of a count in an indictment it would not have been open to objection. Rule 15 of the Rules of Procedure, having stated that each charge shall state one offence only, goes on to provide in r. 15 (4):

“The statement of an offence, if it is not a civil offence, shall be in the appropriate form set down in sch. 2 to these rules, if it is a civil offence in such words as sufficiently describe that offence.”

In the opinion of this court a further proposition put forward by counsel for the Crown was correct. I have amended it slightly, but in substance it is what he submitted:

“Wherever before the court-martial a man is charged with a civil offence, the civil offence is sufficiently particularised if it is framed in a way which would be sufficient in a civil court having jurisdiction to try that offence.”

In other words, what r. 15 (4) contemplated was that when a charge of committing a civil offence was brought against a man subject to military discipline, the form of the charge should be such, *mutatis mutandis*, as would be sufficient for a civil court to deal with him if it were trying him.

In this particular case the man was charged under s. 70 of the Army Act, 1955, with committing a civil offence. That, by itself, would not be enough in order to particularise the nature of the charge against him but, having started the accusation in that way, the charge sheet went on to specify the particular offence in a way which undoubtedly would have been sufficient if in fact he had been tried before a civil court for that self-same offence.

There is one further point about which, in our view, counsel for the Crown was again correct. He said that the problem here is not really one of duplicity which involves the charging of two charges in one separate charge sheet, but it is a charge which could be open, but for his argument, to the criticism of uncertainty, one offence and one only being charged, the uncertainty being as to the way the prosecution were going to allege it was committed. For the reasons which I have endeavoured to state, that objection of uncertainty is, in the circumstances,

not open to this appellant. The charge was perfectly good so far as a civil court is concerned and, accordingly, this appeal must fail.

Appeal dismissed.

Solicitors: *Registrar of the Courts-Martial Appeal Court* (for the appellant);
Director of Army Legal Services (for the Crown).

[Reported by N. P. METCALFE, ESQ., Barrister-at-Law.]

G. E. STEVENS (HIGH WYCOMBE), LTD. v. HIGH WYCOMBE CORPORATION.

[QUEEN'S BENCH DIVISION (Diplock, J.), April 17, 18, 1961.]

Housing—Clearance area—Compulsory purchase order—Compensation—Acquisition of unfit house purchased by company as home for employee—Occupation of house by employee—Whether company entitled to higher rate of compensation payable to owner-occupier of a "private dwelling" or occupier of business premises—Housing Act, 1957 (5 & 6 Eliz. 2 c. 56), Sch. 2, para. 4 (2), para. 6 (2), proviso.

In 1949 the plaintiff company, who carried on a business in High Wycombe, purchased a freehold house there to provide a home for an employee and his family who came from Edinburgh. The employee occupied the house rent free under the terms of a service agreement providing that his occupation should not create a tenancy but should be deemed to be occupation as a servant of the company and on their behalf. In 1959 the defendants, the local authority, acting under the Housing Act, 1957, compulsorily acquired the house as part of a clearance area. On a claim by the plaintiff company to recover in respect of the compulsory purchase the higher rate of compensation, exceeding site value, payable to an owner-occupier of a private dwelling or of a house occupied for business purposes under para. 4 and para. 6 respectively of Sch. 2 to the Housing Act, 1957,

Held: the plaintiff company were not entitled to the higher rate of compensation since, assuming occupation of the house was in them and not in their employee, the company, as such, was incapable of occupying a house "as a private dwelling" within the meaning of para. 4 (2)* of Sch. 2 and could only be in occupation for business purposes, and on the facts the company did not carry on business in the house and thus did not occupy it for the purposes of a business carried on therein within the meaning of the proviso to para. 6 (2)† of Sch. 2.

Hiller v. United Dairies (London), Ltd. ([1933] All E.R. Rep. 667) applied.

[As to the assessment of compensation in respect of unfit houses occupied as dwellings, see 19 HALSBURY'S LAWS (3rd Edn.) 633, 634, para. 1024.

As to a company not being capable of personal residence for the purposes of the Rent Acts, see 23 HALSBURY'S LAWS (3rd Edn.) 806, para. 1586.

For the Housing Act, 1957, Sch. 2, para. 4 and para. 6, see 37 HALSBURY'S STATUTES (2nd Edn.) 463 and 466.]

Cases referred to:

Addiscombe Garden Estates, Ltd. v. Crabbe, [1957] 3 All E.R. 563; [1958] 1 Q.B. 513; [1957] 3 W.L.R. 980; 3rd Digest Supp.

Airdrie, Coatbridge and District Water Trustees v. Flanagan, (1906), 8 F. (Ct. of Sess.) 932; 43 Sc. L.R. 422; 13 S.L.T. 880; 43 Digest 1091, f.

Hiller v. United Dairies (London), Ltd., [1933] All E.R. Rep. 667; [1934] 1 K.B. 57; 103 L.J.K.B. 5; 150 L.T. 74; Digest Supp.

Morrell (Valuation Officer) v. Glamorgan County Council, (1958), 4 R.R.C. 20.

* Paragraph 4 (2) is printed at p. 740, letter F, post.

† Paragraph 6 (2) is printed at p. 740, letter C, post.

Originating summons.

This originating summons was taken out by the plaintiff company under R.S.C., Ord. 54A, r. 1A*, for the determination of a question of construction of a statute, namely, the Housing Act, 1957, and for relief by way of declaration. The plaintiff company carried on business in High Wycombe as corn merchants. In 1949 there was a vacancy on the company's staff for an experienced miller to act as assistant mill foreman. It was found necessary to engage a miller, a Mr. Stout, who came from Edinburgh, but he was not prepared to work in High Wycombe unless the company provided a house for him, his wife and his two children. Accordingly, the plaintiff company acquired the freehold of a dwelling-house known as 3, Townfield Terrace, High Wycombe, at a price of £750. The purchase of the house was completed on Oct. 27, 1949, and from that date Mr. Stout occupied the house rent free under the terms of a service agreement made between himself and the plaintiff company (for the relevant terms of the agreement see p. 741, letter C, post). On Nov. 27, 1957, the defendants, the local authority, made a compulsory purchase order in respect of a clearance area† which included 3, Townfield Terrace, and the order was confirmed by the minister on Nov. 17, 1958. On Jan. 7, 1959, the defendants, pursuant to the compulsory purchase order, served the plaintiff company with notice to treat, and subsequently 3, Townfield Terrace was demolished and Mr. Stout was re-housed by the defendants.

By the summons the plaintiff company asked the court (1) to determine whether on the true construction of s. 31, s. 59 and s. 61 of the Housing Act, 1957, and in the events which had happened, the plaintiff company were entitled to payment of compensation in respect of the compulsory acquisition of 3, Townfield Terrace, pursuant to the compulsory purchase order of Nov. 27, 1957:—(a) as owner-occupier of the dwelling-house, and/or (b) as occupier of the house wholly for business purposes, or (c) in some other and what right or manner under the Act of 1957, (2) for a declaration that the plaintiff company were entitled to compensation as owner-occupier of the house wholly for business purposes and (3) for such further order as seemed just. The relevant provisions of the Housing Act, 1957, are set out in the judgment.

I. McCulloch for the plaintiff company.

J. P. Harris for the defendants.

DIPLOCK, J., having stated the facts, continued: The question which I am asked to determine is the rate of compensation to which the plaintiff company are entitled under the terms of the Housing Act, 1957, and, in particular, under Part 2 of Sch. 2 to that Act. It is, I think, sufficient for me to refer to s. 59 and s. 61 of the Act before turning to Sch. 2. Section 59 (1) provides:

“Where land is purchased compulsorily by a local authority under this Part of this Act (1), the compensation payable in respect thereof shall be assessed in accordance with the Acquisition of Land (Assessment of Compensation) Act, 1919, subject to the following provisions of this section.”

Then sub-s. (2) says that in general the compensation shall be at site value. Section 61 provides:

“The provisions of Part 2 of Sch. 2 to this Act shall have effect as respects payments to be made in certain cases in respect of houses comprised in a clearance area or re-development area.”

This house was a house comprised in a clearance area, and Part 2 of Sch. 2 applies to it. There are two paragraphs of Sch. 2 which are particularly relevant: the first is para. 4 and the second, para. 6, under each of which, as alternatives, the plaintiff company's claims fall, but in the hearing before me counsel

* The terms of R.S.C., Ord. 54A, r. 1A, are printed in footnote (13), p. 742, post.

† See s. 42 and the sections following of the Housing Act, 1957.

(1) Viz., under Part 3 of the Housing Act, 1957, which deals with clearance and re-development.

for the plaintiff company has recognised that, as regards para. 6, at any rate, A there is a difficulty confronting his case which it is not easy to overcome.

I therefore deal first, and briefly, with the claim under para. 6, which has not been seriously proceeded with. Paragraph 6, so far as is relevant, says this:

"(1) This paragraph shall have effect where on or after Dec. 13, 1955, a house has been purchased at site value in pursuance of a compulsory purchase order made by virtue of Part 2 or Part 3 of this Act or vacated in pursuance of—(a) a demolition order under Part 2 of this Act, or (b) a clearance order. B

"(2) If at the date of the making of the order the house was occupied wholly or partly for the purposes of a business and the person entitled to the receipts of the business held an interest in the house, the local authority by whom the order was made shall make in respect of that interest a payment of the amount hereinafter specified: Provided that no payment shall be made under this paragraph in respect of any interest in a house unless the house was occupied wholly or partly for business purposes, and a person entitled to the receipts of a business carried on wholly or partly therein held an interest in the house [on specific dates]." C

Counsel for the plaintiff company whose claim depends on the occupation of the house being in the company and not in Mr. Stout (2), recognises that the proviso requires that the house must be occupied wholly or partly for business purposes of a business which is carried on in the house. It cannot seriously be argued that the business of the company was carried on in the house, and accordingly the claim to the increased rates of compensation (3) under para. 6 fails. D

The alternative claim, which has been argued with great skill and courage before me by counsel for the plaintiff company, is under para. 4, sub-para. (1) of which is in substantially the same terms as sub-para. (1) of para. 6, to which I have already referred. Sub-paragraph (2) of para. 4 is as follows: E

"If on Dec. 13, 1955, the house was wholly or partly occupied as a private dwelling by (or by a member of the family of) a person who acquired an interest in that house by purchase for value on or after [Sept. 1, 1939, and before Dec. 13, 1955] . . . and at the date when the house was purchased compulsorily or, as the case may be, vacated that person or a member of his family was entitled to an interest in the house, the local authority by whom the order in question was made shall make in respect of that interest a payment of the amount hereinafter specified." F

which is an amount larger than the site value (4). Sub-paragraph (3) deals with the case where the person entitled to the compensation had ceased to occupy the house at a date earlier than Dec. 13, 1955, because of being called up on military service, and sub-para. (7), which is the only other one that I need read, says: G

"In this paragraph 'family', in relation to any person, means the husband or wife, the children over eighteen years of age and the parents of that person." H

Counsel for the plaintiff company puts his argument this way. He says that by virtue of s. 19 of the Interpretation Act, 1889, a "person" includes a company. He says that on a true construction of the service agreement between Mr. Stout and the plaintiff company (5), the occupation of the house by Mr. I

(2) The employee of the plaintiff company.

(3) See para. 6 (3) of Sch. 2.

(4) By para. 4 (4) of Sch. 2, the amount of any payment made under para. 4 in respect of an interest "shall be an amount equal to its full compulsory purchase value less the compensation which was or would have been payable in respect of the interest in connexion with the compulsory purchase of the house at site value", subject to the proviso to sub-para. (4).

(5) The relevant terms of the service agreement are referred to at p. 741, letter C. post.

Stout was occupation by the company, and that the house was occupied as a private dwelling by the company. Counsel's argument depends on the occupation of the house being the occupation of the company, and the occupation by the company of the house as a private dwelling, because it is not sufficient that it should be occupied by Mr. Stout as a private dwelling as Mr. Stout was not a person entitled to an interest in the house, since "interest", by the definition in para. 7 (2) of Sch. 2, does not include the interest of a tenant for a year or any less period than a year, or a tenant whose sole right of possession is under the Rent Acts. The occupation of the company must be occupation as a private dwelling, because it is only in respect of a house which was wholly or partly occupied as a private dwelling by the person entitled to the interest therein that the higher rate of compensation is payable.

I must now turn, in order to see the capacity in which the house was occupied by Mr. Stout, to the service agreement, the relevant clauses of which are cl. 5 and cl. 6:

"5. The employers will permit the assistant to occupy the messuage or tenement of the employers known as Number 3 Townfield Terrace High Wycombe aforesaid free of rent rates or taxes during his employment hereunder. 6. The occupation of the said messuage or tenement by the assistant shall not create any tenancy thereof as between the parties hereto or give the assistant any estate or interest in the premises but such occupation shall be deemed to be that of a servant of the employers and on their behalf and the right of occupation shall determine with the determination of the employment of the assistant hereunder."

Counsel for the plaintiff company contends that that does not create a tenancy between the plaintiff company and Mr. Stout, nor does it give Mr. Stout any right of occupation, save on behalf of the plaintiff company.

I have been referred to a number of cases, of which that which can be most conveniently cited is *Addiscombe Garden Estates, Ltd. v. Crabbe* (6), in which the courts have considered, for the purposes of the application of the Rent Restrictions Acts, whether the relationship of landlord and tenant exists between employer and employee. I need do no more than adopt the words of JENKINS, L.J., in *Addiscombe Garden Estates, Ltd. v. Crabbe* (7), where he says:

"... the important statement of principle is that the relationship is determined by the law, and not by the label which parties choose to put on it, and that it is not necessary to go so far as to find the document a sham. It is simply a matter of ascertaining the true relationship of the parties."

If I had to decide whether Mr. Stout was a tenant or not, I should probably have held, in all the circumstances of this case, that he was a tenant and not a mere licensee, and I do not think that I should be deflected from that course by the fact that it is said in para. 6 of the service agreement not that his occupation shall be that of a tenant of the employers on their behalf, but that it shall be deemed to be that of a servant of the employers on their behalf. It does not, however, assist me to come to a concluded opinion on that point, because in my view the plaintiff company is here in a dilemma. The occupation of the house must have been either in Mr. Stout or in the company. As I have said, I think that it was in Mr. Stout, but if I assume that the occupation was in the company then it seems to me to be quite impossible to say that the house was occupied as a private dwelling by the company. If the occupation was in the company, it seems to me that the company was occupying it for business purposes. I think occupation as a "private dwelling" means occupation "as the dwelling-house of a private person", or occupied by a person "in his private capacity" as opposed to being occupied for business purposes.

(6) [1957] 3 All E.R. 563; [1958] 1 Q.B. 513.

(7) [1957] 3 All E.R. at p. 570; [1958] 1 Q.B. at p. 528.

That meaning of the expression "private dwelling" seems to me to be the ordinary meaning of the expression, and I observe that in a decision of the Lands Tribunal—*Morrell (Valuation Officer) v. Glamorgan County Council* (8)—the learned chairman of the Lands Tribunal took that view as to the meaning of "private dwelling". It is also the meaning which was attached to it by LORD Low in *Airdrie, Coatbridge and District Water Trustees v. Flanagan* (9). There is also a short passage in the judgment of SLESSER, L.J., in *Hiller v. United Dairies (London), Ltd.* (10) where he says in relation to companies—this was in connexion with the Rent Restrictions Acts, but it seems to me to be common sense:

"They cannot by the nature of themselves reside in a domestic sense, they cannot come or go to these particular premises and they are without the Act."

It seems to me, therefore, that a company is, in the nature of things, incapable of occupying a house as a private dwelling-house. If the occupation is in the plaintiff company, it is, in my view, an occupation for business purposes and not as a private dwelling-house. If the occupation was, as I think, in Mr. Stout, then, of course, Mr. Stout had not got an interest (11) in the house.

I therefore answer the questions put to me as follows. First, whether on the true construction of s. 31, s. 59 and s. 61 of the Housing Act, 1957, and in the events which have happened the plaintiff company are entitled in respect of the compulsory acquisition of 3, Townfield Terrace, High Wycombe, to payment of compensation by the defendants as owner-occupier of 3, Townfield Terrace. I answer that question "No", the question being with reference to para. 4 of Part 2 of Sch. 2 to the Act of 1957. The second question is whether the plaintiff company are entitled to compensation as occupier wholly for their business purposes of 3, Townfield Terrace. I answer that question also "No", as counsel for the plaintiff company concedes that it should be answered. The third question put to me is whether the plaintiff company are entitled to compensation in some other and what right or manner under the Act of 1957. The parties have not sought that I should answer this question specifically since they will have no difficulty in agreeing what they are entitled to once the two questions which I have answered are decided. In the circumstances no declaration is necessary in this case.

It seems to me that this procedure (12) is a sensible and cheap way of deciding the matter at issue between the parties which appears to me to fall within the words (13) of R.S.C., Ord. 54A, r. 1A. In those circumstances I have thought it right to exercise my discretion and to answer the questions in the summons.

Summons dismissed.

Solicitors: *Bernard W. Main*, agent for *Bliss, Sons & Covell*, High Wycombe (for the plaintiff company); *Sharpe, Pritchard & Co.*, agents for *N. M. Fowler*, High Wycombe (for the defendants).

[Reported by WENDY SHOCKETT, Barrister-at-Law.]

(8) (1958), 4 R.R.C. at p. 23.

(9) (1906), 43 Sc. L.R. at p. 429.

(10) [1933] All E.R. Rep. at p. 670; [1934] 1 K.B. at p. 63.

(11) Viz., an "interest" as defined in para. 7 (2) of Sch. 2 to the Housing Act, 1957.

(12) Viz., by originating summons under R.S.C., Ord. 54A, r. 1A.

(13) R.S.C., Ord. 54A, r. 1A, provides: "In any Division of the High Court any person claiming any legal or equitable right in a case where the determination of the question whether he is entitled to the right depends upon a question of construction of a statute, may apply by originating summons for the determination of such question of construction, and for a declaration as to the right claimed."

R. v. SMITH.

[COURT OF CRIMINAL APPEAL (Ashworth, Salmon and Elwes, JJ.), June 5, 1961.]

Road Traffic—Driving while under the influence of drink—Sentence—Preventive detention—Whether appropriate.

Preventive detention is not excluded as a possible sentence in an appropriate case for the offence of driving while under the influence of drink; but the occasions on which such a sentence is likely to be passed are exceedingly rare (see p. 745, letter H, post).

The appellant pleaded guilty at Middlesex Sessions to two counts, namely, (i) driving under the influence of drink contrary to s. 6 (1) of the Road Traffic Act, 1960*, and (ii) driving whilst disqualified contrary to s. 110 of the Act of 1960†. He was sentenced on count (i) to eight years' preventive detention and on count (ii) to six months' imprisonment, the terms to run concurrently. Between 1952 and 1960 he had had thirteen convictions for motor vehicle offences, of which three were for driving under the influence of drink, two for stealing cars and one for stealing a wheel and tyre from a lorry. He also had other convictions, including five for driving whilst disqualified. In 1958 he was disqualified for driving for life. He had been sentenced to various terms of imprisonment of which the longest was sixteen months.

Held: (i) although there was no statutory limitation as to the class of offence for which sentence of preventive detention might be passed and there was no reason to exclude it for such offences as those to which the appellant had pleaded guilty, yet, in this case, as he had not hitherto been sentenced for a period greater than sixteen months, the time had not yet been reached for the imposition of such a sentence.

(ii) although the two offences to which the appellant had pleaded guilty arose out of the same matter, yet they were essentially different offences and the sentences might properly be consecutive.

(iii) accordingly a sentence of two years' imprisonment would be substituted on count (i) to run consecutively with the sentence of six months under count (ii).

Appeal allowed in part.

[Editorial Note. Statutory revision of the maximum sentence for driving while disqualified is suggested (see p. 745, letter E, post).

As to the penalties for the offence of driving under the influence of drink, see 33 HALSBURY'S LAWS (3rd Edn.) 628, 629, para. 1061.

As to offences by persons disqualified for driving, see *ibid.*, pp. 641, 642, para. 1084.

As to the general principles applicable when sentencing to preventive detention, see 10 HALSBURY'S LAWS (3rd Edn.) 512, para. 931; and for cases on the subject, see 14 DIGEST (Repl.) 586, 587, 5837, 5838, 5841, 5845.

For the Road Traffic Act, 1960, s. 6 (1), s. 110, see 40 HALSBURY'S STATUTES (2nd Edn.) 717, 811.]

Appeal.

This was an appeal by Henry Smith against sentence. He had pleaded guilty at Middlesex Sessions on Feb. 15, 1961, to two counts, namely, (i) driving a motor vehicle whilst under the influence of drink contrary to s. 6 (1) of the

* Section 6 (1), so far as material, reads: "A person who, when driving or attempting to drive a motor vehicle on a road or other public place, is unfit to drive through drink . . . shall be liable—(a) on conviction on indictment, to a fine or to imprisonment for a term not exceeding two years or to both a fine and such imprisonment . . ."

† Section 110, so far as material reads: "If a person disqualified for holding or obtaining a licence— . . . (b) while he is so disqualified drives on a road a motor vehicle . . . he shall be liable on summary conviction to imprisonment for a term not exceeding six months . . ."

Road Traffic Act, 1960; and (ii) driving whilst disqualified contrary to s. 110 of the Road Traffic Act, 1960. He was sentenced by the deputy chairman to eight years' preventive detention in respect of count (i) and to six months' imprisonment (the maximum) in respect of count (ii), that sentence to run concurrently with the sentence under count (i). He was also disqualified from driving for life. After passing sentence the deputy chairman granted a certificate that the case was a fit one for appeal, and on May 15, 1961, the court (ASHWORTH, SALMON and THESIGER, JJ.), granted leave to appeal against sentence. The facts appear in the judgment of the court.

T. H. K. Berry for the appellant.

The Crown was not represented.

ASHWORTH, J., delivered the judgment of the court: This appellant, Henry Smith, pleaded guilty at Middlesex Sessions to driving while under the influence of drink and to driving whilst disqualified, and he was sentenced to eight years' preventive detention on the first charge and to six months' imprisonment on the second, six months being the maximum that it was open to the court to pass for the offence of driving while disqualified (1). He now appeals against sentence with the leave of this court.

As driving records go, this man's record must be about as bad as anyone's could be in the sense of deliberate flouting of the law. It is, perhaps, worth cataloguing his offences. In February, 1952, he was convicted of driving while under the influence of drink, fined £5 and disqualified for twelve months. In May, 1953, for a similar offence, and one of dangerous driving, he was disqualified from driving for ten years. In 1954 there was a different form of motoring offence; he stole a van as bailee, and he was put on probation for two years. In June, 1954, he was convicted of aiding and abetting a disqualified driver to drive and of permitting an uninsured vehicle to be used; he received three months' imprisonment and was fined £10 with the alternative of one month's imprisonment. In July, 1955, he was convicted of stealing a car and stealing a van and on two charges of forgery; he was sentenced to nine months' concurrent and six months' consecutive imprisonment. In October, 1955, he was convicted of driving whilst disqualified and driving whilst uninsured, and was sentenced to six months' imprisonment and three months concurrent with the sentence passed in July. In December, 1956, fifteen months later, he was convicted of using an unlicensed vehicle and fined £4. In October, 1957, he was convicted of permitting an uninsured vehicle to be used and sentenced to three months' imprisonment and disqualified for twenty-one years. In the same month he was convicted of driving while disqualified and he was sentenced to six months' imprisonment consecutive with the previous sentence and disqualified for the same period, twenty-one years. In January, 1958, he was again convicted of driving whilst disqualified and was sentenced to six months' imprisonment consecutive to the previous sentence. In November, 1958, he was convicted of driving when under the influence of drink and he was disqualified for life from driving and sentenced to sixteen and sixteen months' imprisonment concurrent. In December, 1959, he stole a wheel and a tyre and was fined £20. In January, 1960, he was convicted of aiding and abetting the use of no "L" plates and fined £20, and in May, 1960, he was again convicted of driving whilst disqualified, driving with no insurance and for aiding and abetting a disqualified driver (two cases), for which he was sentenced to three months' and six months' imprisonment concurrent. That really is an appalling record. It shows a deliberate and persistent disregard of the orders of the court disqualifying this man from driving, and it also includes no less than three occasions of offences of driving when under the influence of drink. The learned deputy chairman viewed this case as one in which the time had come to protect the public. It is not merely a

(1) Under s. 110 of the Road Traffic Act, 1960, see footnote†, p. 743, ante.

case of a man driving whilst disqualified; he is unhappily addicted to drink, and on the date when the current offences were committed, as his counsel has frankly admitted, he was not merely under the influence of drink, he was drunk, and the danger of a drunken driver on the road needs no elaboration from this court. It is not altogether surprising that in those circumstances the learned deputy chairman felt in duty bound that he was compelled to impose a sentence of preventive detention so that the public should be protected from this man.

Counsel on his behalf has urged everything that could be said. He takes, first of all, the point that for this class of offence a sentence of preventive detention is in the nature of things inappropriate. It is no doubt true that the occasions on which a sentence of preventive detention for this type of offence can be properly passed must be exceedingly rare, but it would not be right, nor indeed did counsel contend the contrary, to say that in no circumstances can a sentence of preventive detention apply when a man has a record of this sort. The relevant statutory provision contains no limitation as to the class of offence for which preventive detention may be passed (2) and, in the opinion of this court, there is no sound reason for excluding the possibility of that type of sentence being passed for offences such as those to which this man pleaded guilty.

Secondly, counsel contended that so far the longest sentence which this man has had to undergo is one amounting in all to sixteen months' imprisonment, and that no doubt is a factor of importance. As he puts it, the difference between sixteen months to date and the eight years which has now been imposed is a wider gap than would normally be found when a court decides to impose preventive detention. Moreover, as he points out, it would be possible to impose on this man without sending him to preventive detention a term of imprisonment which is substantially longer than the longest of the two which he has undergone. The maximum sentence for driving while under the influence of drink is two years and driving while disqualified is six months (3). In the view of this court that second maximum, namely, six months, is one which on the facts of this case calls and calls loudly for the consideration of those responsible for dealing with these matters. If ever a man deserved by his persistent driving while disqualified a longer term of imprisonment for the mere fact of driving while disqualified, then this is the man.

The third point that was taken, and there is substance in it, is that on his record and on the facts the more serious offence in the sense of the two to which he pleaded guilty, was the driving, because he had been disqualified for life. He should never have been on the road that evening at all, and he knew it. What is said is that it is wrong in principle for a court which cannot pass a sentence of preventive detention for driving while disqualified to reach the same end by passing it for the offence of driving while under the influence of drink. The learned deputy chairman after passing sentence made this observation:

"Mr. Berry, you will need no help, but it is right to say that we should appreciate the views of the Court of Criminal Appeal as to what we have done."

I have endeavoured to summarise the views of this court, namely, that preventive detention is not excluded as a possible sentence in an appropriate case but the occasions on which such a sentence is likely to be passed are exceedingly rare. The view of this court is that in the circumstances, having regard to the fact that this man had not undergone a term longer than sixteen months, this court feels that the time had not been reached so far as he is concerned for preventive detention; but no doubt the appellant will realise himself, and those appearing for him will make sure he does, that if any further incident of this

(2) See s. 21 (2) of the Criminal Justice Act, 1948 (28 HALSBURY'S STATUTES (2nd Edn.) 371).

(3) See s. 6 (1) and s. 110 of the Act of 1960 respectively, the relevant portions of which are set out at footnotes * and †, p. 743, ante.

sort occurs it would make it almost incumbent on the court that deals with him to pass a sentence of preventive detention; in other words, the time has now come after the sentence which this court is about to substitute.

One matter which has caused this court some concern is whether in the circumstances it would be right to make the sentences on the two offences consecutive since they arise out of the same matter. This court takes the view that they are essentially different offences, although they arise out of the same matter. The driving of this man was something which he had been forbidden to do ever again, and yet he drives and the drink element was something fortuitous that evening. It was quite shocking. Having considered the matter carefully, this court takes the view that it is possible and right to pass consecutive sentences, and it is only fair to counsel for the appellant to say that while not assenting to that course he did not seriously contend that it would be inappropriate. The result is that this appeal will be allowed, and in lieu of the sentence of eight years' preventive detention on the drink charge there will be substituted a sentence of two years' imprisonment which will be consecutive to six months' imprisonment for the other offence which will stand.

Appeal allowed in part. Sentence varied.

Solicitor: *Registrar, Court of Criminal Appeal* (for the appellant).

[Reported by N. P. METCALFE, Esq., *Barrister-at-Law.*]

PRACTICE NOTE.

BAKER v. BAKER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Lloyd-Jones, J.), June 1, 2, 1961.]

Magistrates—Husband and wife—Dismissal of complaint—Minute of adjudication—Desirability of magistrates' clerk recording dismissal.

[**Editorial Note.** LORD MERRIMAN, P., had made a similar direction previously, see [1949] W.N. 128.

As to the record to be made where a complaint is dismissed, see 12 HALSBURY'S LAWS (3rd Edn.) 498, para. 1098.]

In *Baker v. Baker* a wife appealed against an order of Bromley magistrates made on Jan. 11, 1961, dismissing her complaints of persistent cruelty and constructive desertion. A note of the magistrates' reasons for this decision was before the Divisional Court. There had been previous proceedings in May, 1959, which had also been dismissed. Counsel for the wife sought to put before the Divisional Court notes of evidence in the previous proceedings in the magistrates' court. These notes were not adduced in evidence when the case came before the magistrates' court on Jan. 11, 1961. The magistrates' clerk had not recorded the dismissal of the 1959 complaint in the minutes of the court.

LORD MERRIMAN, P., made the following observation as guidance on the future practice of magistrates' clerks in matrimonial cases: It is customary and desirable in magistrates' courts that a minute of adjudication should be filled up for the purpose of the record when a complaint is dismissed, as it is when a complaint is found proved.

[Reported by N. P. METCALFE, Esq., *Barrister-at-Law.*]

R. v. MARTIN.

COURT OF CRIMINAL APPEAL (Lord Parker, C.J., Ashworth and Lawton, JJ.),
May 9, 18, 1961.]

*Criminal Law—Indictment—Amendment—Amendment before arraignment—
New count charging correct offence shown by depositions—No injustice caused
to prisoner—Whether amendment properly allowed—Indictments Act, 1915
(5 & 6 Geo. 5 c. 90), s. 5 (1).*

A new count may be added to an indictment by way of amendment before arraignment if that can be done without injustice (see p. 750, letter F, post).

The appellant was committed for trial on four charges. At sessions a bill of indictment was drafted which followed the charges in the committal. This bill was signed by a proper officer of the court and became an indictment. Counsel for the prosecution, on examining a copy of this draft indictment, discovered that two of the counts (Nos. 3 and 4) did not charge the offence alleged in the depositions. A count founded on the facts disclosed in the depositions was drafted and was given to the appellant's legal advisers who were told that application would be made to amend the indictment by adding this count. At sessions, before the appellant was arraigned, counsel for the prosecution applied to amend the indictment by adding the new count. Counsel for the appellant objected and applied to have the indictment quashed under s. 2 (3) of the Administration of Justice (Miscellaneous Provisions) Act, 1933*. The recorder allowed the prosecution to amend. On appeal on the ground that the recorder had no jurisdiction to allow the amendment,

Held: the indictment contained a latent defect, and amendment was properly allowed under s. 5 (1) of the Indictments Act, 1915†, no injustice being caused thereby.

R. v. Errington ((1922), 16 Cr. App. Rep. 148) explained.

R. v. Smith ([1950] 2 All E.R. 679) considered.

PER CURIAM: after arraignment it is doubtful whether a new count can be added at all as the defendant will not have pleaded to it, nor, if the trial has started, have been put in the charge of the jury on it (see p. 750, letter G, post).

Appeal dismissed.

[**Editorial Note.** The Court of Criminal Appeal intimate that in all cases of difficulty prosecuting counsel should be instructed to draft the indictment (see p. 749, letter A, post).]

As to the amendment of defective indictments, see 10 HALSBURY'S LAWS (3rd Edn.) 393, para. 712; and for cases on the subject, see 14 DIGEST (Repl.) 265-268, 2332-2362.

For the Indictments Act, 1915, s. 5 (1), see 5 HALSBURY'S STATUTES (2nd Edn.) 995.]

Cases referred to:

R. v. Errington, (1922), 16 Cr. App. Rep. 148; 14 Digest (Repl.) 266, 2336.

R. v. Hughes, (1927), 136 L.T. 671; 91 J.P. 39; 20 Cr. App. Rep. 4; 14 Digest (Repl.) 267, 2358.

* Section 2 (3) of the Act of 1933 provides, so far as material: "If a bill of indictment preferred otherwise than in accordance with the provisions of the last foregoing subsection has been signed by the proper officer of the court, the indictment shall be liable to be quashed: Provided that— . . . (b) where a person who has been committed for trial is convicted on any indictment or any count of an indictment, that indictment or count shall not be quashed under this subsection in any proceedings on appeal, unless application was made at the trial that it should be so quashed".

† Section 5 (1), so far as material, is set out at p. 749, letter D, post.

R. v. Smith, R. v. Pople, R. v. Dallimore, R. v. Lord, R. v. Mallon, [1950] 2 All E.R. 679; [1951] 1 K.B. 53; 114 J.P. 477; 34 Cr. App. Rep. 168; 14 Digest (Repl.) 266, 2342.

Appeal.

The appellant, William Henry Martin, was convicted on Jan. 3, 1961, at West Bromwich Sessions, before the recorder and a jury, on two counts—(i) of obtaining £5 by false pretences (count 2); (ii) of obtaining a lorry and motor tyres, also by false pretences (count 5). He was sentenced to eighteen months' imprisonment on count 2 and to two years' imprisonment on count 5, the sentences to run concurrently. He was also sentenced to three months' imprisonment for breach of probation (he having been placed on probation for three years on Feb. 27, 1960, by Letchworth Magistrates' Court and ordered to pay a sum of money by way of compensation in respect of a conviction of obtaining by false pretences). He appealed against his conviction and the case came before the court (HILBERY, STEVENSON and LAWTON, JJ.), on Apr. 13, 1961, when HILBERY, J., stated that the court granted leave to appeal on count 5 only. This was an alternative count to counts 3 and 4, count 3 alleging that the appellant obtained a motor lorry by means of a worthless cheque for £200 and count 4 that the same lorry's wheel tyres were obtained by means of a worthless cheque for £216, whereas the depositions clearly showed that the lorry and its tyres had been in fact obtained by a false pretence, viz., a worthless cheque for £378. This was charged by count 5, which was added by amendment to the indictment. In asking for the amendment counsel for the prosecution stated that in his personal experience such a practice had been sanctioned more than once (he cited DENNING, J., and BYRNE, J.).

The facts are stated in the judgment. The cases cited below* were referred to in argument in addition to those in the judgment.

G. Green for the appellant.

M. E. Holdsworth for the Crown.

Cur. adv. vult.

May 18. LORD PARKER, C.J., read the following judgment of the court: This appellant, by leave of the court, appeals against his conviction at West Bromwich Sessions on a count of an indictment charging him with obtaining a motor lorry and sixteen tyres by false pretences. He has submitted that this count, which was added to the indictment by way of a purported amendment, had no effect in law as the recorder had no jurisdiction to make the amendment. He did not submit, nor on the facts could he have done, that the making of the amendment prejudiced or embarrassed him in any way.

The appellant had been committed for trial on four charges, one of which alleged that he had obtained a motor lorry by falsely pretending that a cheque for £200 was a good and valid order for the payment of that sum; another charge alleged that he had obtained sixteen tyres by falsely pretending that a cheque for £216 was a good and valid order for the payment of that sum. At sessions a bill of indictment was drafted which followed the charges in the committal. This bill was signed by the proper officer of the sessions and became an indictment. At some stage after the drafting of the bill of indictment a brief to prosecute was delivered to counsel who, pursuant to his duty to the court to ensure that the indictment was correct in form, examined the copy indictment in his brief and discovered that the counts in it relating to the obtaining of the motor lorry and the tyres did not charge the offence which was disclosed in the depositions, namely, the obtaining of a motor lorry and sixteen tyres by means of a worthless cheque for £378. There had not been two obtainings by means of two cheques

* I.e., *R. v. Cleghorn*, [1938] 3 All E.R. 398; *R. v. Jennings*, (1949), 33 Cr. App. Rep. 143; *R. v. London Quarter Sessions (Chairman), Ex p. Downes*, [1953] 2 All E.R. 750; 37 Cr. App. Rep. 148.

but only one obtaining by means of one cheque which was drawn and handed to the loser some time before the two cheques mentioned in the indictment came into existence. By the time this error was discovered the bill of indictment had become an indictment. Probably no error at all would have been made if counsel briefed to prosecute had been instructed to draft the indictment. We are of the opinion that in all cases of difficulty this should be done. On discovering the error, counsel drafted a form of count founded on the facts disclosed in the depositions. A copy of this draft was given to the appellant's legal advisers who were told that at sessions an application would be made to amend the indictment by adding this count.

At sessions, when the case was called on and before the appellant was arraigned, counsel applied to amend the indictment by making this addition. The application was granted by the recorder. Thereon counsel for the appellant, who had resisted the application to amend and was mindful of the provisions of s. 2 (3) of the Administration of Justice (Miscellaneous Provisions) Act, 1933 (1), applied that the indictment be quashed, but the recorder refused to do so.

Such jurisdiction as the recorder had to allow the addition of this count to the indictment came from s. 5 (1) of the Indictments Act, 1915, which provides as follows:

"Where, before trial, or at any stage of a trial, it appears to the court that the indictment is defective, the court shall make such order for the amendment of the indictment as the court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice . . ."

In the circumstances of this case the amendment, if there was jurisdiction to make it at all, could have been made without injustice. It follows that the only question is whether the indictment was defective. If it was, the recorder had jurisdiction to allow the amendment; if it was not, he had none.

It is pertinent to remember that before the Indictments Act, 1915, courts of assize and quarter sessions had only limited powers to amend indictments. These powers were derived from a number of statutes which were repealed by that Act, which was not a consolidating one. As this court stated in *R. v. Smith* (2):

"That enactment [s. 5 (1) of the Act of 1915] . . . was passed mainly for the purpose of doing away with the technicalities and redundancies of pleading in criminal cases."

It was clearly the intention of Parliament that the powers of amendment should be very considerably extended.

✧ An indictment which charges offences which are not disclosed in the depositions and fails to charge an offence which is, lacks the most essential quality of an indictment. It makes an accusation of crime without cause when it should have made one with cause. This is what the indictment under consideration in this appeal did before it was amended. In our opinion this indictment contained a latent defect which made it just as much defective within the meaning of s. 5 (1) as if the defect had been a patent one. In *R. v. Smith* (2), this court rejected the argument that any indictment to be defective must be one which in law did not charge any offence at all and therefore was bad on its face. HUMPHREYS, J., who delivered the judgment of the court, went on to say (2):

"In our opinion, any alteration in matters of description, and probably in many other respects, may be made in order to meet the evidence in the case so long as the amendment causes no injustice to the accused person."

The amendment in this case was made for the purpose of meeting the evidence disclosed on the depositions and no injustice was done to the appellant. ✕

(1) See footnote *, p. 747, ante.

(2) [1950] 2 All E.R. at p. 681; 34 Cr. App. Rep. at p. 176.

We were referred to a number of cases in which this court has considered whether the powers of amendment given by s. 5 (1) have been properly used. None dealt with the exact situation which arose in this case. We were informed, however, that the practice of allowing counts to be added to an indictment before arraignment has been allowed by some judges and rejected by others. In *R. v. Errington* (3), a new count, charging wholly new false pretences, was added after the appellant had been arraigned and had pleaded not guilty. The reasons for the making of the amendment are not stated. The court adjudged that the amendment was an irregularity for two reasons; first, it was not made because the indictment was defective and, secondly, it was one which could not, at that stage, be allowed without injustice. For the reasons already given, we are of the opinion that the indictment in this case was defective and it was never submitted that the amendment, which was made before arraignment, caused any injustice to the appellant. In our opinion, *R. v. Errington* (3) is not an authority supporting the proposition that a count of an indictment cannot in any circumstances be added by way of amendment before arraignment.

In *R. v. Hughes* (4), there is a paragraph in the judgment of LORD HEWART, C.J. (5), which appears on first reading to be against the view which we are taking in this judgment. *R. v. Hughes* (4) was a case in which at the close of the prosecution's case the judge allowed all the counts for false pretences to be amended by the substitution of another alleged false pretence for those stated in the indictment. The court was of the opinion that such an amendment at that stage of the trial could not be made without injustice. As the court in *R. v. Hughes* (4) were considering whether the amendment caused injustice rather than the question whether, having regard to the evidence disclosed on the depositions, the indictment was defective, we do not consider that the observations of LORD HEWART, C.J., are relevant to a situation and problem which are wholly different.

We appreciate that no case has been reported which approves the adding of a new count before arraignment and by way of an amendment, but nevertheless we consider that there is no objection in principle to this being done provided it can be done without injustice.

✕ This judgment is not intended to encourage the adding of counts to indictments by way of amendment. Indictments which have been carefully drafted should require no amendments of this kind. Unless a defendant has ample warning of an intention to apply for a count to be added, the probabilities are that the addition cannot be made without injustice. After arraignment it is doubtful whether a new count can be added at all as the defendant will not have pleaded to it nor, if the trial has started, have been put in charge of the jury on it; and if it were made, injustice, as *R. v. Errington* (3) and *R. v. Hughes* (4) show, would almost certainly be caused. When, however, the court which is asked before arraignment to allow the addition of a new count is satisfied that no

(3) (1922), 16 Cr. App. Rep. 148.

(4) (1927), 20 Cr. App. Rep. 4.

(5) (1927), 20 Cr. App. Rep. at p. 8, LORD HEWART, C.J., said this: "In the opinion of the court, that subsection [i.e., s. 5 (1) of the Indictments Act, 1915] is dealing with what it speaks of, namely, a case where an indictment is defective. The function of the subsection is to enable the court, in order that justice may be done, to remedy a defect in the indictment. That is a wholly different matter from revising and altering the substance of what was charged. As this indictment was copied and passed, it alleged a false pretence which was no false pretence at all. The evidence that was given was largely consistent with the view that a representation of that kind, and not of another kind, was made; and in our opinion it would be a bad precedent, in the circumstances of such a case as this, to permit the re-writing of a false pretence at the conclusion of the case for the prosecution, so as to introduce into the indictment for the first time the fundamental ingredient of a representation of an alleged existing fact. It was not correcting a defect in the indictment, it was altering its substance; and it was altering its substance in circumstances in which, as it appears to us, the defendant was prejudiced by the alteration."

injustice will be caused to the defendant, we can see no reason why such an amendment of the indictment should not be made. ✓ The appeal will be dismissed.

Appeal dismissed.

Solicitors: Registrar, Court of Criminal Appeal (for the appellant); Hand, Morgan & Owen, Stafford (for the Crown).

[Reported by N. P. METCALFE, ESQ., Barrister-at-Law.]

Re ASPINALL (deceased). ASPINALL v. ASPINALL.

[CHANCERY DIVISION (Buckley, J.), May 18, 19, 1961.]

Landlord and Tenant—Rent—Accrual of cause of action—Quarterly rent—Right of action arising at last moment of quarter day—Apportionment.
Executor and Administrator—Administration of estates—Capital or income—Rent—Quarterly rent—Death of testator on the morning of a quarter day—Whether rents should be treated as capital or income of residuary estate—Apportionment.

A testator was entitled to leasehold premises divided into four parts, which were sub-let. The rents due under two of the sub-leases were payable quarterly in advance on the usual quarter days. The rent due under a third sub-lease was payable quarterly in arrear. The testator died on the morning of a quarter day, Dec. 25, 1954.

Held: (i) subject to apportionment (by consent) of one day's rent to capital, the current quarter's rents under the two sub-leases (viz., the two sub-leases under which rent was payable in advance) at the testator's death were income of his estate because—

(a) rights of action in respect of the rents did not accrue until midnight on Dec. 25/26, 1954, and

(b) the court should have regard to the actual moment of the testator's death, and should not treat it as having occurred at the last moment of Dec. 25, 1954, so that the rights of action to recover the rents had not accrued at his death, and accordingly the rents eventually received were not capital of his estate.

Duppa v. Mayo ((1669), 1 Wms. Saund. 275) applied.

(ii) apportioning by consent to capital all the current quarter's rent payable in arrear under the third sub-lease except rent for the last day of the quarter, that day's rent accrued, for the reasons stated at (i) (a), (b), above, after the testator's death and was income of his estate.

[As to rent not being in arrear until the end of the day for payment, see 23 HALSBURY'S LAWS (3rd Edn.) 544, para. 1202; and for cases on the subject, see 31 DIGEST (Repl.) 253, 254, 3879-3887.

As to the apportionment of rent in respect of time, see 23 HALSBURY'S LAWS (3rd Edn.) 555, 556, para. 1218.

As to apportionment in the administration of estates, see 16 HALSBURY'S LAWS (3rd Edn.) 282, 283, para. 537.]

Cases referred to:

Clun's Case, (1613), 10 Co. Rep. 127a; 77 E.R. 1117; sub nom. *Clun v. Fisher*, Cro. Jac. 309; 79 E.R. 265; 31 Digest (Repl.) 254, 3892.

Dibble v. Bowater, (1853), 2 E. & B. 564; 22 L.J.Q.B. 396; 17 J.P. 792; 118 E.R. 879; sub nom. *Biddle v. Bowater*, 21 L.T.O.S. 165; 31 Digest (Repl.) 253, 3877.

Duppa v. Mayo, (1669), 1 Wms. Saund. 275; 85 E.R. 336; 31 Digest (Repl.) 253, 3885.

Ellis v. Rowbotham, [1900] 1 Q.B. 740; 69 L.J.Q.B. 379; 82 L.T. 191; 31 A Digest (Repl.) 286, 4208.

Lester v. Garland, (1808), 15 Ves. 248; 33 E.R. 748; 42 Digest 947, 203.

Norris v. Harrison, (1817), 2 Madd. 268; 56 E.R. 333; 40 Digest (Repl.) 742, 2286.

North, Re, Ex p. Hasluck, [1895] 2 Q.B. 264; 64 L.J.Q.B. 694; 59 J.P. 724; sub nom. *Re North, Ex p. Parkinson*, 72 L.T. 854; 42 Digest 946, 189.

Rockingham (Lord) v. Penrice, (1711), 1 P. Wms. 177; 24 E.R. 345; sub nom. *Rockingham (Lord) v. Oxenden*, 2 Salk. 578; 91 E.R. 487; 31 Digest (Repl.) 253, 3882.

Strafford (Earl) v. Wentworth (Lady), (1720), Prec. in Ch. 555; 24 E.R. 249.

Adjourned Summons.

This was an application by originating summons dated Nov. 21, 1960, by the plaintiff, Robert James Clement Aspinall, who was interested in the capital of the residuary estate bequeathed by the will of Robert Stivala Aspinall, deceased ("the testator"). Question 1 of the originating summons asked for the determination of the question whether by reason of the death of the testator having taken place on Dec. 25, 1954, each of the sums received in his lifetime by the testator or since his death by the second defendant, Harry Lipton, as the testator's executor and trustee, on account of the following rents:—(a) the rents of £80 and £20 payable in advance on Dec. 25, 1954, under a lease dated July 15, 1954, made between the testator and Ivy Marguerite Anderson, (b) the rents of £71 5s. and £34 2s. 6d. payable in advance on Dec. 25, 1954, under a lease dated Dec. 11, 1951, made between Ernest Gayford and Ronald Baker, (c) the rent of £12 10s. payable in arrear on Dec. 25, 1954, under an underlease dated Feb. 27, 1952, made between Ernest Gayford and one Peters, (d), the rents of £125 15s. 6d. and £19 7s. payable in advance on Nov. 22, 1954, under a tenancy agreement dated Nov. 22, 1954, made between the testator and the Automatic Telephone and Electric Co., Ltd.—ought properly to be treated either (i) wholly as capital of the testator's residuary estate, or (ii) wholly as income of the residuary estate, or (iii) partly as capital and partly as income of the residuary estate, and if so, in what proportions. The defendants were Cecilia Mary Aspinall, the testator's widow, who was interested in the income of his residuary estate and the above-mentioned Harry Lipton. The facts appear in the judgment.

P. A. Goodall for the plaintiff.

J. H. Hames for the first defendant.

O. R. Smith for the second defendant.

BUCKLEY, J.: This case raises a short and academically interesting point which has been very well argued before me, but the amount of money involved is small and I cannot help regretting that the parties, who are step-mother and stepson, were not able to dispose of the matter by an amicable agreement.

The testator, Robert Stivala Aspinall, who died on Dec. 25, 1954, by his last will gave his residuary estate in trust for his wife, the first defendant, for life, and after her death in trust for his son, the plaintiff, absolutely. The testator was the owner of leasehold premises, 55, Cadogan Place, London, in respect of which, at his death, there were four sub-leases or sub-tenancy agreements current in respect of four separate parts of the property. The ground floor was the subject-matter of a sub-lease for seven years from June 24, 1954, at an annual rental of £320 payable quarterly in advance on the usual quarter days and an additional rent of £80 a year, also payable quarterly in advance on the usual quarter days, in respect of certain services provided by the testator (1). The first and second floors were the subject-matter of a tenancy agreement under which they were let for a period from Nov. 22, 1954, to Mar. 31, 1955, at a total rental

(1) See question 1 para. (a) of the originating summons, letter D, *supra*.

of £251 11s. payable in advance in two equal instalments of £125 15s. 6d., the first of which was payable on Nov. 22, 1954, and the second on Jan. 24, 1955. In this case also there was an additional rent amounting to £38 14s. for the whole of the period of the tenancy, payable by two equal instalments of £19 7s. on the dates I have mentioned (2). The third and fourth floors were the subject-matter of a sub-lease for twenty-one years from Dec. 25, 1951, at a rent of £285 a year, payable by equal quarterly instalments on the usual quarter days, and an additional rent in respect of services of £136 10s. also payable in advance by quarterly instalments on the usual quarter days (3). At the rear of the house there was a property known as 60, Cadogan Lane, London. That was subject to an underlease for a term of forty-three and three-quarter years less ten days from Dec. 28, 1951, at a yearly rental of £50 payable by equal instalments on the usual quarter days in arrear (4). The testator died on Dec. 25, 1954, being the day on which quarterly instalments of rent fell due in respect of the ground floor, the third and fourth floors, and 60, Cadogan Lane. The question which I have to decide is whether those rents ought to be regarded as capital or as income in the administration of the testator's estate. As regards the first and second floors, the rent which fell due on Nov. 22, 1954, was paid in the testator's lifetime.

Now the plaintiff, who is interested in the capital of the residuary estate of the testator in remainder expectant on his stepmother's death, says that the rents which fell due on the day on which the testator died became due from the earliest moment of that day; and he says that, because the law pays no attention to fractions of a day, the testator must be taken to have lived throughout that day and to have died at midnight on Dec. 25, 1954. Therefore, he contends that the rents which fell due on Dec. 25, 1954, belonged to the testator for twenty-four hours before his death and are to be regarded as a capital asset of his estate. He relies on the authority of *Dibble v. Bowater* (5) which was a case decided under the statute 11 Geo. 2 c. 19, s. 1 [the Distress for Rent Act, 1737], which related to fraudulent removal of goods by a tenant in order to avoid distress. In that case, the tenant on the morning of the quarter day fraudulently removed his goods with intent to avoid a distress for the rent which became due on that day. The landlord, after the rent had become in arrear, and within thirty days of the removal, followed and seized the goods as a distress. The question was whether that was a course which the landlord was entitled to take, having regard to the terms of the section which provided that

“... in case any tenant . . . of . . . lands . . . upon the demise or holding whereof any rent is or shall be reserved, due, or made payable, shall fraudulently or clandestinely convey away, or carry off or from such premises, his, her, or their goods or chattels, to prevent the landlord . . . distraining the same for arrears of rent so reserved, due, or made payable, it shall and may be lawful to and for every landlord . . . within the space of thirty days next ensuing . . .”

to seize the goods. It had already been held in earlier decisions that where the goods were removed before the quarter day, the section did not apply. The question really turned on the construction of the words “rent so reserved, due, or made payable”. In the course of his judgment, LORD CAMPBELL, C.J., said (6):

“Mr. Warren [who was one of the counsel in the case] has satisfactorily shown that rent is in one sense due and payable on the quarter day; for payment on that morning to a tenant for life who dies in the course of the day could not be good against the heir if the rent were not due and payable.

(2) See question 1 para. (d) of the originating summons, p. 752, letter D, ante.

(3) See question 1 para. (b) of the originating summons, p. 752, letter E, ante.

(4) See question 1 para. (c) of the originating summons, p. 752, letter E, ante.

(5) (1853), 2 E. & B. 564.

(6) (1853), 2 E. & B. at p. 568.

But the rent, though due on that day, is not in arrear till the day is elapsed; and there can be no distress till the rent is in arrear."

ERLE, J., in the course of his judgment, said (7):

"In law, no distress could be made till the following day; but the rent was due at the beginning of Dec. 25, though the tenant had the whole of that day in which to pay it."

Although ERLE, J., says in terms "the rent was due at the beginning of Dec. 25", I would point out that LORD CAMPBELL, C.J., said that it was in one sense due and payable at that time.

For that part of his argument which turns on the law ignoring a fraction of a day, counsel for the plaintiff relies on the decision of *Lester v. Garland* (8), a case which turned on the question whether or not a particular lady had done something within six calendar months after the testator's decease, and it was held that the day on which the testator died must be excluded from the period of six calendar months within which she had to comply with the condition. But, although in a case of that kind the principle that the law ignores a fraction of a day may very properly be applicable, there is, I think, clearly no general rule that in every case that principle is to be applied: see in particular the observations of LORD ESHER, M.R., in *Re North, Ex p. Hasluck* (9). In my judgment, the cases that I shall refer to later make it clear that in a case such as I have to consider, that rule does not apply.

It seems to me that the test which I have to use for the purpose of deciding whether or not these rents ought to be regarded as capital assets of the testator's estate is whether at the time of his death a cause of action to recover the rent had then accrued. If it had, that cause of action was an asset of the testator's estate at his death, and the fruits of that asset would constitute part of the corpus of his estate. If, on the other hand, the cause of action in respect of these rents did not accrue until after his death, then there is no asset that one can identify comprised in his estate at his death. If the cause of action is a right which arises after his death, it is as much income as, for instance, a dividend declared on shares after his death would be income of the estate.

I apply myself, therefore, to the question at what time the cause of action in respect of the rents which fell due on Dec. 25, 1954, can be said to have arisen; and in this connexion I think that help is to be obtained from cases which were decided in respect of leases granted by tenants for life before life tenants had statutory powers to grant leases. In that state of the law, the life tenant might have an express power to grant leases conferred on him by the settlor, and in such a case, if he granted a lease for a term which in the event extended beyond his own life, the term was unaffected by his death. If, on the other hand, the tenant for life had no such power, he could only grant leases which were binding on his own interest and estate in the land; and if he died in the course of a term for which such a lease was granted, the lease immediately determined on his death, because it could have no effect on the estate of the remainderman.

The first case to which I think that I should make reference is *Earl of Strafford v. Lady Wentworth* (10). The headnote to that case is:

"Tenant for life makes a lease for years, reserving rent at Lady-day and Michaelmas, and dies on Michaelmas-day, about twelve o'clock at noon; the rent shall go to his executor, and not to the remainderman; but if such tenant had a power of leasing, and had died in manner aforesaid, the rent, in respect to the continuance of the lease, must have gone to the remainderman, as incident to the reversion."

The tenant for life there had no express power of granting leases. He granted leases for years, reserving rent payable at Lady-day and Michaelmas, and died

(7) (1853), 2 E. & B. at p. 570.

(9) [1895] 2 Q.B. at p. 269,

(8) (1808), 15 Ves. 248.

(10) (1720), Prec. in Ch. 555.

on Michaelmas-day at noon. LORD MACCLESFIELD, L.C., who heard the case, was reported as having declared (11):

"... that if tenant for life makes a lease for years, reserving rent at Lady-day and Michaelmas during the term, and dies on Michaelmas or Lady-day at twelve o'clock, or any other time before the last instant, that the rent in such cases is nevertheless due to his representative; for though the lessee had election to pay it any time before the last instant of those days, if this lease had so long continued, yet it being payable on those days during the term, and the lessor being living some part of those days, his election to defer it to the last instant was taken away by such dying, before the rent became completely due, and consequently it would belong to the representatives of the lessor; and this, he said, was so clear, that he would no more send it to be determined by law, than he would, whether the father's estate should descend to the eldest son; for the term having a continuance some part of those days, the lessee at his peril ought to pay his rent before the expiration of the term, it being payable on those days during the term, and the term did subsist on those days, though not to the last instant."

And a little later he was reported to have said (12):

"But if such lease were made, by virtue of a power to make leases in a settlement, as the term subsisted, and had continuance there by the death of the lessor before the last instant, the rent would go along with the land to him in remainder, or reversion; because being payable on those days during the term, the lessee had till the last instant of those days to pay his rent, the term enduring till the last instant of those days, and consequently the lessor dying before it was completely due, his representatives can make no title to it..."

The distinction drawn between the two cases is interesting. In the case of the lease granted under the power, the tenant had got until the last instant of the day in which to pay his rent, and on the tenant for life dying before the end of the day, the rent would not belong to the life tenant but would go to the remainderman. On the other hand, where a life tenant granted the lease having no power to do it, so that the term determined at the instant of his death, the rent became due at the instant of his death and the locus poenitentiae which the tenant would have otherwise had to withhold payment until the last instant of the day disappeared on account of the death of the life tenant and the rent became immediately due at the death of the life tenant; therefore, the life tenant's executor was entitled to the rent because the right to the rent was one which was complete at the moment of the life tenant's death.

Another case which deals with the same sort of point is *Lord Rockingham v. Penrice* (13). In this case the lease was granted by a life tenant who had power to grant leases. Before his marriage, a certain Sir James Oxenden settled property on his wife for her jointure, with power for himself to make leases at the usual rent. He made leases under which the rent was payable at Lady-day and Michaelmas, and he died on Michaelmas-day. One of the lessees had paid his rent (14) "in the morning of the said Michaelmas-day", but the other tenants had not paid their rent, which amounted to £500. SIR JOHN TREVOR, M.R., declared (15) that, Sir James Oxenden dying before sun-set and there being no remedy for the lessor against the lessee before Sir James' death to compel the payment of a half-year's rent, that rent should on Sir James' death go to the jointress, who then had the reversion. So that is a case which was the opposite to *Strafford v. Wentworth* (16), where the leases were granted without

(11) (1720), Prec. in Ch. at p. 556.

(12) (1720), Prec. in Ch. at p. 557.

(13) (1711), 1 P. Wms. 177 and noted in 1 Swan. at p. 345.

(14) (1711), 1 P. Wms. at p. 177.

(15) (1711), 1 P. Wms. at p. 179.

(16) (1720), Prec. in Ch. 555.

having any power. It appears from the note in *1 Swanston* at p. 346 that the statement in *1 Peere Williams* at p. 177 that one tenant had paid his rent on the morning of Sir James' death was inaccurate. It seems that the payment was made not on that morning but on Sept. 21, when there was a surrender of the old lease and the taking of a new lease, but nevertheless Sir James' personal representative was declared to be accountable to the jointress for that rent.

Another case to which I was referred, with which I will not deal in any detail, was *Norris v. Harrison* (17). In these cases reference was made to an earlier observation of SIR MATTHEW HALE, at the time when he was Chief Baron, in *Duppa v. Mayo* where he said (18):

"... that although the time of sun-set was the time appointed by the law to demand rent, to take advantage of a condition of re-entry, and to tender it to save a forfeiture, yet the rent is not due until midnight; for if a man seised in fee makes a lease for years, rendering rent at the Feast of St. John the Baptist, upon condition of re-entry for non-payment, now the lessor, if he will take advantage of the condition, must demand it at sun-set; yet if he dies after sun-set, and before midnight, his heir shall have this rent, and not his executors, which proves that the rent is not due until the last minute of the natural day."

In my judgment, these authorities establish that, in a matter of this kind, the court does pay attention to the actual moment of the relevant death and does not treat it as an event which is conterminous with the day on which it occurs, so that the deceased should be regarded as having lived until the last moment of that day. I think that these authorities also establish that rent is not completely due until the end of the day fixed for payment, if the term continues until the end of that day, and that there is no cause of action in respect of the rent until the last moment of that day.

That brings me to the last case that I think I need refer to, *Clun's Case* (19), in which there is an observation of LORD COKE, C.J.:

"And it is to be known, that in case of payment of rent issuing out of land, there are four times of payment, the first time of payment voluntary and not satisfactory, and yet good to some special purpose. The second voluntary, and in case satisfactory, and in case not. The third legal and satisfactory absolutely, and not coercive. The fourth legal, satisfactory and coercive."

He goes on to explain that those four times are, first of all, the period before the rent becomes due, during which, if any payment is made, it is a purely voluntary payment and does not operate as a discharge of the obligation to pay the rent, although there may, of course, be an agreement between the tenant and the landlord that when that obligation matures the payment shall be taken in satisfaction. The second is the day fixed for payment of the rent, when, if the tenant likes to pay in the morning, it is in a sense a voluntary payment because he is not bound to pay until the last moment of the day, but it is nevertheless a good satisfaction of the obligation to pay the rent on that day. The third is the moment when the rent becomes finally due, that is to say, the last moment of the day; and the fourth is when the rent can be said to be in arrear, which is after the end of the day,

I therefore reach the conclusion that in the present case the tenants' liability to pay these rents did not completely mature until midnight on Dec. 25, 1954; and, the testator having died at about half-past eight in the morning, I reach the conclusion that no cause of action to recover these rents formed part of his estate at the moment of his death, but that the cause of action matured after his death, and that the rents eventually received were not received in respect of a

(17) (1817), 2 Madd. 268.

(18) (1669), 1 Wms. Saund. at p. 287.

(19) (1613), 10 Co. Rep. at p. 127b.

right which belonged to him when he died, but in respect of a right which matured after his death.

I think, therefore, that the right conclusion is that (subject to any necessary apportionment) these rents ought not to be treated as capital, but as income. If they are treated as income, counsel for the first defendant concedes that to the extent of one day there should be apportionment and that as regards the rents payable in advance one day's rent, and as regards the rent payable in arrear all but one day's rent, should be treated as having accrued in the testator's lifetime; the remainder as having accrued since. Had the rents been properly regarded as having accrued before the testator died, it seems that on the authority of *Ellis v. Rowbotham* (20), the Apportionment Act, 1870, would not have applied; but as, on the view which I have taken, they accrued due after that event, the Act does apply, and, as I say, counsel for the first defendant concedes that there should be such apportionments as I have mentioned, and that the rents should be regarded as capital to the extent, and only to the extent, that they should be treated as having accrued in the testator's lifetime.

As regards the payment which was made in respect of the first and second floor maisonette before the death of the testator, the Apportionment Act, 1870, in my judgment does not apply, because that rent had accrued due in the lifetime of the testator, and those rents ought all to be regarded as capital.

I will therefore declare that by reason of the death of the testator having taken place on Dec. 25, 1954, each of the amounts of rent mentioned in paras. (a) and (b) of question 1 of the originating summons (21) ought to be treated as income of the residuary estate except to the extent of one day's rent in each case, and that the amount of rent mentioned in para. (c) except to the extent of one day's rent ought to be treated as capital and that the rents referred to in para. (d) of the originating summons ought to be regarded as wholly capital.

Declaration accordingly.

Solicitors: *Theodore Goddard & Co.* (for the plaintiff); *Jaques & Co.* (for the first defendant); *Lipton & Jefferies* (for the second defendant).

[*Reported by* JENIFER SANDELL, *Barrister-at-Law.*]

(20) [1900] 1 Q.B. 740.

(21) See p. 752, letters D and E, ante.

WATERS v. SUNDAY PICTORIAL NEWSPAPERS, LTD.

[COURT OF APPEAL (Willmer and Danckwerts, L.J.J.), May 17, 18, 1961.]

Libel—Pleading—Striking out pleading—Defence—Justification, fair comment, fair and accurate report of judicial proceedings—Bad reputation in mitigation of damages—Dicta in judicial proceedings involving plaintiff.

The defendants in their Sunday newspaper referred to the plaintiff as (a) "a notorious, dodgy operator of London slum properties", (b) "this wily dodger" and (c) "the man whose estate agency was described . . . by LORD GODDARD, then Lord Chief Justice, as 'a fraudulent business from beginning to end'." In their defence to an action for damages for libel the defendants admitted that the words were defamatory but pleaded (i) justification, (ii) fair comment on a matter of public interest, (iii) that the words at (c) above were a fair and accurate report of judicial proceedings, and (iv) in mitigation of damages that, as a result of certain judicial proceedings, the plaintiff had already been brought into scandal, odium and contempt. They cited three judicial proceedings: first, a criminal prosecution in 1953 for alleged offences of dishonesty, on appeal from which the plaintiff's convictions were quashed by the Court of Criminal Appeal on the ground of a defective summing-up and the Lord Chief Justice's observations were made; second, a civil action by a company in which the plaintiff was interested in which the county court judge dismissing the claim suggested fraud by the plaintiff; and third, proceedings by companies in which the plaintiff was interested in which the Court of Appeal criticised the companies. On an application to strike out of the defence the passages relating to the proceedings under each of the several heads of defence on the ground that they disclosed no reasonable answer to the plaintiff's claim,

Held: the allegations would not be struck out because—

(i) the plea of justification might answer some meaning that the jury would place on the words complained of.

Cadam v. Beaverbrook Newspapers, Ltd. ([1959] 1 All E.R. 453) considered.

(ii) it must follow from the decision not to strike out the matter pleaded in justification that the repetition of it in relation to the plea of fair comment should stand.

Dictum of LORD OAKSEY in *Kemsley v. Foot* ([1952] 1 All E.R. at p. 508) applied.

(iii) the question whether the words at (c) above were a fair and accurate report was a question for the jury, and

(iv) the plea in mitigation of damages that the plaintiff had already been brought into public odium by the judgments in the proceedings referred to did not go beyond what was permissible as evidence of bad reputation in a sector of life relevant to the alleged libel.

Plato Films, Ltd. v. Speidel ([1961] 1 All E.R. 876) applied.

Appeal dismissed.

[As to striking out pleading showing no cause of action or defence, see 30 HALSBURY'S LAWS (3rd Edn.) 37, para. 76; and for cases on the subject, see DIGEST (Practice) 71-82, 623-687.]

Cases referred to:

Cadam v. Beaverbrook Newspapers, Ltd., [1959] 1 All E.R. 453; [1959] 1 Q.B. 413; [1959] 2 W.L.R. 324; 3rd Digest Supp.

Kemsley v. Foot, [1952] 1 All E.R. 501; [1952] A.C. 345; 3rd Digest Supp.

Plato Films, Ltd. v. Speidel, [1961] 1 All E.R. 876; [1961] 2 W.L.R. 470.

Scott v. Sampson, (1882), 8 Q.B.D. 491; 51 L.J.Q.B. 380; 46 L.T. 412; 46 J.P. 408; 32 Digest 167, 2045.

Appeal.

The plaintiff appealed to the Court of Appeal by leave of the judge against an order of HINCHCLIFFE, J., made on Mar. 17, 1961, dismissing an appeal against

an order of Master JACOB, made on Mar. 6, 1961, refusing an application to strike out sub-para. (4), (5), (6) and (7) of the particulars of justification in the defence, so much of para. 4 of the defence as referred to such sub-paragraphs, para. 5 of the defence and the last sentence of para. 8.

By their defence the defendants pleaded (in para. 3) that the words complained of (with the exception of certain words not relevant to this report) in their natural and ordinary meaning were true in substance and in fact. They gave particulars of justification which included

"... (4) Between Apr. 14 and May 1, 1953, the plaintiff together with one Flavin and one Dell was tried at the Central Criminal Court on an indictment containing fourteen counts charging divers offences concerning claims made by the plaintiff to the War Damage Commission in respect of the alleged war damage repairs to his properties. The plaintiff was convicted on eleven of the said counts and sentenced to twelve months' imprisonment. (5) The plaintiff appealed to the Court of Criminal Appeal against his conviction. The appeal was allowed on Dec. 8, 1953, on the ground that the summing-up was defective. The Lord Chief Justice, LORD GODDARD, delivering the judgment of the court, stated inter alia that the case for the Crown was that the plaintiff had been buying up slums and other properties which had been damaged by enemy action and that fraudulent claims were made to the War Damage Commission making out that work had been done which had not been, and that various sums had been fraudulently obtained. £90,000 in all had been obtained from the commission. At the trial an astonishing state of affairs had been shown which the Lord Chief Justice did not hesitate to say wrote 'fraud' in large letters across the business which the plaintiff was carrying on as an estate agent. He was the manager of a business, Waters and Waters, which professed to be estate agents, his wife and daughter being the other partners. The evidence in the case appeared to him to have been overwhelming: it was a fraudulent business from beginning to end. The Lord Chief Justice further stated that the court were convinced that if the jury had arrived at a verdict of guilty upon a proper direction there would not have been the remotest chance of the Court of Criminal Appeal interfering with it. The word 'fraud' was written in the largest letters all over the case. The prosecution was abundantly justified. (6) On dates between Sept. 23 and Oct. 15, 1954, an action was heard by JUDGE CLOTHIER in Lambeth County Court in which Rojam, Ltd. claimed against one Elizabeth Dorrell (widow) arrears of payment on a mortgage of her dwelling-house. During his judgment, given on Oct. 15, 1954, JUDGE CLOTHIER stated that the plaintiff was the principal behind the transaction and that Rojam, Ltd. were nothing more than a name interposed between the said Elizabeth Dorrell and the plaintiff. The judge further stated that the whole purpose of the plaintiff's organisation of forty companies . . . was to disguise and cloak the plaintiff's activities: that the object of the transaction was nothing more than the sale by the plaintiff to Mrs. Dorrell of a piece of worthless property at an enhanced price by fraudulent misrepresentation: and that not only was the whole of the plaintiff's organisation fraudulent but the particular mortgage transaction in question reeked with fraud from start to finish. The judge declared the mortgage to be void and set it aside."

In sub-para. (7) of the particulars of justification the defendants referred to the judgments of the Court of Appeal in the cases of *Morelle, Ltd. v. Waterworth** and *Rodnal, Ltd. v. Ludbrook**, and quoted passages from the judgments of

* Reported [1954] 2 All E.R. 673.

SINGLETON, L.J.*, and DENNING, L.J.†. The defendants pleaded that the judgments of SINGLETON and DENNING, L.J.J., received widespread publicity at the time (including publicity in "The Times" newspaper for June 17, 1954) when it was widely known that *Morelle, Ltd.* and *Rodnal, Ltd.* were the plaintiff's companies. By para. 4 of their defence the defendants pleaded

"Further or alternatively the words 'a notorious dodgy operator of London slum properties', 'vast empire of thousands of slum houses', 'this wily dodger', and 'these impudent demands' are fair comment made bona fide and without malice upon matters of public interest, namely upon the statements of fact comprised in the remainder of the said article, all of which (except for the words . . .) are true in substance and in fact, and upon the facts and matters pleaded in sub-paras. (1) to (12) inclusive of the particulars under para. 3 hereof."

Paragraph 5 of the defence is set out at p. 762, letters F and G, post. Paragraph 6 of the defence was a denial that words in para. 3 of the statement of claim were capable of bearing any of the secondary meanings pleaded therein. By para. 8 of their defence the defendants denied that the plaintiff suffered the damage alleged or any damage, and pleaded, in the last sentence, that he had already been brought into public scandal, odium and contempt by the said judgments of the Court of Criminal Appeal and of JUDGE CLOTHIER in Lambeth County Court, both of which received wide publicity.

L. Lewis for the plaintiff.

David Hirst for the defendants.

WILLMER, L.J.: The plaintiff's action is for libel in respect of an article published in the "Sunday Pictorial" on Aug. 9, 1959. It is admitted that the words complained of are defamatory. The defendants, by their defence, raised a number of defences, which included, first, a plea of justification; secondly, a plea of fair comment made bona fide and without malice on a matter of public interest; thirdly, a plea (as to part of the words complained of) that they are a fair and accurate report published bona fide and without malice of judicial proceedings; and, fourthly, a plea in mitigation of damages, that, as the result of certain judicial proceedings, the plaintiff had already been brought into scandal, odium and contempt.

It is not necessary for the purposes of this appeal to read in full the article complained of, which is fully set out in the statement of claim. For the purposes of the questions before us, it is sufficient to say that the gist of the complaint is that the article referred to the plaintiff by name as "a notorious, dodgy operator of London slum properties", and in another passage as "this wily dodger". The article also set out that he was

"the man whose estate agency was described in 1953 by LORD GODDARD, then Lord Chief Justice, as 'a fraudulent business from beginning to end'."

The portions of the defence sought to be struck out were those in which it was sought to rely on certain judicial proceedings in which the plaintiff had been involved. These judicial proceedings were three in number. First, there was a criminal prosecution in 1953 on an indictment charging the plaintiff with a number of offences of dishonesty. The plaintiff was convicted on eleven out of fourteen counts; but, on appeal to the Court of Criminal Appeal, all the convictions were quashed on the ground that the summing-up was defective. It was in the course of those proceedings in the Court of Criminal Appeal that the Lord Chief Justice made the observation to which I have already referred. Second,

* This was the passage at [1954] 2 All E.R. 678, letters B-E, from "The case gives rise to some interesting speculations" to "... house property such as this".

† This was the passage at [1954] 2 All E.R. 679, letters B-C, from "Here is a foreign company" to "... obtain their proper taxes".

there was a civil action in 1954 in Lambeth County Court, which was brought by a company in which the plaintiff was interested in respect of a mortgage on a dwelling-house. It is alleged that, in the course of giving judgment dismissing the claim, the county court judge made certain observations suggesting fraud on the part of the plaintiff. Third, there were also in 1954 certain proceedings in the Court of Appeal brought by two other companies in which the plaintiff was interested for possession of certain house property. The Court of Appeal held that the leases were forfeited to the Crown under the Mortmain and Charitable Uses Act, 1888; and the members of the court made certain observations by way of adverse criticism of the respective companies. Some or all of these three judicial proceedings are relied on by the defendants as part of their defence under all the four heads of defence to which I have already referred.

The application to strike out parts of the defence was said to be based on R.S.C., Ord. 19, r. 27, and Ord. 25, r. 4, and also on the inherent jurisdiction of the court. These rules provide for a variety of reasons for striking out a pleading; but the only reason advanced in argument before us has been that the particular paragraphs of the defence which are attacked are said to disclose no reasonable answer to the plaintiff's claim. It seems, therefore, that the only rule really in question here is R.S.C., Ord. 25, r. 4.

It is well-established that the drastic remedy of striking out a pleading, or part of a pleading, cannot be resorted to unless it is quite clear that the pleading objected to discloses no arguable case. Indeed, it has been conceded before us that the rule is applicable only in plain and obvious cases. It is perhaps not without significance that we managed to spend the whole of the day yesterday in listening to an argument whether or not the matter objected to did set up an arguable case. For the purposes of this appeal, we are not in any way concerned whether any of the defences raised is likely to be successful. The sole question in relation to each of the four headings is whether the case sought to be set up is so unarguable that it ought to be struck out in limine. I have come to the conclusion, in relation to each of the four headings, that it is quite impossible for us to take this drastic course.

Having stated that conclusion, I propose to say as little as possible as to the merits of the various defences raised, for I do not wish anything which I may say now to prejudice the eventual trial of the action. However, it is necessary to describe how the application arises in relation to each of the four heads of defence. As to the plea of justification, the application is to strike out four sub-paragraphs of the particulars of justification, in which are set out the observations of the various judges in the course of the judicial proceedings to which I have referred. It is contended that what the various learned judges said in the course of those proceedings is not admissible to prove the truth of the allegations made against the plaintiff. As to what the Lord Chief Justice said in the Court of Criminal Appeal, counsel for the defendants points out that it is a part of the alleged libel that the learned Lord Chief Justice spoke the words complained of. He contends that in such circumstances it must be permissible to plead that the Lord Chief Justice did in fact speak the words. In the case of what was said in the other proceedings by the other judges, it is contended on behalf of the defendants that their remarks are properly pleaded in support of the allegation that the plaintiff is "a notorious, dodgy operator", the words spoken being part of the notoriety that is alleged.

Reliance was placed on behalf of the defendants on the decision of this court in *Cadam v. Beaverbrook Newspapers, Ltd.* (1) where the alleged libel was contained in an article stating that a writ had been issued against the plaintiffs for alleged conspiracy. In that case, by their defence the defendants alleged that the words complained of were incapable of a defamatory meaning; but subsequently they sought and obtained leave to add an alternative plea of justification, supported by particulars setting forth details of a writ which had in fact

been issued. Counsel for the plaintiff sought to distinguish *Cadam's* case (2) on the ground that in that case there was an issue whether the words complained of were defamatory at all. Until it was known what defamatory meaning, if any, the jury might put on the words complained of, it could not be said that the particulars sought to be added could in no circumstances amount to justification. Here it is said, however, that the case is different, for the words complained of here are admittedly defamatory. Even so, however, I do not think that the distinction sought to be drawn is valid; for here, too, it cannot be known what exact meaning the jury will put on the words complained of, and, as in *Cadam's* case (2), so here, it is impossible to say that the particulars of justification can be no answer to any conceivable meaning which a jury might find.

I do not think, therefore, that it is possible to strike out these sub-paragraphs of the particulars of justification which set out the effect of what was said in the various previous judicial proceedings. It must follow from that a fortiori that it is impossible to strike out, as we are asked to do, so much of para. 4 of the defence as sets up these same facts as matters of public interest so as to form the basis of a plea of fair comment. This follows a fortiori once it is held impossible to strike out the paragraphs in relation to the plea of justification. It is sufficient, so far as the paragraph relating to fair comment is concerned, to refer to what was said by LORD OAKSEY in *Kemsley v. Foot* (3). He said (4):

"A defendant who has made a defamatory comment on a matter of public importance must be entitled to adduce any relevant evidence to show that the comment was fair, and, in order to do so, must be entitled to allege and attempt to prove facts which he contends justify the comment. Whether the facts alleged are satisfactorily proved or not it will still be for the jury to say whether they consider that the comment in the circumstances proved might have been made by an honest man."

I think that those remarks cover this case, and that it is impossible to strike out para. 4 of the defence.

I pass then to consider the plaintiff's next contention, that the whole of para. 5 of the defence should be struck out. Paragraph 5 alleges:

"Further or in the further alternative the words 'The man whose estate agency was described in 1953 by LORD GODDARD, then Lord Chief Justice, as a fraudulent business from beginning to end' are a fair and accurate report published bona fide and without malice of judicial proceedings before a properly constituted judicial tribunal exercising its jurisdiction in open court, to wit the proceedings of the Court of Criminal Appeal on Dec. 8, 1953, referred to in sub-para. (5) of the particulars under para. 3 above. By reason of the premises the said words were published on an occasion of qualified privilege."

It is alleged on behalf of the plaintiff that the words complained of cannot be said to be a fair and accurate report, seeing that the learned Lord Chief Justice's criticism of the plaintiff's business is set out without any mention of the fact that, in the very same proceedings, all the convictions against the plaintiff were quashed. As to that submission, all I desire to say is that the jury at the trial may or may not take that view; but, to my mind, it is essentially a matter for the jury to decide. It is quite impossible for us at this stage to say that the matter is so clear that the plea should be struck out in limine.

The last question before us arises out of the plaintiff's contention that so much of para. 8 of the defence as alleges that the plaintiff had already been brought into public scandal, odium and contempt by the judgments of the Court of Criminal Appeal and of Lambeth County Court should be struck out. It is said

(2) [1959] 1 All E.R. 453; [1959] 1 Q.B. 413.

(3) [1952] 1 All E.R. 501; [1952] A.C. 345.

(4) [1952] 1 All E.R. at p. 508; [1952] A.C. at p. 361.

that that follows from the recent decision of the House of Lords in *Plato Films, Ltd. v. Speidel* (5). By their decision in that case the House of Lords affirmed the principle of *Scott v. Sampson* (6), whereby it was laid down that, in mitigation of damages, only general evidence of reputation may be adduced, and that it is not permissible to adduce evidence of specific facts. It is said that what the defendants are seeking to do here is to set up these judgments in previous judicial proceedings as specific facts in mitigation of damages. On the other side, it is urged that all that it is sought to do is to direct attention to the relevant sector of the plaintiff's life in respect of which he is alleged to be of bad reputation. This, it is said, is no more than their Lordships in *Speidel's* case (5) held to be permissible. We were referred to what was said by LORD RADCLIFFE (7), by LORD DENNING (8) and by LORD MORRIS (9). It may be remarked, I think, that in *Speidel's* case (5) the House of Lords approved the order made by this court giving leave to amend the pleading so as to allege

"that the plaintiff had . . . a bad reputation as a man who was party to and/or responsible for actions which were war crimes and/or against humanity and/or atrocities."

Thus, it was held by the House of Lords to be permissible to plead such matters as directing attention to the relevant sector of the plaintiff's life.

For my part, I am not persuaded that the plea objected to here goes beyond what was held permissible in *Speidel's* case (5); or, at any rate, that it goes so far beyond it that it ought to be struck out. In those circumstances, I do not think that a case for striking out any of the paragraphs objected to has been made out. I am not satisfied that either the master or the learned judge below came to a wrong conclusion, and, for my part, therefore, I would dismiss the appeal.

DANCKWERTS, L.J.: I agree. R.S.C., Ord. 19, r. 27, and Ord. 25, r. 4, and, indeed, also the inherent jurisdiction of the court, are only to be exercised in cases where it is clear that the defences which have been put forward cannot really succeed, so that it may be proper to strike them out at such an early stage in the action. Unless that is reasonably plain, it is a jurisdiction which in practice is not exercised, and it is a jurisdiction which is exercised only with the greatest care. In the present case, the matter was argued both ably and persistently by the counsel in the case, and the longer they argued the more obvious it became to me that the questions involved were thoroughly arguable, in spite of the authorities to which we were referred. Consequently, I became satisfied that it was not a case in which this jurisdiction should be used.

So that there may be no misunderstanding about the matter, I add that, in my opinion, it is not a case for an application under R.S.C., Ord. 25, r. 2. That rule is one which is only useful when there is a legal point, or legal points, which will dispose of the action if they are decided in a certain way. The issues on these particular paragraphs of the defence would not necessarily dispose of the action. Therefore these matters must be decided by the judge who tries the case.

The learned judge and the master came to the correct conclusion in the present case, and the appeal should be dismissed.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *A. L. Philips & Co.* (for the plaintiff); *William Charles Crocker* (for the defendants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

(5) [1961] 1 All E.R. 876.

(7) [1961] 1 All E.R. at p. 885.

(6) (1882), 8 Q.B.D. 491.

(8) [1961] 1 All E.R. at p. 890.

(9) [1961] 1 All E.R. at p. 895.

KEMP v. KEMP.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Baker, J.), May 1, 2, 3, 1961.]

Divorce—Desertion—Constructive desertion—Adultery—Discovery of past adultery—Adultery not continuing or persisted in—Whether innocent party justified in leaving matrimonial home.

If one spouse discovers that the other has committed adultery, or has reasonable grounds, induced by the other's conduct, for believing that adultery has been committed, the innocent spouse may be justified in leaving the matrimonial home and subsequently in alleging constructive desertion, even though the adultery neither was persisted in nor is continuing.*

Teall v. Teall ([1938] 3 All E.R. 349) considered and explained.

Baker v. Baker ([1953] 2 All E.R. 1199); *Everitt v. Everitt* ([1949] 1 All E.R. 908) and *Glenister v. Glenister* ([1945] 1 All E.R. 513) considered.

In August, 1960, the wife made a complaint that the husband had deserted her on July 30, 1960, and applied for an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949. It appeared from the evidence that for a period of some six weeks between the middle of December, 1959 and the beginning of February, 1960, the husband had been conducting an adulterous association with a young woman. This association apparently ended in January or February, 1960. The wife had continued to live with the husband, but on July 27, 1960, after the husband had seen a man talking to the wife in a public house, he had hit her, and on July 30, 1960, she left him. The husband admitted in evidence at the hearing before the magistrates that in December, 1959, he had committed adultery. It was not clear on the magistrates' findings whether the wife knew of the adultery before the husband's admission of it at the hearing. On appeal by the wife from the dismissal of her complaint,

Held: the case would be remitted for re-hearing since (a) there was no clear finding whether the wife knew, prior to her husband's admission at the hearing before the magistrates, that his association with the young woman had been adulterous, and (b), as a matter of law, the discovery of that adultery, even though past and not persisted in, could have justified the wife in leaving the husband and thus constructive desertion by him might have been established.

Appeal allowed.

[As to a husband's adultery forcing the wife to leave the matrimonial home and constituting constructive desertion, see 12 HALSBURY'S LAWS (3rd Edn.) 247, para. 461, note (b); and for cases on the subject, see 27 DIGEST (Repl.) 350, 351, 2897-2906, 697, 6666, 6667.]

Cases referred to:

Allen v. Allen, [1951] 1 All E.R. 724; 115 J.P. 229; 27 Digest (Repl.) 84, 633.

Baker v. Baker, [1953] 2 All E.R. 1199; [1954] P. 33; 117 J.P. 556; [1953] 3 W.L.R. 857; 3rd Digest Supp.

Barker v. Barker, [1950] 1 All E.R. 812; 27 Digest (Repl.) 560, 5116.

Durant v. Durant, (1825), 1 Hag. Ecc. 733; 162 E.R. 734; *previous proceedings* (1824), 2 Add. 267; 27 Digest (Repl.) 396, 3265.

Edwards v. Edwards, [1948] 1 All E.R. 157; [1948] P. 268; [1948] L.J.R. 670; 112 J.P. 109; 27 Digest (Repl.) 351, 2911.

Everitt v. Everitt, [1949] 1 All E.R. 908; [1949] P. 374; 113 J.P. 279; 27 Digest (Repl.) 348, 2881.

* See, e.g., p. 769, letter H, and p. 773, letter H, to p. 774, letter A, post.

Forbes v. Forbes, [1954] 3 All E.R. 461; 119 J.P. 30; [1954] 1 W.L.R. 1526; 3rd Digest Supp.

Frankish v. Frankish, (Jan. 24, 1945), unreported.

Glenister v. Glenister, [1945] 1 All E.R. 513; [1945] P. 30; 114 L.J.P. 69; 172 L.T. 250; 109 J.P. 194; 27 Digest (Repl.) 367, 3040.

Kemp v. Kemp, [1953] 2 All E.R. 553; 117 J.P. 409; [1953] 1 W.L.R. 1225; 3rd Digest Supp.

Lodge v. Lodge, (1890), 15 P.D. 159; 59 L.J.P. 84; 63 L.T. 467; 27 Digest (Repl.) 349, 2889.

Pratt v. Pratt, [1939] 3 All E.R. 437; [1939] A.C. 417; 108 L.J.P. 97; 161 L.T. 49; 27 Digest (Repl.) 350, 2895.

Sickert v. Sickert, [1899] P. 278; 68 L.J.P. 114; 81 L.T. 495; 27 Digest (Repl.) 350, 2897.

Sullivan v. Sullivan, [1956] 1 All E.R. 611n.; 120 J.P. 161; [1956] 1 W.L.R. 277n.; 3rd Digest Supp.

Teall v. Teall, [1938] 3 All E.R. 349; [1938] P. 250; 107 L.J.P. 118; 102 J.P. 428; 27 Digest (Repl.) 697, 6666.

Thomas v. Thomas, [1924] All E.R. Rep. 48; [1924] P. 194; 93 L.J.P. 61; 130 L.T. 716; 27 Digest (Repl.) 349, 2890.

Appeal.

The wife appealed against an order of the Burnley and Colne justices, sitting at Reedley, Lancashire, dated Sept. 29, 1960.

The parties were married in 1942 and there was one child born in 1947. On July 30, 1960, the wife left the husband and on Aug. 30, 1960, she caused a summons to be issued against him on her complaints (i) that he had deserted her on July 30, 1960 and (ii) that he had been guilty of wilful neglect to provide reasonable maintenance for her and the child since July 30, 1960.

At the hearing of the complaints the wife stated, among other things, that the husband had said on occasions that he wished she were dead, and that he had slapped her face; that in 1958 she became suspicious "and got on to him" about another woman. At first he denied it, but "I made up a story about me having another man, and he then admitted it"; that a man called O. used to come to their house for meals, that the husband accused her of an association with him and that the husband had told O. not to come, but that he had then apologised to O. who resumed his visits; that she had left her husband but returned to him because of the child; later she heard that "this girl was having a child and I asked my husband but he denied it"; that on July 27, 1960, she and her mother had gone first to one then to another public house, that the husband followed and that a man had said to the wife that he knew her and that he never forgot a pretty face, and that when she and the husband got home the husband said that he supposed this man was one of her fancy men and hit her twice; that the following Saturday she left and went to live with her aunt but had been "cleaning for O. and making his meals" for which she was paid 30s. and was given her meals. In cross-examination the wife said that she knew that the husband thought the real trouble was over O.; that O. had wanted to give her a watch for her birthday but that the husband did not want him to; that she had told the husband she loved O. "to get my own back": and that "My husband had an association with a woman called Jean. It finished about February". She said that she had not left home because of O. The husband in evidence said: "In December, 1959, I had an affair with J.W. It finished completely in January last. She is expecting a child. I deny it is mine because of the time factor". He agreed that he had stopped O. visiting the house but that he had later apologised and told him that he could come, that the wife had said "If O. goes, I go" and that she had in fact left on June 27, 1960, but had returned on July 7, 1960. In cross-examination he said that his own conduct had been "pretty awful at times".

The justices dismissed the wife's complaints. In a document headed "Findings and decision of the justices" they stated:

"We find the following facts proved . . . The husband admitted to us that he had committed adultery with J.W. but denied both to the wife and to us that he was the father of J.W.'s child because, he said, she was already pregnant when he associated with her. This affair discontinued in January or February, 1960, and the wife continued to live with her husband and had intercourse with him."

In their decision they stated that they believed that the wife left the husband without sufficient cause and stated:

"Although the husband committed adultery, we are of opinion that the wife knew of this before the affair ceased and subsequently condoned it by resuming domestic relations with her husband. We are further of the opinion that the wife has formed an increasing attachment for O. since the beginning of the acquaintanceship, and that her real reason for leaving her husband was to associate with O., although there is no evidence that such association is adulterous . . . In short we believe that, with the exception of the adultery, the husband's conduct was not such as to support a charge of constructive desertion, although it was admittedly bad, and the wife has used it as an excuse to cover her real reason for leaving. We think that the adultery was condoned and not revived by any subsequent act of the husband, and should, therefore, be largely discounted."

They dismissed the complaint of wilful neglect to maintain the wife on the ground that the wife had forfeited her claim to maintenance: and they found that in fact the husband was adequately maintaining the child. The wife now appealed.

M. B. Smith for the wife.

P. A. Hayward for the husband.

LORD MERRIMAN, P.: I say at once that it is unnecessary to distinguish between the wife's two complaints because it is quite plain, and indeed is common ground, that if the dismissal of the complaint of desertion were right, then it would also be the case that the wife had put herself in such a position that she would not be entitled to maintenance. I, therefore, do not propose any further to distinguish between these two complaints.

The motion before the court is either for a reversal by us of the finding or, alternatively, for a re-hearing. This is not an easy case and I was very favourably impressed by the careful way in which the magistrates had tried the matter. They have given us a very good note of the evidence and a very full statement of their reasons. If one were to make any criticism of the latter I think that it would be to this effect, that it is not always clear on the face of the statement of their reasons whether, for example, when they say "The wife said so-and-so" or that "The husband alleged so-and-so", they are stating a finding of fact or merely stating what the rival contentions were. I have come to the conclusion that it is impossible for us to give a concluded decision because this is a case which depends on the impression made by the witnesses coupled, and this is important, with a clear appreciation of the points of law involved. I have also come to the conclusion that a re-hearing is inevitable because I am not satisfied that the facts have been considered with a full appreciation of the legal issues involved. I say that particularly with regard to the issue of condonation which is a fundamental issue in the present case.

As I am of opinion that there must be a re-hearing I want to be particularly careful not to indicate any settled conclusion about the inferences to be drawn on the various points, but there is also another reason why we should be careful not to decide this case ourselves. In the magistrates' court it was clear that any issue arising directly out of the husband's adultery was barred by the six months'

A limitation. It is now an accepted fact in this case that between the middle of December, 1959, and the end of January or beginning of February, 1960, for a period of six weeks or thereabouts, the husband was conducting an adulterous association with a young woman. One of the important issues in this case is the wife's knowledge, whether she knew and how much she knew about this, for on that plainly the issue of condonation depends. It is well settled, as things stood
B until this year when the Matrimonial Proceedings (Magistrates' Courts) Act, 1960 (1) came into force, that the six months' limitation in connexion with adultery applied solely to the date of the commission of the adultery, and not to the date when the adultery became known to the aggrieved spouse (2), and in that respect a complaint on Aug. 30, 1960, was plainly already out of time with regard to the adultery itself. The law has now been changed under the Act of 1960 (3) and the limitation runs from the date of the discovery. Even assuming the Act of 1960 to apply, which I am not to be taken to be saying that it does, that is also already out of date. It was indicated to us that there has been no settled determination to take divorce proceedings but it was candidly stated that the matter was under consideration. We did not feel that the mere fact that there had been no question of settled determination to bring divorce proceedings was sufficient to justify us in postponing the hearing of this appeal pending the divorce proceedings, if any. The point, of course, is that no such limitation in either respect, either as regards the adultery itself or as regards the date of discovery, is involved in proceedings in the Divorce Court, if any are taken. For that additional reason, therefore, I wish to be very careful what I say about the facts and the inferences from the facts.

E It is a fact, admitted on oath in the witness-box before the magistrates, that between the dates which I have mentioned this adulterous association was going on. It is, of course, a commonplace to say that the issue of condonation, which has been determined against the wife in the present case, depends on knowledge and that mere suspicion is not knowledge. I do not think that it is necessary to go into an elaborate disquisition on the shades of difference between
F a suspicion which is sufficiently near to knowledge to count as such, or anything of that sort. There is in the present case a plain issue, about which the evidence is very scanty, whether or not the wife had anything approaching knowledge of what was going on until the very fact was admitted in open court on Sept. 29, 1960. I will only mention one fact in connexion with it, which I think, as far as I can judge from the evidence, is the central fact on which knowledge must
G have been assumed. I say "assumed" because I do not see any finding of fact about her actual knowledge. Apparently the woman in question became pregnant; the wife heard about that, which at least suggests pretty plainly that she knew that there was an association going on between her husband and the young woman, but that does not necessarily mean, of course, that the association was adulterous. I pause to remark, so that there may be no misapprehension, that
H the word "association" was used indiscriminately to describe, for want of better words, an association that was plainly innocent and an association which it was suggested was guilty, and that by both spouses. Let me make it plain that what is the subject of condonation is adultery, not an association, unless association means an adulterous association. The wife plainly knew that there was some form of association going on between her husband and the young
I woman, otherwise she would not have taxed him as she did with the fact that she had discovered that the woman was pregnant. The evidence is "The husband denied it", and that at once raises the question what it was that he denied. The phrase is plainly ambiguous. It may mean that he denied that there was anything wrong going on between him and the young woman, or it may mean an implicit admission that there was an adulterous association going on but that it

(1) 8 & 9 Eliz. 2 c. 48.

(2) *Teall v. Teall*, see p. 768, letter H, post.

(3) See s. 12 (1).

had not resulted, so far as he was concerned, in any responsibility for any pregnancy which was in progress. There the matter is left, so far as I can see, undetermined and manifestly that cuts at the root of a finding that there was condonation. I think that it is undesirable that I should say any more than I have said, but to my mind the whole issue in that context, knowledge and with knowledge condonation of adultery, as distinct from a nebulous association, is left undetermined.

[HIS LORDSHIP then turned to the question whether, assuming condonation, the husband's subsequent conduct was sufficient to justify the wife in leaving him on July 30, 1960. HIS LORDSHIP stated that, in relation to condonation of adultery and revival, the governing consideration was that the reinstatement of the wrongdoer as a spouse was conditional in the sense that the wrongdoer undertook that in future he would treat the aggrieved spouse with conjugal kindness in every respect; the law was laid down by SIR JOHN NICHOLL in *Durant v. Durant* (4). Then, after reviewing the facts, after referring to the findings of the magistrates, and after stating that the question of condonation and revival of itself would necessitate a re-hearing, HIS LORDSHIP referred to the facts relevant to a submission on behalf of the husband that the wife's friendship for another man, O., was the true cause of her leaving. After stating that in the circumstances a very heavy burden rested on the husband on that issue, HIS LORDSHIP continued:] I hope that I have dealt sufficiently with my doubts about the findings of the magistrates with which they conclude their report of the case, but I must deal, having regard to the argument, with another aspect of the matter. It may be, although it is not very clear from the notes, that the wife is entitled not merely to rely on the husband's adultery but also, if in fact she did not know about it at the time, so that the issue of condonation proper does not arise, to allege that the circumstances were such as to bring into play the ruling in *Glenister v. Glenister* (5) which has been developed and approved by the Court of Appeal in *Allen v. Allen* (6) and *Everitt v. Everitt* (7), and has been consistently applied and followed in this court in many cases. The gist of the matter on that aspect is this, that the husband by his conduct might be thought to have afforded the wife ground for reasonable belief that he had committed adultery and that she was actuated by that in leaving him. I am not at all clear that that issue was ever raised before the magistrates but if the circumstances do not warrant a finding of knowledge of actual adultery and condonation, it may very well be that this other line of approach will have to be considered at the re-hearing. It is on that supposition that I must deal with an argument which has been directed to us.

It is said that subsequent confession by the wrongdoer of adultery cannot operate to bring the rule in *Glenister v. Glenister* (5) into effect unless the confessed association is still persisting. That depends on a decision of this court, to which I was a party, in *Teall v. Teall* (8), about which I must say a word. I will read the headnote because it is on the second paragraph of the headnote that the point turns. The first paragraph reads:

"Where a wife applies for maintenance on the ground of adultery under s. 11 of the Matrimonial Causes Act, 1937, she must lodge her complaint, in pursuance of s. 11 of the Summary Jurisdiction Act, 1948, within six months of the last act of adultery complained of, and there is no warrant for the six months' time limit running from the discovery of the adultery."

Then there are certain cases referred to which it is not necessary for me to go into because about that part of the decision there is no question at all. The second paragraph of the headnote reads:

(4) (1825), 1 Hag. Ecc. 733.

(6) [1951] 1 All E.R. 724.

(5) [1945] 1 All E.R. 513; [1945] P. 30.

(7) [1949] 1 All E.R. 908; [1949] P. 374.

(8) [1938] P. 250; [1938] 3 All E.R. 349.

"Where a wife, on applying for such order, alleges constructive desertion on the part of the husband by reason of his adultery, she must show intention on his part to persist in an adulterous association, as contrasted with the mere discovery of past offences."

That depends on a passage in my judgment. I had discussed in the earlier part of the judgment the point of the application of the time limit about which, as I say, there is no longer any dispute. Then I went on to say that in substance the same point applies to the charge of desertion, and said (9):

"I do not propose to review all the authorities which have been examined on this point. It is sufficient for me to say that [counsel for the respondent] with characteristic frankness has admitted that he cannot produce any authority for the proposition that the mere discovery of an adulterous association, not coupled with any suggestion that it is still subsisting, or that there is an intention on the part of the husband to persist in it, is, of itself, enough to entitle the wife to leave home."

Then I corrected myself and said (9): "I should have added the words 'discovery of a past adulterous association'," and I emphasise the word "past". Correcting myself again, it would have been more apt to say "confession by the husband of a past adulterous association". Then I said (9):

"In other words, to entitle the wife to leave home, and to say that her husband had deserted her on the ground of an adulterous association, there must be some element of an intention to persist in the adulterous association, as contrasted with the mere discovery of past offences. Here, again, for the reasons I have already given, in connexion with the evidence of adultery itself, we are left in . . . a complete state of doubt, as to how the matter really stands."

When this passage was cited in support of this general proposition, I called counsel's attention to the fact that I had a note that PILCHER, J., and I had re-considered this matter in *Frankish v. Frankish* (10). Owing to the kind researches of the Official Shorthandwriter I have been provided with the relevant passage from my judgment in the latter case which absolutely confirms the sidenote which I had made about the effect of *Frankish v. Frankish* (10), including, amongst other things, that one of the matters which was there present to our minds when we sent *Teall v. Teall* (11) back for re-hearing—and let it be remembered that we did not decide the case ourselves but we merely gave directions to the justices how they should deal with the facts of that particular case—was the fact that the association had apparently ended and that after the wife had full knowledge she had stayed on in the matrimonial home. I am not going through the detail of the review that we made in *Frankish v. Frankish* (10) but I will read two or three passages from what I am reported as having said. I began by saying:

"I am bound to say that as a general proposition I should on reflection prefer to qualify that, because it seems to me to be impossible to assert that there can be no circumstances in which a wife on discovery for the first time of a history of past adultery may not say 'This is so dreadful that I must leave home at once; indeed, if I do not, having discovered everything, I shall be held to have condoned' "

and then I went on to say:

"but what I think ought to be pointed out is that this passage should be read in the circumstances to which it was directed."

(9) [1938] 3 All E.R. at p. 353; [1938] P. at p. 256.

(10) (Jan. 24, 1945), unreported.

(11) [1938] 3 All E.R. 349; [1938] P. 250.

I then examined the circumstances of the case in which the remark was made, and ended this aspect of the matter by saying:

"I am not prepared to say now that, if at the moment when she had certainty substituted for suspicion she had left home, that would have put her in the wrong and would not have entitled her to say that her husband was a deserter, but again that is not what happened. Having complete and absolute knowledge of what had happened she stayed in the matrimonial home and it was not until some weeks later, the precise period does not matter, having by that time contracted a nervous breakdown she left home and then justified or sought to establish by the fact that some time before she had discovered that her husband had been committing adultery and it was that which caused her to leave home."

Then I added:

"I say no more than this, that we are directing the justices' mind to that issue and I do not think that the passage on which reliance had been placed should be treated as a universal proposition apart from the very special circumstances of that case."

PILCHER, J., agreeing with my judgment, said:

"I should like, if I may, to add one word to what my Lord has said about *Teall v. Teall* (12). With respect I agree that the general proposition set out in the second paragraph of the headnote of that case appears to me to be too wide. I agree with my Lord that whilst the decision in *Teall v. Teall* (12) on its own facts was well justified, the passage in the learned President's judgment (13) (upon which the second paragraph of the headnote was based) must be read in the light of the facts of that particular case."

There I will leave the matter, beyond saying that I am not ashamed to confess that I was plainly a little too pronounced in what I said on that occasion and did not sufficiently qualify it at the time.

Now that that has been pointed out, one ought to consider one other case. It is only fair to both the late HENN COLLINS, J., and myself to say that at the time when we were dealing with *Teall v. Teall* (12), although of course there was authority on the point, the doctrine that constructive desertion could be constituted out of a belief reasonably held and induced by the other spouse that he or she had committed adultery, had not developed to the full extent and with the ample authority by which that doctrine is now supported in such cases, for instance, as *Baker v. Baker* (14), *Sullivan v. Sullivan* (15) and various other cases which I do not think that it is necessary to quote. But it is only fair to point out that in *Baker v. Baker* (14) there is again some reference to persistence. The headnote is quite short:

"If a husband deliberately induces in his wife the belief that he is carrying on an adulterous association, and his wife leaves the matrimonial home in consequence, he can be held to have expelled her and, therefore, to have deserted her, even though she fails to bring a charge, or to prove the fact, of adultery. *Glenister v. Glenister* (16) applied."

In the course of the judgment I am reported as saying (17):

"There was evidence that the wife had objected to what she believed was an improper association between her husband and this woman, and when it had been persisted in and lied about, as she asserted, she had withdrawn from cohabitation, as being, it was suggested, the only thing a decent woman

(12) [1938] 3 All E.R. 349; [1938] P. 250.

(13) [1938] 3 All E.R. at p. 353; [1938] P. at p. 256.

(14) [1954] P. 33; [1953] 2 All E.R. 1199.

(15) [1956] 1 All E.R. 611n.

(16) [1945] 1 All E.R. 513; [1945] P. 30.

(17) [1953] 2 All E.R. at p. 1200; [1954] P. at p. 35.

could do. In my opinion, the magistrate was justified in saying, hypothetically and as a matter of law, that, if a man deliberately induces the belief that he is carrying on an adulterous association, and, in consequence, his wife leaves the matrimonial home, he can be held to have expelled her, and, therefore, to have deserted her, even though she fails to bring a charge, or to prove the fact, of adultery."

I am quite unrepentant about the use of the words "persisted in and lied about" in that case, and I am prepared to refute the suggestion that I was stating a proposition of law of general application, for the next three pages or more of the judgment are devoted to what I call a simpler approach to the decision of the case. The passage which I have just read justifies the headnote as being the actual position as a matter of law in the case, but I then proceeded to subject the facts to a very close examination and I say no more than this, that a perusal of that would convince any reader, I think, that there was certainly persistence in and lying about the association, the wife's knowledge of which, and belief in which, had been held to amount to constructive desertion. On the ordinary principle that a judgment is to be read in the light of the subject-matter I do not withdraw for a moment the use of the word "persistence" in that particular context, and I do not think that it is necessary to say any more about that.

I do not think that it would be either useful or necessary to say any more about the case, than that with such assistance in assessing the various facts in issue in this case as they are able to derive from what I have said, and what BAKER, J., will be saying, by way of guidance on the issues of law, I think that this order dismissing the wife's complaint must be set aside and the complaint re-heard by a fresh panel of justices.

BAKER, J.: I agree. I have found this a difficult case. The difficulties start with the fact, which the wife accepted in her evidence, that the husband's association with J.W., which is now known to have been an adulterous association, had ended in February, 1960. The magistrates found in their decision, as I read it, that the wife knew that the husband had committed adultery. What they said was:

"Although the husband committed adultery, we are of opinion that the wife knew of this before the affair ceased and subsequently condoned it by resuming domestic relations with her husband."

I have failed to discover any evidence in the transcript to justify a finding that the wife knew that her husband had committed adultery with J.W., or with anybody else, before the husband made an admission at the hearing before the magistrates. Certainly there is no evidence that she knew that the husband was committing adultery before the association ceased in February, 1960.

The magistrates stated in their findings and decision:

"We find the following facts proved . . . The husband admitted to us that he had committed adultery with J.W. but denied both to the wife and to us that he was the father of J.W.'s child because, he said, she was already pregnant when he associated with her."

It is perfectly true that that is what the husband said in court but I fail to find any evidence to support a finding that he denied to the wife that he was the father of J.W.'s child for the reason he gave, thus inferentially admitting adultery. The only evidence was that given by the wife who said:

"Later, I heard that this girl was having a child and I asked my husband but he denied it."

As LORD MERRIMAN, P., has pointed out, it is impossible to discover what "it" was that he denied. That was some time in the summer of 1960. I want to be particularly careful for the reason LORD MERRIMAN, P., has given not to discuss the evidence in this case in any detail, but to my mind that initial finding that

the wife knew of the adultery and knew of it before February, 1960, is one which cannot be supported and which colours everything that happened thereafter. The magistrates go on to say that she subsequently condoned it by resuming domestic relations with her husband. Again, what is "it"? Presumably they mean the adultery. Although I have looked at the evidence carefully I cannot find any evidence of a conscious condonation of adultery at any time when the parties were together. What I imagine the magistrates meant to say is that there was condonation of the adultery after the parting in June when the wife returned in July, 1960, and stayed for three weeks, but it is not clear, and I am driven to the conclusion that there is certainly no evidence that the wife knew of the adultery, and the probability is that she did not. That is a matter which will have to be considered further.

I do not propose to say anything further about the facts because I agree entirely with all that LORD MERRIMAN, P., has said. But I want, before leaving this matter, to say one word about an argument, which has been very properly pressed, that the adultery, or the reasonable belief in adultery, must be related to adultery which has a quality of persistence and—I think it is "and" rather than "or"—is persisting at the time that the wife (or the husband in an appropriate case) leaves the matrimonial home. It is said categorically that persistence or subsistence is necessary in order to found an allegation of desertion, when the wife says "I have been driven from the home by my husband's adultery or because I have a reasonable honest belief induced by him that he has committed adultery". That proposition is founded on *Teall v. Teall* (18) to which LORD MERRIMAN, P., has referred, and counsel for the husband quite properly drew our attention to the fact that *Teall v. Teall* (18) is cited in a note in *RAYDEN ON DIVORCE* (8th Edn.), at p. 172, with the words in brackets "Mere discovery of past adultery insufficient". That is, of course, in the context of constructive desertion. The case is also cited in a note in *STONE'S JUSTICES' MANUAL* (92nd Edn.), Vol. 1, at p. 1209, and the same note appears in the 93rd Edn. at p. 1238. The note reads:

"Adulterous association. A wife, whose husband is carrying on an adulterous intercourse with another woman, is not bound to remain in cohabitation with him, whether the adulterous intercourse is carried on in the matrimonial residence or elsewhere. She may offer to remain with her husband provided he will give up the connexion complained of, and if he refuses to do so, she may withdraw from cohabitation. The husband, in such a case, must be taken to intend the consequences of his acts, and his conduct constitutes desertion (*Sickert v. Sickert* (19)). It must be shown that the adulterous association is still subsisting, or there must be intention on the part of the husband to persist in it. The mere discovery of a past adulterous association is not sufficient (*Teall v. Teall* (18))."

Then the note goes on to consider various other older cases in 1889, 1899 and, indeed, in 1864, and the last few lines of that note sets out the modern decisions with the words:

"A wife whose husband has, by his conduct, induced belief that he has committed adultery, may, on leaving him, claim that she has been constructively deserted (*Kemp v. Kemp* (20), *Baker v. Baker* (21), cf. *Glenister v. Glenister* (22), *Forbes v. Forbes* (23)) . . ."

and then goes on to deal with suspicion.

I think that the first part of that note dealing with the older decisions and *Teall v. Teall* (18) may be misleading. It is important to remember that before 1923 (24) a wife could not obtain a divorce on the ground of her husband's

(18) [1938] 3 All E.R. 349; [1938] P. 250.

(19) [1899] P. 278.

(20) [1953] 2 All E.R. 553.

(21) [1953] 2 All E.R. 1199; [1954] P. 33.

(22) [1945] 1 All E.R. 513; [1945] P. 30.

(23) [1954] 3 All E.R. 461.

(24) Matrimonial Causes Act, 1923, s. 1.

adultery alone. She had to couple her allegation with one of desertion or cruelty, and to my mind it is very clear when one looks at the report of *Sickert v. Sickert* (25) that that consideration was present to the mind of GORELL BARNES, J. In the course of argument (26) he specifically put to counsel that unless there was something in the nature of bringing women into the matrimonial home and a persistence in the adultery after the wife had discovered it and pleaded with the husband to stop and to mend his ways, the result might be that the wife on discovering one act of adultery in the distant past, could walk out of the matrimonial home and allege not only adultery but also constructive desertion in that she had been forced out of the house by the long dead act of adultery. That would have founded both the adultery and the desertion in a single act of adultery and would clearly have defeated what the law then required. But when one looks at decisions within the last fifteen years it is, I think, apparent that the element of persistence or subsistence is no longer required. In *Everitt v. Everitt* (27) LORD MERRIMAN, P., presiding in the Court of Appeal, speaking of the finding of the learned commissioner, said (28):

“There remains the third alternative. If the passage in question (29) means that there had, indeed, been an actual adulterous association, but that its cessation, because of the marriage and departure for Belgium of the woman in question did not justify the wife’s refusal to resume cohabitation, the decision, in my opinion, was also wrong.”

That was a case where the husband had gone to stay with an ex-mistress who married a Belgian and the husband denied at the trial that he had committed adultery with that woman during the time that he was staying with her and, of course, even if there had been an adulterous association it ceased when the woman married and went abroad with her husband. Later in the same case LORD MERRIMAN, P., said (30):

“In another decision in the Divisional Court—*Edwards v. Edwards* (31)—my judgment concluded with this (32): ‘There may be some conduct so gross that no woman could be expected ever to resume cohabitation with him. The point is that every case must be dealt with on its merits, and if the husband’s merits are so slight that he has very little hope of ever being taken back, that is one of the consequences of his own conduct, and it ought not to affect the result of the case’. It follows, therefore, in my opinion, that if, e.g., it is the husband who is offering to resume cohabitation but he has been guilty of adultery which is uncondoned (as in *Lodge v. Lodge* (33)) or of cruelty of so atrocious a character that the wife could not possibly be expected to subject herself to a risk of recurrence, then as WARRINGTON, L.J., said in *Thomas v. Thomas* (34): ‘... the actual separation must continue to have the quality of desertion by the husband; otherwise I see no alternative except to regard the wife as deserting him, which would be impossible’. That is precisely what was done in *Lodge v. Lodge* (33).”

Most, if not all, the authorities are dealing with the case of the innocent spouse refusing to have back the spouse who has been guilty of adultery when the guilty association has ceased. But it seems to me that when a wife discovers or has reasonable ground for believing that her husband has committed adultery, albeit in the past and even with a woman who is then dead, that wife is justified in saying: “Your conduct is such that I am leaving”, and that can be held—

(25) [1899] P. 278.

(26) [1899] P. at p. 280.

(27) [1949] 1 All E.R. 908; [1949] P. 374.

(28) [1949] 1 All E.R. at p. 913; [1949] P. at p. 381.

(29) [1949] 1 All E.R. at pp. 910, 911; [1949] P. at p. 378.

(30) [1949] 1 All E.R. at p. 916; [1949] P. at p. 385.

(31) [1948] 1 All E.R. 157; [1948] P. 268.

(32) [1948] 1 All E.R. at p. 160; [1948] P. at p. 272.

(33) (1890), 15 P.D. 159. (34) [1924] All E.R. Rep. at p. 51; [1924] P. at p. 201.

I emphasise "can"—to be constructive desertion by the husband. The same considerations, of course, apply to a husband's discovery of adultery by his wife.

The authorities have been summarised by DAVIES, J., in *Forbes v. Forbes* (35). I do not propose to quote in full the extract (36) from the judgment of BUCKNILL, L.J., in *Barker v. Barker* (37) which seems to me, as it seemed to him, to be of considerable importance, although obiter. It reads (38):

"Where there is no doubt that the spouse has committed adultery, but proof of it cannot be obtained, it seems from the decision in *Everitt v. Everitt* (39) that the innocent spouse may refuse to cohabit with the guilty spouse and may, at the end of three years, petition for a divorce on the ground of desertion. In such a case there is no room for the argument, which was successful in *Pratt v. Pratt* (40), that repentance and a genuine wish to return home communicated to the deserted spouse brings the desertion to an end."

Then having emphasised the necessity for basing a petition on adultery whenever possible BUCKNILL, L.J., goes on (38):

"To take an extreme case. The wife in a temper tells her husband that she committed adultery on one occasion with a man, now dead, and then leaves the matrimonial home. The next day she implores the husband to let her come back and persists in her entreaties, but the husband refuses to do so or to have anything more to do with her, and makes no independent inquiries as to the truth of her statement. The husband waits for three years and then petitions for a divorce on the ground of desertion. Assuming that he satisfied the court that he honestly believed that his wife had committed adultery, the principle, as stated in *Everitt v. Everitt* (39) should enable him to obtain a decree."

So much for *Teall v. Teall* (41).

In conclusion, I think that a good deal of the difficulty of the present case has been caused by the quite natural but unfortunate use by the parties of such words as "affair" and "association" without indicating whether it is said to be adulterous or something short of that. Although I concur with what LORD MERRIMAN, P., has said about the care with which the magistrates have dealt with this matter, they have in the course of their findings and decision on something like six or seven occasions used such phrases as "She stated that . . .", "the husband admitted to us that he had . . .", "the wife alleged that . . .", "she told us that . . ." and so on. They have not indicated whether they find that these statements and complaints are true. That, too, has made our task somewhat difficult. I agree that this matter should be referred back for re-hearing.

Order accordingly.

Solicitors: *Robinson & Bradley*, agents for *Whittle & Whittaker*, Colne (for the wife); *Janson, Cobb, Pearson & Co.*, agents for *Farnworth & Watson*, Nelson (for the husband).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

(35) [1954] 3 All E.R. 461.

(37) [1950] 1 All E.R. 812.

(39) [1949] 1 All E.R. 908; [1949] P. 374.

(40) [1939] 3 All E.R. 437; [1939] A.C. 417.

(41) [1938] 3 All E.R. 349; [1938] P. 250.

(36) [1954] 3 All E.R. at p. 465.

(38) [1950] 1 All E.R. at p. 816.

RUTHERFORD AND ANOTHER v. MAURER.

[COURT OF APPEAL (Ormerod, Willmer and Danckwerts, L.JJ.), April 21, 24, 1961.]

Agriculture—Agricultural holding—Agricultural land—Land used for grazing horses of riding school—Letting for “six months periods”—Whether used for purpose of a trade or business and for specified period of the year—Agricultural Holdings Act, 1948 (11 & 12 Geo. 6 c. 63), s. 1 (1), (2), s. 2 (1), s. 94 (1).

A field of five acres, which belonged to Mrs. B. in fee simple was used for the grazing of horses by Mrs. M., who was the proprietor of a neighbouring riding school. The user was by virtue of a document in the following terms:—“£6 for six months—Feb. 18, 1959. Let to [Mrs. M.] for grazing for six months periods—must not be used for riding or any other purposes—fences to be kept in order and a fence from your field so that the horses cannot put their heads over and eat the hedges or anything else which they do in my garden. No sub-letting without my permission.” The executors of Mrs. B. having given a six months’ notice to quit the field, Mrs. M. claimed that she had an agricultural tenancy of the field, that the field was an agricultural holding within s. 1 of the Agricultural Holdings Act, 1948, and that the notice was invalid as she was entitled to the protection of that Act.

Held: the field was an agricultural holding and Mrs. M. was entitled to the protection of the Agricultural Holdings Act, 1948, for the following reasons—

(i) the words “trade or business” in the definition of agricultural land in s. 1 (2)* of the Agricultural Holdings Act, 1948, were not confined to agricultural trades or businesses, and, accordingly, the field was agricultural land within the definition in s. 1 (2).

Dictum of JENKINS, L.J., in *Howkins v. Jardine* ([1951] 1 All E.R. at p. 329) considered.

(ii) the letting to Mrs. M. was not excluded from being an agricultural tenancy by the proviso to s. 2 (1)† of the Act of 1948, since, having regard to the use of the plural, “. . . for six months periods . . .”, the agreement of Feb. 18, 1959, was a letting for at least one year and was not an agreement made in contemplation of the use of the land only for grazing “during some specified period of the year” within the proviso.

Appeal allowed on (i) above.

[As to agricultural holdings, see 1 HALSBURY’S LAWS (3rd Edn.) 252, para. 550; and for cases on the subject, see 2 DIGEST (Repl.) 4-6, 2-11.]

As regards the minimum term of an agricultural holding, see 1 HALSBURY’S LAWS (3rd Edn.) 256, para. 556.

For the Agricultural Holdings Act, 1948, s. 1, s. 2, and s. 94, see 28 HALSBURY’S STATUTES (2nd Edn.) 29, 93.]

Cases referred to:

Deith v. Brown, (May 15, 1956), unreported.

Dunn v. Fidoe, [1950] 2 All E.R. 685; 2 Digest (Repl.) 4, 4.

Howkins v. Jardine, [1951] 1 All E.R. 320; [1951] 1 K.B. 614; 2 Digest (Repl.) 5, 5.

* The terms of s. 1 (1) and (2) are printed at p. 777, letter H, post.

† The terms of s. 2 (1) are printed at p. 777, letter I, to p. 778, letter C, post.

Joel's Lease, Re, Berwick v. Baird, [1930] 2 Ch. 359; 99 L.J.Ch. 529; 143 L.T. 765; 2 Digest (Repl.) 4, 3.

Monson (Lord) v. Bound, [1954] 3 All E.R. 228; [1954] 1 W.L.R. 1321; 2 Digest (Repl.) 6, 9.

R. v. Charvton (Inhabitants), (1841), 1 Q.B. 247; 10 L.J.M.C. 55; 5 J.P. 290; 113 E.R. 64; 31 Digest (Repl.) 63, 2201.

Reid v. Dawson, [1954] 3 All E.R. 498; [1955] 1 Q.B. 214; [1954] 3 W.L.R. 810; 2 Digest (Repl.) 7, 14.

Scene Estate, Ltd. v. Amos, [1957] 2 All E.R. 325; [1957] 2 Q.B. 205; [1957] 2 W.L.R. 1017; 3rd Digest Supp.

Appeal.

This was an appeal by the defendant from a decision of His Honour JUDGE HAROLD BROWN, Q.C., made on Dec. 6, 1960, at Haywards Heath County Court. By the particulars of claim the plaintiffs alleged that an oral agreement, dated Feb. 18, 1959, had been made between Mrs. Winifred Banbury, since deceased, and the defendant, whereby Mrs. Banbury had granted to the defendant a licence to graze horses in a field comprising five acres at Hassocks, Sussex. The plaintiffs alleged that the licence was for periods of six months and that a memorandum thereof had been drawn up which did not, however, contain all the terms. Further, that by a notice in writing dated Dec. 28, 1959, Mrs. Banbury had given to the defendant notice revoking the licence as from Aug. 17, 1960. Mrs. Banbury had died on June 25, 1960, and the plaintiffs were her executors. The plaintiffs had caused a gap between the field and certain land of the defendant to be closed by wires secured to posts on Aug. 18, 1960, and alleged that the defendant had wrongfully removed a post and wires on Aug. 20, 1960, and had permitted her horses to enter the field. The plaintiffs claimed a declaration that the defendant was not entitled to graze her horses in the field and an order restraining her from permitting or suffering the horses to be grazed therein; they also claimed damages for trespass. By her defence the defendant denied that the agreement dated Feb. 18, 1959, constituted a licence, and claimed that it constituted a full yearly letting of an agricultural holding as defined in the Agricultural Holdings Act, 1948. She further alleged that the wording of the agreement was such as to exclude the letting from the proviso to s. 2 (1) of the Act of 1948. On Jan. 12, 1960, a counter-notice was served on behalf of the defendant requiring that s. 24 (1) of the Act of 1948 should apply to the plaintiffs' notice to quit. The defendant also alleged that the notice to quit, or notice of revocation dated Dec. 28, 1959, was invalid. The county court judge granted the plaintiffs an injunction restraining the defendant from permitting her horses to graze in the field on the ground that the agreement was not within s. 1 (2) of the Act of 1948 and was not a contract of tenancy of agricultural land. He further decided that the agreement was not within the proviso to s. 2 (1), as the letting was not a letting for the specified period of a year. By notice of appeal dated Dec. 23, 1960, the defendant appealed on the ground that the county court judge had been wrong in law in holding that the expression "for the purposes of a trade or business" in s. 1 (2) of the Agricultural Holdings Act, 1948, should be construed as meaning "for the purposes of an agricultural trade or business". The plaintiffs gave a respondent's notice dated Jan. 18, 1961, that if the county court judge had been wrong in law as alleged in the notice of appeal, yet the agreement of Feb. 18, 1959, fell within the proviso to s. 2 (1) of the Act of 1948, as being an agreement for the letting of land or the granting of a licence to occupy land made in contemplation of the use of the land only for grazing during some specified period of a year, and that accordingly the agreement or licence had been duly terminated.

P. N. Garland for the defendant.

S. L. Newcombe for the plaintiffs.

ORMEROD, L.J.: The defendant, Mrs. Maurer, was the proprietor of a riding school at Hassocks, and the plaintiffs are the executors of the owner of the land adjoining the riding school, a Mrs. Banbury, who died prior to the hearing of this action. The field in question is a five-acre field which was used by the defendant, Mrs. Maurer, as grazing land for some of the horses used in connexion with the school.

It would appear that the land in question was let to a farmer of the name of Pesterfield, and the arrangement entered into in 1958 between the defendant and Pesterfield was that she should have the right to graze in this field. In 1959 it came to her knowledge that Pesterfield was contemplating retirement and so she went to see Mrs. Banbury, and as a result of that interview two documents were prepared. They were similar documents; one was written out by Mrs. Banbury and signed by the defendant, and the other was written out by the defendant and signed by Mrs. Banbury. There is no difference between the two documents other than the handwriting and the respective signatures on the documents; the one which has been used by the learned county court judge, I think properly, for that hearing, and the one which it is proposed should be used in this appeal is the one in the handwriting of Mrs. Banbury and accordingly signed by the defendant. Although we have a separate copy of it I will read it from the transcript which has been given to us of the learned judge's judgment. This is how it goes:

"£6 for six months—Feb. 18, 1959. Let to Mrs. Maurer for grazing for six months periods—must not be used for riding or any other purposes—fences to be kept in order and a fence from your field so that the horses cannot put their heads over and eat the hedges or anything else which they do in my garden. No sub-letting without my permission."

Counsel for the plaintiffs has remarked in the course of his argument that this was a document which was not drawn up by legal advisers, it was drawn up by the parties themselves, and having read the document that fact, I think, becomes abundantly clear. However, there it is, and it is a document on which some controversy has turned in this appeal.

It transpired that, shortly after, Mr. Pesterfield gave up the tenancy of the farm, and from that time onwards objection was made by the plaintiffs to the use of this land by the defendant for the purpose of grazing her horses. The basis on which this objection was made was the Agricultural Holdings Act, 1948; on the one hand the defendant contended that, as a result of the provisions of s. 1 and s. 2 of that Act, and the definition section, s. 94, she was entitled to remain in possession because no proper notice had ever been given to her, and, on the other hand, the plaintiffs contended that the document was one which came within the proviso to s. 2 (1) of that Act, and, that, accordingly, the Agricultural Holdings Act, 1948, did not apply. It is essential at this stage that I should read the statutory provisions in question. Section 1 of the Agricultural Holdings Act, 1948, provides:

"(1) In this Act the expression 'agricultural holding' means the aggregate of the agricultural land comprised in a contract of tenancy, not being a contract under which the said land is let to the tenant during his continuance in any office, appointment or employment held under the landlord.

"(2) For the purposes of this and the next following section, the expression 'agricultural land' means land used for agriculture which is so used for the purposes of a trade or business..."

Section 2 (1) provides:

"Subject to the provisions of this section, where under an agreement made on or after Mar. 1, 1948, any land is let to a person for use as agricultural land for an interest less than a tenancy from year to year, or a person is granted a licence to occupy land for use as agricultural land, and the

circumstances are such that if his interest were a tenancy from year to year he would in respect of that land be the tenant of an agricultural holding, then, unless the letting or grant was approved by the minister before the agreement was entered into, the agreement shall take effect, with the necessary modifications, as if it were an agreement for the letting of the land for a tenancy from year to year: Provided that this subsection shall not have effect in relation to an agreement for the letting of land, or the granting of a licence to occupy land, made (whether or not the agreement expressly so provides) in contemplation of the use of the land only for grazing or mowing during some specified period of the year, or to an agreement for the letting of land, or the granting of a licence to occupy land, by a person whose interest in the land is less than a tenancy from year to year and has not by virtue of this section taken effect as such a tenancy."

It is on the construction of that proviso that a good deal has turned in this case.

The learned county court judge accepted the contention of the plaintiffs that s. 1 (2) cannot apply in this case because the trade or business referred to there was an agricultural trade or business. It is that against which the defendant is appealing today. There is also a cross-notice by the plaintiffs to the effect that the learned county court judge should have included in his reasons for finding as he did, the finding that this case came within the proviso to s. 2 (1), whereas in fact the learned county court judge came to the opposite conclusion.

Before I read the relevant parts of the judgment of the learned county court judge it would be as well if I referred shortly to the parts of the interpretation section, s. 94 (1). The relevant definition which we have to consider is that of "agriculture" and it is provided by s. 94 (1) of the Act:

" 'agriculture' includes horticulture, fruit growing, seed growing, dairy farming and livestock breeding and keeping [and these are the important words] the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds, and the use of land for woodlands where that use is ancillary to the farming of land for other agricultural purposes, and 'agricultural' shall be construed accordingly."

Counsel for the plaintiff included in his argument reference to the definition of "livestock":

" 'livestock' includes any creature kept for the production of food, wool, skins or fur or for the purpose of its use in the farming of land or the carrying on in relation to land of any agricultural activity."

To deal first of all with the two conclusions to which the learned judge came, with the first one of which I certainly do not agree, it was contended before the learned county court judge that s. 1 (2) of the Act applied. There is no doubt that this land was used for agriculture in some way or other, because it was land which was used for grazing. The point is: was it land which was used for the purposes of a trade or business? The learned judge has found that phrase to have a narrower meaning than appears on the face of it, and the contention of counsel for the defendant is that "trade or business" means what it says, and does not mean an agricultural trade or business. The learned judge, in his judgment, said:

" This is an agreement for grazing only. It is within the definition of 'agriculture' in s. 94 of the Act. Does it come within s. 1 (2) as being 'land used for agriculture which is so used for the purposes of a trade or business'? Undoubtedly the conduct of a riding school is a trade or business. The issue between the parties is whether the trade or business must be an agricultural trade or business."

That, I think, puts quite succinctly the matter which has been in dispute between the parties in this appeal. The learned judge continued:

"My attention has been drawn to *Re Joel's Lease*, *Berwick v. Baird* (1), *Dunn v. Fidoe* (2), *Howkins v. Jardine* (3), and *Lord Monson v. Bound* (4). In *Howkins v. Jardine* (3) JENKINS, L.J., referred to s. 1 (2) and to the purposes of 'an agricultural trade or business'. Quite apart from such guidance, and that in the other cases, I should have thought that the words in this subsection which I have quoted mean 'land used for agriculture in the way of a trade or business concerned with agricultural produce'. If this is right then clearly this agreement is not within s. 1 (2) and is not a contract of tenancy of agricultural land."

So far as the last part of that sentence is concerned I would agree with the learned judge at once, but I do not agree with his construction of the words "trade or business". However, that is a matter with which I will deal in one moment. The learned judge then goes on to discuss the matter which is the subject of the cross-notice by the plaintiffs:

"A further submission is made on behalf of the plaintiffs to the effect that this is a letting for a specified period of a year for grazing and is within the proviso to s. 2 (1). The vital words are 'for six months periods' and '£6 for six months'. The use of the plural 'periods' leads me to think that the letting is for twelve months certain subject to six months' notice at the end of the first or any subsequent six months. I hold that this is not a letting for a specified period of a year..."

Then some reference is given to a case and there is some doubt whether the reference is a correct one or not. That, I think, is the whole matter which is the subject of this appeal so far as the judgment of the learned county court judge is concerned.

To deal with these two issues, the first one is the defendant's submission that the learned county court judge is wrong in saying that the words "trade or business" refer to an agricultural trade or business. That is much too narrow a construction to be put on the words and whatever the term "trade or business" means—and presumably it means something other than the use of the premises for private purposes—it is clear that the business of keeping a riding school would come within those words. I am bound to say, having considered those words, that this is very largely, I think, a case of first impression. The meaning that is indicated by the words themselves is that "trade or business" refers to a trade or business and not to some specified type of trade or business.

Counsel for the plaintiffs has referred to the words of JENKINS, L.J., in *Howkins v. Jardine* (3), which, indeed, were the words on which the learned county court judge largely relied. The words are these (5):

"The literal construction of the word 'used' in s. 1 (2) as requiring actual use of every inch of the holding for agriculture or for the purposes of an agricultural trade or business at any given time would make the Act wholly unworkable."

I should say that the issue in *Howkins v. Jardine* (3) was whether there could be any sub-lettings of a tenancy one part of which was clearly an agricultural tenancy and another part of which was not. Although counsel for the plaintiffs has prayed that expression "an agricultural trade or business" of JENKINS, L.J., strongly in aid of his argument, and although clearly it affected the mind of the learned county court judge when he was considering this matter, my own view is that, as I have already said, the words "trade or business" mean what they say and should not be qualified or narrowed in their application by the use of a term like "agricultural".

(1) [1930] 2 Ch. 359.

(2) [1950] 2 All E.R. 685.

(3) [1951] 1 All E.R. 320; [1951] 1 K.B. 614.

(4) [1954] 3 All E.R. 228.

(5) [1951] 1 All E.R. at p. 329; [1951] 1 K.B. at p. 629.

It has been argued by both parties to this appeal that to put what I regard as the natural construction on these words would result in an anomaly. That may very well be. It does not follow that, because a certain construction is put on words of an Act of Parliament which may, in certain circumstances, result in an anomalous situation, that construction cannot be adopted, and although in this case to put the construction for which the defendant contends on these words may, in certain circumstances, result in an anomalous situation, that is a matter for the legislature and not a matter for this court. I have come to the conclusion that the defendant is right and that the construction for which she contends is the correct one. That, however, is not the end of the case, as counsel for the plaintiffs contends that in any event this cannot be an agricultural tenancy because of the proviso to s. 2 (1) of the Act of 1948.

It is clear, I think, from the authorities to which we have been referred that "a part of the year" means something less than the full 365 days which are the normal number of days in a year. One authority (6) has been cited to us where only 364 days was the period of the tenancy and it was held that that was only part of a year and was not a specified period of a year. The learned judge has concluded here that the effect of this document was that there would be the right to graze on this land for two successive periods of six months; that that must be implied by the fact that the word "periods" was in the plural, and that any notice which had to be given was a notice which would have to be given for the third or some subsequent period of six months.

We have to bear in mind that in construing a document of this kind, or in construing a section of this kind, we must pay regard to the actual words of the document in its application to the section. We have been asked to say that this document does not bear that construction, but that it bears an entirely different one, a construction that it is only a letting of this grazing right for some period less than a year, i.e., for a period of six months only. That is not, in my judgment, the proper construction to put on this document.

I, for my part, would say that I disagree with the learned county court judge in the particular view which he has taken of this document and the words of the proviso. It follows from that that I would allow this appeal so far as the defendant's contention is concerned and I would disallow the plaintiffs' notice where they ask for a different decision from the one to which the learned judge had come on the proviso to s. 2 (1) of the Act.

WILLMER, L.J.: I agree. The defendant, as tenant, claims the protection of the Agricultural Holdings Act, 1948, in respect of a five-acre field let to her by Mrs. Banbury, the testatrix, under an agreement of Feb. 18, 1959, for the purpose of grazing horses. I should remark straight away that the learned county court judge took an adverse view of the credibility of the defendant, and declined to accept her evidence as to what took place between her and the testatrix at the time when the agreement was made. If I thought that the question at issue between the parties depended on the truth or otherwise of the defendant's evidence as to what took place at the material interview, I should hesitate long before interfering with the conclusion arrived at by the learned judge. But in fact the essential points of agreement between the parties were reduced to writing, and are contained in the memorandum of Feb. 18, 1959, which ORMEROD, L.J., has read. In my judgment the issue between the parties depends for its solution entirely on the true construction of the memorandum and of the relevant provisions of the Agricultural Holdings Act, 1948. The material facts are not in issue, and I do not think, therefore, that any question of credibility really arises.

The defendant's claim to the protection of the Act is resisted by the plaintiffs on two grounds. First, it is contended that the field in question, being let only

(6) *Reid v. Dawson*, [1954] 3 All E.R. 498; [1955] 1 Q.B. 214.

for the grazing of horses used in connexion with the defendant's riding school, is not "agricultural land" within the definition contained in s. 1 (2) of the Act. Secondly, it is argued that the field was let in contemplation of the use of the land only for grazing during a specified period of a year, so as to be excluded from the ambit of the Act by reason of the proviso to s. 2 (1). The learned judge decided the first point in favour of the plaintiffs, and on that ground made the order, the subject of the appeal. On the second point his conclusion was in favour of the defendant, but this has been the subject of a cross-notice entered on behalf of the plaintiffs. Both points have been fully argued before us, and for my part I have come to the conclusion that the defendant is entitled to succeed on both.

It is common ground that the defendant is the proprietor of a riding school in the vicinity of the field in question. It is not suggested that the field was itself let for use as a riding school, or that it was so used. On the contrary its use for the purposes of riding was expressly forbidden. It was used exclusively for the purpose of grazing the horses maintained by the defendant for her riding school. Section 1 (2) of the Act, so far as material, provides:

"For the purposes of this and the next following section, the expression 'agricultural land' means land used for agriculture which is so used for the purposes of a trade or business..."

By the definition provision in s. 94 (1), the word "agriculture" is defined as including "the use of land as grazing land". The field in question here was used as grazing land, and, therefore, for agriculture, and it was so used for the purposes of a trade or business, namely, the business of the defendant's riding school. *Prima facie*, therefore, it falls within the plain words of the subsection.

The argument to the contrary, which found favour with the learned county court judge, was that the words "used for the purposes of a trade or business" must mean, in the context of this subsection, "used for the purposes of an agricultural trade or business", or "used for the purposes of a trade or business concerned with agricultural produce". The only authority cited in support of this proposition was the dictum of JENKINS, L.J., in *Howkins v. Jardine* (7), which my Lord has already read. Much as I respect any dictum of JENKINS, L.J., I cannot think that when he made this observation his mind was directed to the point which is here in issue. In that case the holding, the letting of which was in issue, consisted partly of agricultural land and partly of certain cottages. On an attempt being made on the part of the landlords to obtain possession of the cottages, as opposed to the agricultural land, it was held that there was no room for severance of the agricultural from the non-agricultural part of the holding, and the question was whether the holding viewed as a whole, was to be regarded as agricultural or not. No similar problem arises in the present case, where the whole of the field in question was admittedly let for the purposes of grazing and nothing but grazing. What JENKINS, L.J., said in the passage relied on was in no way necessary for the actual decision of the case then before the court, nor do I think that the actual decision of that case is of any assistance in relation to the question that arises here. The same remark applies to *Monson v. Bound* (8), and *Deith v. Brown* (9), an unreported decision of PEARSON, J., of which we have been furnished with a copy of the transcript. In each of these cases land was let primarily for the use for the purposes of a business, and the use of part of it for agricultural purposes was merely ancillary to the primary purpose.

I derive rather more assistance from what was said by SOMERVELL, L.J., in *Howkins v. Jardine* (10), where, speaking of s. 1 (2) of the Agricultural Holdings Act, 1948, he said (11):

(7) [1951] 1 All E.R. at p. 329; [1951] 1 K.B. at p. 629.

(8) [1954] 3 All E.R. 228.

(9) (May 15, 1956), unreported.

(10) [1951] 1 All E.R. 320; [1951] 1 K.B. 614.

(11) [1951] 1 All E.R. at p. 323; [1951] 1 K.B. at p. 619.

"In my view, this subsection is not directed to severance, but to take out of the Act land which is used for the purposes of agriculture within the definition in s. 94, but not as a trade or business."

As I understand the learned lord justice the distinction which he was there drawing was between land used for the purposes of agriculture as a commercial venture and land so used as a matter of pleasure or for recreational purposes. That this was the distinction intended is, I think, to some extent confirmed by the reference later in the subsection to the powers of the minister under s. 109 (1) of the Agriculture Act, 1947, where land used as pleasure grounds or for the purposes of sport or recreation is expressly excluded from the definition of "agricultural land".

In my judgment, therefore, there is no warrant for construing the words "trade or business" as applying only to an agricultural trade or business. So to construe the words would involve writing in something which is not there. I see no good reason for doing any such thing, for the words in their natural sense have a perfectly clear meaning. I would only add this. If "trade or business" were to be construed as being confined to an agricultural trade or business, I think that considerable difficulties might well arise in determining what is and what is not an agricultural business. It seemed to me that this possible difficulty became sufficiently apparent from the examples of border-line cases that were discussed during the course of the argument: but it is a difficulty which is avoided by construing the words, as I think they should be construed, in their natural sense.

The second point argued before us does not admit of much elaboration, and I can deal with it briefly, for I am abundantly satisfied that the learned judge's conclusion was plainly right. Section 2 (1) of the Act, omitting the immaterial words, provides:

"... where under an agreement... land is let to a person for use as agricultural land for an interest less than a tenancy from year to year... the agreement shall take effect... as if it were an agreement for the letting of the land for a tenancy from year to year: Provided that this subsection shall not have effect in relation to an agreement for the letting of land, or the granting of a licence to occupy land, made (whether or not the agreement expressly so provides) in contemplation of the use of the land only for grazing or mowing during some specified period of the year..."

It was argued for the plaintiffs that the agreement in this case was made in contemplation of the use of the land only for grazing during a specified period of the year, viz., six months, and therefore fell within the proviso. Reliance was placed on *Scene Estate, Ltd. v. Amos* (12) (where land was let under an agreement in writing for three months, subsequently extended by letters for further periods of three months), and on *Reid v. Dawson* (13) (where the letting was for a period of 364 days). In both cases it was held that the agreement was made in contemplation of the use of the land only during a specified period of a year, and therefore fell within the proviso so as to be excluded from the operation of the Act. I do not think that these authorities have any application to the circumstances of the present case. Here the memorandum provided by its terms for a letting for six months' periods, in the plural. It could not, therefore, operate for less than two such periods, so that the minimum period of letting contemplated could not be less than a full year. The learned judge so held, and in doing so he appears to have relied on *R. v. Chawton (Inhabitants)* (14), a case decided in 1841. It seems to me to be a case directly in point.

(12) [1957] 2 All E.R. 325; [1957] 2 Q.B. 205.

(13) [1954] 3 All E.R. 498; [1955] 1 Q.B. 214.

(14) (1841), 1 Q.B. 247.

In these circumstances I do not see how it can be successfully contended that the agreement here was made in contemplation of the use of the land only for a specified period of the year, and I am satisfied that the learned judge came to a correct conclusion in holding that the agreement did not fall within the proviso. On this point, therefore, the defendant is, in my judgment, entitled to succeed. For the reasons already given, I am of the opinion that she is also entitled to succeed on the first point. Consequently I concur in the conclusion that the appeal should be allowed.

DANCKWERTS, L.J.: This appeal depends on the construction and application of the Agricultural Holdings Act, 1948. That Act is a consolidating Act and it consolidates a series of Acts which have proved a fruitful source of litigation in the past. A perusal of the law reports since 1948 and a study of the terms of the present Act lead one irresistibly to the conclusion that the present Act is likely to be as successful as its predecessors in producing litigation and mental exercise for lawyers.

The first point depends on the application of the facts of this case to s. 1 of the Act. There is no real dispute about the facts. This is a five-acre field which was used for the purpose of grazing in connexion with the defendant's riding school. If it is an agricultural holding then the notice which has been given by the plaintiffs is inadequate and the defendant is entitled to be protected. An agricultural holding is defined in s. 1 (1) of the Act as: "the aggregate of the agricultural land comprised in a contract of tenancy", and by sub-s. (2):

"For the purposes of this and the next following section, the expression 'agricultural land' means land used for agriculture which is so used for the purposes of a trade or business . . ."

There is no doubt that this land, which is used as grazing land, is within the definition contained in s. 94 (1) of the Act, and the sole point which has given rise to the argument is whether "for the purposes of a trade or business" is confined to an agricultural trade or business or bears its natural and wider meaning of any trade or business. Apart from a dictum of JENKINS, L.J., in *Howkins v. Jardine* (15) there is really no authority whatever which would give rise to any conclusion other than that the words bear their natural meaning, and a study of *Howkins v. Jardine* (16), in my view, leads irresistibly to the conclusion that the observation of JENKINS, L.J., was not directed to the point which we have here to consider. It was merely made incidentally by him in the course of consideration of a quite different question which arose in that case.

It seems to me plain, therefore, that the learned county court judge did not reach the right conclusion on the subject of the appeal and that the defendant has an agricultural holding which is entitled to the protection provided by the Act, unless there is some other question which requires us to reach a different point of view.

The second question, which is the subject of the cross-appeal, depends on the construction of the agreement made between the parties and the meaning of s. 2 of the Agricultural Holdings Act, 1948. Section 2 (1) seems to have been directed to the creation of tenancies which would not receive the protection which an ordinary tenancy from year to year would receive in the case of agricultural holdings, and was designed to prevent landlords from introducing some sort of tenancy which would relieve them from the obligation of giving a notice otherwise required by the Act. The point which this court has to consider arises wholly on the proviso which is appended to that subsection, and the words of that proviso are, so far as is material:

(15) [1951] 1 All E.R. at p. 329; [1951] 1 K.B. at p. 629.

(16) [1951] 1 All E.R. 320; [1951] 1 K.B. 614.

“Provided that this subsection shall not have effect in relation to an agreement for the letting of land, or the granting of a licence to occupy land, made (whether or not the agreement expressly so provides) in contemplation of the use of the land only for grazing or mowing during some specified period of the year . . .”

On reading that provision one would, I think, naturally come to the conclusion that the proviso was directed to agreements, which are not uncommon, by which the tenant or licensee has a right to go on land for two, three or four months of the year and either graze the land or mow it, which is really a similar purpose, and then for the rest of the year he goes out of occupation. But the construction which has been put on this proviso by courts in the period since 1948 has produced a result which I cannot help thinking would have surprised the draftsman of the section, for they have applied the proviso to a tenancy for 364 days in a year and a tenancy for successive periods of three months. That being so it was necessary to consider whether the terms of the particular agreement in this case came within the provisions of the proviso.

The material part of the written agreement is “£6 for six months. Let to Mrs. Maurer for grazing for six months periods”. It is said that this looks as if it was a letting for six months only but I think the proper construction is that “£6 for six months” is merely denoting the amount of the rent. In any case the other copy of the agreement which was exchanged between the parties leaves out that provision and possibly it aids the construction which has been suggested. Then the other part is: “Let to Mrs. Maurer for grazing for six months periods”. In view of the Law of Property Act, 1925, s. 61 (a), six months must be calendar months, and, therefore, if the agreement is to be construed as granting a tenancy for two periods of six months at least it must be for a period of a year and not less than a year. It seems to me that that is the proper construction in this case and, therefore, it is impossible to bring this agreement within the terms of the proviso to s. 2 (1) of the Act, and the tenant, or licensee, is not deprived of the protection of the Agricultural Holdings Act, 1948. It seems to me that the plaintiffs’ contention in the present case fails in respect of the proviso, the tenant, or licensee, succeeds and the appeal, accordingly, must be allowed.

Appeal allowed.

Solicitors: *Curwen, Carter & Evans*, agents for *Montague Williams & Piper*, Hurstpierpoint (for the defendant); *Ralph Bond & Rutherford* (for the plaintiffs).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

NORTON v. CANADIAN PACIFIC STEAMSHIPS, LTD.

[COURT OF APPEAL (Sellers, Harman and Pearson, L.J.J.), April 14, 17, May 12, 1961.]

Independent Contractor—Negligence—Driving of motor vehicle—Liability of owner—Electric truck driven by porter on landing stage for carrying passenger's luggage from defendants' ship.

The porters at a certain landing stage in a port plied for hire and rendered services in the carrying of passengers' luggage to and from ships either for the passengers or for the ships whose owners arranged and paid for these services as a facility provided for the passengers. Thus there was no relationship of master and servant between the porters and the shipowners. The porters used seven electric bogies to carry luggage: four of these bogies were provided jointly by the defendant shipowners and another shipowner and three were provided by the bogie manufacturers. The two shipowners each maintained the four bogies in alternate years. The porters used the bogies indiscriminately, irrespective of the ownership of the ship to or from which they were carrying luggage. While using one of the bogies jointly owned by the defendants to carry luggage from one of the defendants' ships, M., a porter, negligently ran it into and injured the plaintiff, a fellow-porter.

Held: the defendants did not exercise any control over M. who, when using the bogie, did so on his own behalf, not as agent or delegate of the defendants, who had assumed no responsibility to anyone as to the driving of the bogies; the defendants, therefore, were not responsible for M.'s negligence.

Ormrod v. Crosville Motor Services, Ltd. ([1953] 2 All E.R. 753) explained and distinguished.

Per PEARSON, L.J.: the owner of a car, when he takes or sends it on a journey for his own purposes, owes a duty of care to other road users, and if any of them suffers damage from negligent driving of the car by an agent to whom the owner has delegated the driving, the owner is liable (see p. 790, letter D, post).

Appeal allowed.

[As to liability of a vehicle owner for negligent driving by another person, see 28 HALSBURY'S LAWS (3rd Edn.) 71, para. 71; and for cases on the subject, see 36 DIGEST (Repl.) 104, 521-524.]

Cases referred to:

Brooke v. Bool, [1928] All E.R. Rep. 155; [1928] 2 K.B. 578; 97 L.J.K.B. 511; 139 L.T. 376; 36 Digest (Repl.) 125, 632.

Cassidy v. Ministry of Health, [1951] 1 All E.R. 574; [1951] 2 K.B. 343; 2nd Digest Supp.

Dalton v. Angus, (1881), 6 App. Cas. 740; 50 L.J.Q.B. 689; 44 L.T. 844; 46 J.P. 132; 34 Digest 158, 1234.

Gold v. Essex County Council, [1942] 2 All E.R. 237; [1942] 2 K.B. 293; 112 L.J.K.B. 1; 167 L.T. 166; 106 J.P. 242; 17 Digest (Repl.) 170, 653.

Hardaker v. Idle District Council, [1896] 1 Q.B. 335; 65 L.J.Q.B. 363; 74 L.T. 69; 60 J.P. 196; 25 Digest 480, 62.

Hewitt v. Bonvin, [1940] 1 K.B. 188; 109 L.J.K.B. 223; 161 L.T. 360; 2nd Digest Supp.

Mersey Docks & Harbour Board v. Coggins & Griffiths (Liverpool), Ltd., [1946] 2 All E.R. 345; [1947] A.C. 1; 115 L.J.K.B. 465; 175 L.T. 270; 2nd Digest Supp.

Murray v. Currie, (1870), L.R. 6 C.P. 24; 40 L.J.C.P. 26; 23 L.T. 557; 34 Digest 25, 44.

Ormrod v. Crosville Motor Services, Ltd., [1953] 2 All E.R. 753; [1953] 1 W.L.R. 1120; 3rd Digest Supp.

Parker v. Miller, (1926), 42 T.L.R. 408; 36 Digest (Repl.) 109, 541.

Performing Right Society, Ltd. v. Mitchell & Booker (Palais de Danse), Ltd., [1924] 1 K.B. 762; 93 L.J.K.B. 306; 131 L.T. 243; 34 Digest 29, 72.

Pickard v. Smith, (1861), 10 C.B.N.S. 470; 4 L.T. 470; 142 E.R. 535; 34 Digest 162, 1264.

Quarman v. Burnett, (1840), 6 M. & W. 499; 9 L.J. Ex. 308; 151 E.R. 509; 34 Digest 23, 29.

Samson v. Aitchison, [1912] A.C. 844; 82 L.J.P.C. 1; 107 L.T. 106; 36 Digest (Repl.) 161, 852.

Trust Co., Ltd. v. De Silva, [1956] 1 W.L.R. 376; 3rd Digest Supp.

Appeal.

The defendant shipowners appealed against the decision of the presiding judge of the Court of Passage of the City of Liverpool, dated Apr. 27, 1960, that they were liable in damages to the plaintiff for injuries sustained by him as a result of the negligent driving of an electric bogie by Morris, a porter taking passengers' luggage from one of the defendants' ships. The facts are stated in the judgment of *SELLERS, L.J.*

D. M. Forster for the defendants.

J. G. Burrell, Q.C., for the plaintiff.

Cur. adv. vult.

May 12. **SELLERS, L.J.**, read the following judgment: For more than a hundred years the porters on the Prince's landing stage in the port of Liverpool have been under some general control. In 1842 the previously unorganised men who attended there to carry luggage to and from a ship embarking or discharging passengers were controlled by a provision in the Liverpool Corporation Act of that year. Since then a licence, granted by Liverpool City Council, has had to be held by every man doing such work and the granting of licences and the conditions relating thereto have been governed by bye-laws made by the council. During the last quarter of a century or more the bye-laws have become out of date, especially in respect of the scale of charges, and have given way to the practice of the porters' work on the landing stage although a licence is still necessary and enforced. The judgment finds, and it is accepted, that under the bye-laws the porters are casual workers offering their labour at the quayside to move passengers' luggage but under police supervision as to their general behaviour. There are two classes of porters, fifty-seven luggage porters and one hundred and twenty-three general porters at the time of the trial, for the whole of the floating landing stage, about three furlongs long, under "the Inspector of Licensed Porters", a Sergeant Hudson, who has a staff of three constables for these duties. Some sort of organisation has been established, no doubt to reduce casual and intermittent occupation, as has been sought with dock labour generally, and the work of the porters has been controlled by a senior head porter and four head porters. At all material times the baggage master of the owners of a ship intending to embark or discharge passengers at the Liverpool landing stage would inform Sergeant Hudson's office, who would inform the senior head porter of the expected time of arrival of the ship and the number of passengers. The senior head porter would decide the number of porters required and under one of the head porters they would be detailed for the work. The number would of necessity have regard to the number of porters available. The practice had been, for some time, for the shipowners to pay for the porters' services a lump sum for the ship and a rate per passenger direct to the senior head porter, who was responsible for its distribution among the porters in whatever manner they had agreed. The current rate had risen to £20 per ship and 2s. per passenger. This type of remuneration had for many years superseded the old scale of the bye-laws, apparently without question. The porters were clearly an independent body of men who plied for hire and rendered services in the carrying of luggage either for the

passengers or for the ship who arranged and paid for the services for the passengers or as a facility which the shipowner provided for the convenience and comfort of the passengers in transferring their luggage between the ship and the customs. The contract between the defendant shipowners in this case and the passengers' luggage was put on to the landing stage by means of a conveyor belt called a "creeper" before passengers would normally disembark. At the landing stage end it was received by the porters and moved by them across the stage to another conveyor belt which took it up to the customs sheds, where it was received by other porters who took it to the appropriate place for customs examination.

If these were all the facts no unusual question would have arisen. The legal problem of the present case has arisen because since about 1924 the porters have been using on the landing stage indiscriminately for their work of transporting baggage seven electric bogies, four provided jointly by the defendants and the Cunard Line and three by the manufacturers of all the bogies so used. The four bogies were maintained by the defendants and the Cunard Line, each company being responsible financially in alternate years. Apart from the fact that the other three were kept on the landing stage together with the four and were used by the porters as required for any ship of any owner who required the porters' services nothing is known about them from the evidence in this case. The porters drove them and, as far as the evidence goes, drove them without selection from their number and without instruction. No doubt they were simple to move and manoeuvre and in practice some porters may have driven more or less regularly and others but rarely.

On Oct. 28, 1957, during the movement of passengers' baggage from the defendants' s.s. *Empress of Britain*, a licensed porter Morris was driving by chance one of the four electric bogies provided, apparently in 1924 by the Cunard Line and the defendants jointly, and as he was moving the bogie in the vicinity of the creeper he ran into and injured the plaintiff Norton, a fellow-porter who was receiving baggage from the creeper. Somewhat surprisingly, the plaintiff, who, but for his accident and the legal advice concerning it, would, I feel sure, have stoutly refuted that he was anyone's servant or agent and have maintained that he was his own master, has sought damages for his injuries alleging first, that the defendants were the masters of the porters, in particular of Morris, and were responsible for his negligent driving, and second, that at the time of the accident Morris was the agent of the defendants in circumstances which made them so responsible. The negligence of the driver Morris was admitted by the defendants (and apparently not challenged by Morris, who was not a party to the action).

The presiding judge of the Court of Passage of the City of Liverpool, in a carefully reasoned judgment on the submission, found against the plaintiff's main contention and held that Morris was not a servant of the defendants. The cross-notice of appeal from that finding was abandoned and no argument was heard on it. That part of the judgment therefore stands.

But the presiding judge has found in favour of the plaintiff on the ground that the bogie Morris was driving belonged to the defendants, as joint owners with the Cunard Line, and that in the circumstances Morris was driving as their agent at the time of the accident to the plaintiff. From this decision the defendants appeal and in my view they are clearly entitled to succeed. The porter Morris never lost his independence as a licensed porter and was in complete control of the services he was rendering, using the bogie purely for the better or quicker or easier performance of the duties for which he was engaged and paid. The passengers or the defendants, the shipowners, were the customers of him and his colleagues and as such could direct where the baggage was to go and could rightly complain if it was mishandled but such things are the ordinary incidents of portage services. I can see no evidence of circumstances which would give rise to an agency whereby the defendants or indeed any passenger whose baggage

was being handled could be held liable for the negligence in the driving of the vehicle or the movement of the parcels. If a porter man-handling luggage knocked into a passer-by or dropped a heavy package onto his foot and injured him it could not, I think, be suggested that the owner of the luggage or the shipowner who had engaged the services of the porter would be liable. What difference can it make if the porter is using a bogie, electric or otherwise, in rendering the services? The bogie in question might have been in use at the time of an accident for the discharge of a ship not owned by the defendants or the Cunard Line, or Morris might have been driving at the time of this accident a bogie belonging to Roadcraft, the manufacturers who owned the other three. Liability cannot shift about in such changing circumstances. Morris as a licensed porter was exercising an independent calling. His services were, of course, of value and of interest to the defendants or he would have had no trade. But he was using the bogie for the purpose of his work and that of his fellow-porters in and about the task for which they had been engaged.

The judgment dealt shortly with this issue and relied, as does the plaintiff's argument, solely on a decision of this court in *Ormrod v. Crosville Motor Services, Ltd.* (1). The evidence scarcely anticipated the point for very little evidence was directed to it. The fact which was established, that the defendants were joint owners of the bogie and shared its maintenance costs with the Cunard Line, was admitted; but this in itself is insufficient to create liability on the defendants for the negligent use of the bogie. If, as would appear, it and the other bogies were lent to the porters for the purposes of their work no liability for its negligent use can be attributed to the owners although it might possibly be different if the vehicle were defective and not fit for the purpose for which it was known it would be used. In *Ormrod v. Crosville Motor Services, Ltd.* (1) the driver of a car was driving it for the owner from Birkenhead to Monte Carlo where the owner wished to have it available for a holiday after he had concluded his participation in a motor rally to that place. The driver, a friend, also wished to travel to Monte Carlo and make a visit in France on the way and so was willing to take the owner's car. The journey was for the joint purposes of both. The user of the bogie cannot be properly so regarded here. The decision in that case was as stated by SINGLETON, L.J., as follows (2):

"The mere fact of consent by the owner to the use of a chattel is not proof of agency, but the purpose for which this car was being taken down the road on the morning of the accident was either that it should be used by the owner, the third party, or that it should be used for the joint purposes of the male plaintiff and the [owner] when it reached Monte Carlo."

DENNING, L.J., made some rather wider observations but added (3):

"The owner only escapes liability when he lends it or hires it to a third person to be used for purposes in which the owner has no interest or concern: see *Hewitt v. Bonvin* (4)."

I think, with respect, that the trial judge was erroneous in attributing to the defendants any interest in the sense the lord justice had in mind. There was no delegation of the driving of the bogies, which was the basis of the decisions in *Hewitt v. Bonvin* (4) and *Ormrod v. Crosville Motor Services, Ltd.* (1).

If consideration is given to control in the driving or the right to control the driving which has arisen in many cases the defendants are clearly not responsible for that and it was in the performance of that task that the accident to the plaintiff happened. The independent porter, under possibly the general control of the head porter detailed to the ship, was manipulating the bogie and directing its use. I can see no agency or responsibility on the part of the defendants and would allow the appeal.

(1) [1953] 2 All E.R. 753.

(3) [1953] 2 All E.R. at p. 755.

(2) [1953] 2 All E.R. at p. 754.

(4) [1940] 1 K.B. 188.

HARMAN, L.J.: I agree. I have prepared an independent judgment, but it covers, I think, the same ground as **SELLERS, L.J.**, has already covered in his judgment. In my opinion, once the facts were elicited—a matter of great difficulty in this case—the case was really a simple one; and I think that it will be enough if I say that I concur in what my Lord has said, without expatiating on it further.

PEARSON, L.J., read the following judgment: I agree, and wish only to add something as to the arguments that were presented.

Counsel for the appellants, who were the unsuccessful defendants in the Court of Passage of Liverpool, had in his favour the clear and emphatic evidence, accepted by the learned presiding judge, to the effect that the defendants did not exercise any control, or have any right of control, over the licensed porters in respect of the manner in which they were to move the luggage or use the bogies. He argued that the absence of such control, besides excluding the relation of master and servant, was sufficient in itself to absolve the defendants from any liability on the ground that Morris was acting as their agent. Cases were cited in support of the proposition: *Murray v. Currie* (5); *Samson v. Aitchison* (6); *Performing Right Society, Ltd. v. Mitchell & Booker (Palais de Danse), Ltd.* (7), per **MCCARDIE, J.**; *Parker v. Miller* (8), in the Court of Appeal; *Brooke v. Bool* (9), **SALTER, J.**'s second reason; *Mersey Docks & Harbour Board v. Coggins & Griffiths (Liverpool), Ltd.* (10), in the House of Lords; *Trust Co., Ltd. v. De Silva* (11), in the Privy Council. But on that line of argument, when counsel for the defendants came to deal with *Ormrod v. Crosville Motor Services, Ltd.* (12), although he could account for the decision, he could not account for the reasoning, which is evidently based on a different principle.

On the other hand, counsel for the plaintiff, who was successful in the Court of Passage, sought to uphold the decision in his favour as having been correctly based on the reasoning in *Ormrod v. Crosville Motor Services, Ltd.* (12).

It is necessary to refer to some of the previously decided cases in order to ascertain the principle that was applied in *Ormrod v. Crosville Motor Services, Ltd.* (12) with a view to determining how it should be applied in the present case. In *Dalton v. Angus* (13) **LORD BLACKBURN** said:

“Ever since *Quarman v. Burnett* (14) it has been considered settled law that one employing another is not liable for his collateral negligence unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it.”

There are passages to the same effect in *Pickard v. Smith* (15), and in *Hardaker v. Idle District Council* (16), per **LINDLEY, L.J.**

In *Hewitt v. Bonvin* (17), **DU PARCQ, L.J.**, said:

“The driver of a car may not be the owner's servant, and the owner will be nevertheless liable for his negligent driving if it be proved that at the material time he had authority, express or implied, to drive on the owner's

(5) (1870), L.R. 6 C.P. 24.

(7) [1924] 1 K.B. at pp. 766-769.

(9) [1928] All E.R. Rep. at p. 157; [1928] 2 K.B. at p. 584.

(10) [1946] 2 All E.R. 345; [1947] A.C. 1.

(12) [1953] 2 All E.R. 753.

(14) (1840), 6 M. & W. 499.

(16) [1896] 1 Q.B. at p. 340.

(6) [1912] A.C. 844.

(8) (1926), 42 T.L.R. 408.

(11) [1956] 1 W.L.R. 376.

(13) (1881), 6 App. Cas. at p. 829.

(15) (1861), 10 C.B.N.S. at p. 480.

(17) [1940] 1 K.B. at pp. 194, 195.

behalf. Such liability depends not on ownership, but on the delegation of a task or duty . . . The decision in this court in *Parker v. Miller* (18), which has troubled some text-book writers is, I think, merely another illustration of the same principle. In *Parker v. Miller* (18) this court differed from a Divisional Court as to the effect of the evidence, but not, apparently, as to the law. The report is meagre, but it would seem that the defendant, who had been taking a friend and the friend's daughter for a drive, got out of the car and permitted or requested the friend to drive himself and his daughter home. The county court judge, whose decision on questions of fact was of course not open to review, must, I think, have drawn the inference that the defendant had delegated the tasks of conveying the female passenger to her destination and of looking after the car to his friend, who was therefore in charge of the car as his agent, and not merely as a bailee."

The same principle is applied in two of the hospital cases: *Gold v. Essex County Council* (19), per LORD GREENE, M.R., and *Cassidy v. Ministry of Health* (20), per DENNING, L.J.

In my opinion the reasoning in *Ormrod v. Crosville Motor Services, Ltd.* (21) is based on the same principle. The owner of a car, when he takes or sends it on a journey for his own purposes, owes a duty of care to other road users, and if any of them suffers damage from negligent driving of the car, whether by the owner himself or by an agent to whom he has delegated the driving, the owner is liable. There is the principle. How should it be applied to the present case? There is no evidence as to the existence or terms of any arrangement between the defendants and their passengers in respect of the conveyance of the luggage across the landing stage to the customs sheds, but if the defendants had in this respect assumed some obligation to the passengers, and had delegated the performance of it to the porters, the defendants would still be responsible only for the due performance of the obligation and not for any collateral negligence of the porters. The defendants have not assumed any obligation or undertaken any task of driving or using the bogies, and have not delegated the performance of any such obligation or task to the porters. The porters use the bogies, which have been placed at their disposal, when and where and as they think fit: they use them on their own behalf in their own business.

Thus, applying the principle of *Ormrod v. Crosville Motor Services, Ltd.* (21), I find the defendants not liable for the negligence of Morris, and I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Hill, Dickinson & Co.* (for the defendants); *Helder, Roberts & Co.*, agents for *John A. Behn, Twyford & Reece*, Liverpool (for the plaintiff).

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

(18) (1926), 42 T.L.R. 408.

(19) [1942] 2 All E.R. at p. 242; [1942] 2 K.B. at p. 301.

(20) [1951] 1 All E.R. at pp. 586, 587; [1951] 2 K.B. at pp. 363, 364.

(21) [1953] 2 All E.R. 753.

COOK v. COOK.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lloyd-Jones, J.), March 28, 29, 1961.]

Injunction—Husband and wife—Matrimonial home—Decree nisi granted to wife but not made absolute—Jurisdiction to grant before decree absolute an injunction requiring husband to leave matrimonial home and restraining him from molesting wife.

The Divorce Court has jurisdiction after decree nisi but before decree absolute to grant an injunction to exclude the husband from the matrimonial home and to restrain him from molesting the wife.

[As to granting an injunction where a matrimonial suit is pending but before final decree, see 12 HALSBURY'S LAWS (3rd Edn.) 477, para. 1067, note (c); and for a case on the subject, see 27 DIGEST (Repl.) 677, 6457.]

Cases referred to:

Anglo-Italian Bank v. Davies, (1878), 9 Ch.D. 275; 47 L.J.Ch. 833; 39 L.T. 244; 21 Digest 665, 2454.

Cobb v. Cobb, [1955] 2 All E.R. 696; [1955] 1 W.L.R. 731; 3rd Digest Supp.

Gorulnick v. Gorulnick, [1958] 1 All E.R. 146; [1958] P. 47; [1958] 2 W.L.R. 58; 3rd Digest Supp.

Lee v. Lee, [1952] 1 All E.R. 1299; [1952] 2 Q.B. 489, n.; 3rd Digest Supp.

McDowell v. McDowell, (1957), 107 L.Jo. 184.

Silverstone v. Silverstone, [1953] 1 All E.R. 556; [1953] P. 174; [1953] 2 W.L.R. 513; 3rd Digest Supp.

Smith v. Smith, (1889), 59 L.J.P. 15; 27 Digest (Repl.) 677, 6457.

Summons.

The wife applied for an injunction ordering the husband to leave the matrimonial home forthwith and not to return thereto pending suit between the parties and restraining him from molesting or in any way interfering with the wife. The facts appear in the judgment.

Miss Elaine Jones for the wife.

K. B. Campbell for the husband.

LLOYD-JONES, J.: The petition was filed on June 12, 1959. The wife alleged acts of cruelty against the husband. Before the suit was heard, as a result of an application by the wife to MARSHALL, J., on Jan. 20, 1960, the husband gave an undertaking that he would not make advances to the wife for sexual intercourse pending the hearing of the suit. No order was in fact made on that application in respect of molestation. The wife made a further application to me on Mar. 2, 1960, and she then asked for an injunction to restrain the husband from molesting or interfering with her pending the hearing of the suit, and again an undertaking was given by the husband not to molest or interfere with the wife in any way pending the hearing of the suit, and no order was made on the summons for the injunction.

The wife filed a supplemental petition in March, and yet a second supplemental petition in June, 1960, and in the first supplemental petition she alleged that there had been breaches of the undertaking given to MARSHALL, J., certainly on two occasions, and in the second supplemental petition she alleged that the husband had treated her with cruelty and in a manner which was a breach of the undertaking which he gave to me on Mar. 2. All these matters came for trial in November, 1960, and having heard the evidence over a period of many days I pronounced a decree nisi in favour of the wife on Nov. 22, 1960, and the findings which I then made implied that there had been a number of breaches of the undertakings that had been given. I found also that the charges of cruelty were in fact made out by the wife, and I then expressed the view that I preferred the evidence of the wife to that of the husband whenever they were in conflict.

I regarded her as a truthful witness but I was not able to accept his evidence about the matters which were in issue. Furthermore, at the conclusion of the case, on the invitation of counsel for the wife, I reminded the husband of his undertakings and enjoined him not to break his undertakings in the terms in which they had been given to MARSHALL, J., and myself.

During the months pending the hearing of the suit and after the pronouncing of the decree nisi these parties were living together under the same roof at the matrimonial home, 25, Tudor Close, Dartford, and the breaches of undertakings which were found to have been made out by the wife in her evidence arose in no small measure from the fact that they were in this close association, although the parties had worked out a *modus vivendi* which brought them into each other's company to the minimum degree. Still, according to the wife, there were occasions when the husband found that he could not behave in the way in which he had undertaken to behave, and not only did he make sexual advances to her but he did on one occasion, as I found, subject her to a very severe beating. On Feb. 22, the wife made an *ex parte* application to me for an injunction and I granted an interim injunction, and the parties came before me again on Mar. 8, after an interval of some fourteen days. On that occasion evidence by affidavit was put in and on the application of the husband I agreed that it was a proper case in which the whole matter should be tried with *viva voce* evidence of the parties, and yesterday I heard the evidence of both spouses.

The wife alleges by her first affidavit, which was dated Feb. 18, 1961, breaches of the undertakings which the husband had given, and she sets them out in the affidavit. She says, first of all, that her husband was in a temper on Jan. 31, and told her that she was to clear out of the house after Feb. 22, and that he himself would throw her out as it was his house and that she could go with the children to a rest centre or the gutter, and that he punched her some six times in the chest. She makes a further allegation of an even more extended attack on her on Feb. 11, when she says that in addition to addressing her abusively he started to hit her viciously on her legs and buttocks and also punched her on the face, arms, chest and back and threw her out forcibly through the front door.

Then she says that she went to see her doctor as a result of that—and the doctor's certificate was exhibited to her affidavit, in which he talks about bruises which he saw on Monday, Feb. 13, on her left biceps, a bruise on the right calf and a large bruise on the front of the left thigh some two by three inches, and several smaller bruises on the left thigh. She alleges in a further affidavit that the husband on Feb. 23 again made some kind of assault on her, striking her in the face, on the arms and back and pushing her, and she says that on Feb. 25, he seized her by the hair and pulled her off the chair and dragged her across the kitchen and addressed very wounding and abusive language to her.

The husband, by his affidavit which was sworn on Mar. 3, denied that he did any of the things that were alleged against him and put the whole matter in issue. Yesterday, having been the judge who heard the suit and having formed impressions and expressed my views then about the parties, I had the inevitably difficult task of deciding, with a mind as free from prepossessions as I could humanly hope to have, which of these parties I now find is telling me the truth. I see no reason for changing my view about their reliability as witnesses. I am satisfied that the wife is a truthful person and I see no reason to change my mind about her and I am satisfied that the allegations which she has made are well founded and that there have been these further breaches on the part of the husband.

The husband puts forward the case that this is a stratagem on the part of the wife to ensure that she will be able to continue to live with the children at this house, the matrimonial home, and he says that that is manifestly her real object. He grounds himself—in part, at least—on the fact that the wife has not availed herself of the opportunity which was open to her on Feb. 22 and since of applying to have the decree nisi which I pronounced in November made absolute. She

has not taken that step and her motives for not so doing have been questioned, and that has been prayed in aid of the submission that this is just a stratagem to keep the property. I think that the wife has dealt quite frankly with her attitude to the property, and I think that the best course that I can take now is to read para. 3 of the first of the affidavits sworn for the purpose of these proceedings, and that is the one dated Feb. 18, 1961, where she says:

"On Jan. 11, 1960, on the advice of my counsel I caused a notice to be issued by which it was asserted that the purchase of the matrimonial home on Jan. 29, 1957, which was purchased in the name of my husband but towards the purchase price and legal costs of which I contributed £230 as against £150 provided by my husband and which it had been agreed was to be purchased in joint names was a post-nuptial settlement and by which I sought a variation thereof. My object in so doing was to provide a home for the children and myself should this honourable court grant me a decree nisi."

Counsel for the husband submitted that she had no possible hope of establishing the settlement for which she is contending and that this would be an entirely futile application on her part. I am told, on the other side, that she does intend to pursue that claim, and I am now satisfied that she can at least have the matter adjudicated on without proceeding to apply for the decree absolute.

On the other hand, the husband would himself be entitled in a matter of some five or six weeks to make an application—which, in the discretion of the court, might be successful—for the making absolute of the decree nisi, and sooner or later the question of the interest in the property and the amounts contributed will be decided one way or the other. The parties are not in agreement as to the contributions that they have made, although it is beyond any doubt at all that it was the husband who had the mortgage of the house and it was the husband who, even up to the present time, has paid all the outgoings in respect of the mortgage, rates and insurance. The husband has continued to make payments to the wife of £5 a week. He told me that the outgoings in respect of the house amounted to some £4, which comes out of his average earnings of £17 a week.

The wife also, in para. 8 of the same affidavit to which I have referred, says this:

"I am advised and verily believe that should I succeed on my application for the variation of the alleged post-nuptial settlement I am likely to be able to remain in the matrimonial home. I feel that it is in the best interest of my children to attempt to retain the matrimonial home for them and that any other course, apart from the disturbance involved to them, will be fraught with uncertainty and difficulty. I am certain that the conduct of my husband is designed to drive me from the home and thereby force me to agree to the course which he desires to pursue of selling the said home. I have already suffered considerably from the cruelty with which he has treated me and I dread to contemplate what may happen in the future if this honourable court refuses me its protection."

So, as I have said, she has been quite open in her affidavit as to what attitude she has adopted, on advice, in regard to the home.

The husband, for his part, also says that he is anxious to do what would be in the best interests of the children, and he says in para. 7 of his affidavit, "My concern is for the children and I want to do the best I can for them." The husband says that it is true that he did in November leave the home for a matter of some five days, but that he found that he was unable to afford to live in lodgings and, therefore, went back. The wife puts forward the suggestion that he went back in order to force her into an agreement as to selling the house and if possible to secure the house for himself, to drive her out and to make it possible for him to sell.

Those are the facts, and I find that there have been breaches of undertakings on the part of the husband in the various ways which are set out in the affidavit and which were enlarged on in the witness-box. I am not of the view that they were grave and serious assaults, but they were undoubtedly assaults which caused distress and suffering to the wife and in fact caused her on one occasion to go to a doctor and I am satisfied that she is in a low state of health and in a highly nervous condition at the present time.

The issue has been raised whether the court has any jurisdiction to grant the injunction which has been sought in this case, and counsel for the husband has submitted with great ability that the court has no jurisdiction to grant an injunction in the form in which it is asked in the application. His submission is that once the decree nisi has been pronounced the parties are strangers and that all that remains in effect is the administrative act of the granting of the decree absolute. He concedes that in that interval opportunities are offered not only to the Queen's Proctor but also to others to intervene and that various steps can be taken in regard to the marriage until the decree has been made absolute. However, he submits that there was really no suit in being on which the court could found any jurisdiction to grant such an injunction as is now sought.

On the other hand, counsel for the wife referred me first of all to a passage in *RAYDEN ON DIVORCE* (8th Edn.), at p. 495, para. 35, under the heading "Molestation", which reads:

"When a matrimonial suit is pending (but not after final decree or after the petition has been dismissed), the court will restrain one spouse from forcing his or her society upon the other, and from other acts of molestation . . ."

Her submission was that there has been no final decree in the present case, and she referred me to *Smith v. Smith* (1), where it was held that where there had been a decree of judicial separation the functions of the court were at an end with the decree. *BUTT, J.*, said (2):

"The parties are now strangers to each other, and I have no jurisdiction over them. The proper person for Mr. Smith to apply to is a police magistrate."

It was submitted that the decree nisi is not equivalent to a decree of judicial separation and is not the final decree.

I accept that submission and in my judgment the court has jurisdiction to grant this injunction. I was assisted by a reference by counsel for the wife to *Anglo-Italian Bank v. Davies* (3), to which I need not refer in any detail. In substance it decided that there could be an injunction granted even after judgment. I was also referred to s. 45 of the Supreme Court of Judicature (Consolidation) Act, 1925 (4), in support of her submission.

Counsel for the husband invited me to consider *Silverstone v. Silverstone* (5). In that case *PEARCE, J.*, held that the Divorce Court has power to restrain a husband from entering the matrimonial home pending the hearing of the petition although he is the owner of the premises. Counsel for the husband in the present case submitted that not only on the facts of that case but from the very ratio of the decision the court would not act in that way after the granting of the decree nisi and would only take such a course before the decree nisi had been pronounced. *PEARCE, J.*, decided in that case that in spite of the fact that the husband was the only person with any proprietary interest in the flat in question he ought to grant an injunction in all the circumstances because of the danger

(1) (1889), 59 L.J.P. 15.

(3) (1878), 9 Ch.D. at pp. 286, 287.

(4) 18 HALSBURY'S STATUTES (2nd Edn.) 482.

(5) [1953] 1 All E.R. 556; [1953] P. 174.

(2) (1889), 59 L.J.P. at p. 16.

that if he did not forbid the husband the right to go to the premises it might result in pressure being brought on the wife. He said (6):

“It is desirable, if [the court’s] powers allow, that it should prevent her being bullied out of her remedy or deterred by pressure from seeking the help of the court.”

There is no authority directly in point, but I cannot accept the submission that the court is only entitled to act in that way where there has been no decree nisi—that is, only up to the date of the decree nisi—and it seems to me that if the court is satisfied, there being a suit still in existence, as there is in the present case, that the party who asks for the relief is in danger of being bullied out of some remedy which she seeks or is being subjected to pressure, then, by a parity of reasoning, the court is equally entitled to act certainly up to the date of decree absolute. I say nothing about what the position might be after decree absolute because I am not asked to deal with that.

I do not overlook the fact that counsel for the husband drew my attention to what in *Gorulnick v. Gorulnick* (7), HODSON, L.J., said of *Silverstone v. Silverstone* (8), in the course of his judgment (9):

“*Silverstone v. Silverstone* (8) was an extreme case, because the home was actually the flat of the husband and the wife had no proprietary interest in the property at all. But, without in any way seeking to cut down the discretion of the court to make an appropriate order in the right case which may involve one spouse ceasing to live under the same roof as the other, I do not see any circumstances in this case which would warrant this court in interfering with the exercise of the discretion by the learned judge who refused to make such an order.”

The next case to which I want to refer is *McDowell v. McDowell* (10). HODSON, L.J., said in the course of his judgment that the only question in the case was whether under s. 17 of the Married Women’s Property Act, 1882 (11) the court had power to say that two co-owners should not live together and that the husband should be the one to suffer. The wife’s case was that the court had such a wide discretion. *Lee v. Lee* (12) showed clearly that the court would hesitate to turn a wife out of a house owned by a husband to whom she looked for support, but this was not authority for taking property from the husband. The decision in *Cobb v. Cobb* (13) was exactly in point, save that there the wife claimed judicial separation, whereas here she had got it. The court had there indicated that where both parties had equal rights of ownership, s. 17 gave no power whereby one could turn the other out. There was no authority that s. 17 could give the court jurisdiction to turn a husband out of the occupation of the dwelling-house. The court was not dealing with protection from molestation, or an application under s. 12 of the Act of 1882, and the appeal must be allowed.

I appreciate that to keep a husband out of his property (although there is in the present case a contest as to what is the true position) is not a course that one would take unless one felt that it was the only sure means of preventing the wife from being molested. Being satisfied, as I am, on the point of jurisdiction, I have given the best consideration that I can to the question whether or not I ought to go as far as to keep the husband out of the matrimonial home. Having regard to the history of this matter and the fact that I cannot accept that the husband would behave himself if he were allowed to go back to the home, in

(6) [1953] 1 All E.R. at p. 557; [1953] P. at p. 177.

(7) [1958] 1 All E.R. 146; [1958] P. 47.

(8) [1953] 1 All E.R. 556; [1953] P. 174.

(9) [1958] 1 All E.R. at p. 149; [1958] P. at p. 52.

(10) (1957), 107 L.Jo. 184.

(11) 11 HALSBURY’S STATUTES (2nd Edn.) 804.

(12) [1952] 1 All E.R. 1299; [1952] 2 Q.B. 489, n.

(13) [1955] 2 All E.R. 696.

view of his past conduct and the judgment that I have formed after hearing and considering all the evidence, I am of the view that it is just and convenient in all the circumstances—not forgetting the position of this rather frail wife and that of the two children, which is of importance—that I should make the order which is sought. The wife satisfied me that if the husband went back to the matrimonial home, if he were allowed back there even on terms that enjoined him not to molest her, she could not tolerate living with him again and could not cope with that situation, and that would mean that she would necessarily have to leave for the protection of her own health and well-being.

There will, therefore, be an injunction in the terms sought—which means, in effect, as I understand it, down to decree absolute if and when it is made—subject to the inclusion of the words “while the wife continues to reside there,” i.e., in the matrimonial home.

Order accordingly.

Solicitors: *Frederick Weil* (for the wife); *Denis Hayes*, agent for *Hewitt & Co.*, Dartford (for the husband).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

SANDERSON v. NATIONAL COAL BOARD.

[COURT OF APPEAL (Holroyd Pearce, Upjohn and Donovan, L.J.J.), May 17, 18, 1961.]

Coal Mining—Statutory duty—Breach—Maintenance of machinery—“Patent” defect—Projecting hook on conveyor belt—No evidence as to when defect occurred—Defence of impracticability of avoiding contravention—Mines and Quarries Act, 1954 (2 & 3 Eliz. 2 c. 70), s. 81 (1), s. 157.

The plaintiff was employed by the defendants as a packer at one of their collieries. One of his duties was to work underground, at the face of a seam, packing with stones brought on a branch conveyor which ran beside him. The conveyor's 260 yards of endless belt consisted of sixty segments which were joined with hooks. It was the duty of the beltman, who was posted at the junction of the branch conveyor and the main conveyor, to look for defects in the belt, to stop it when he saw anything wrong, and to repair it. On Jan. 22, 1959, one or more of the hooks on the belt came unfastened and projected, and, as the conveyor went past the plaintiff, caught his leg and dragged him. The plaintiff's shouts were not heard, so that the conveyor was not stopped, and, as the plaintiff clung to a prop to prevent himself being dragged further, the hooks were torn out of his leg, causing him injury. It was not known when the hooks came unfastened. At the time of the accident the only light where the plaintiff was working was his cap light. The plaintiff claimed damages against the defendants on the ground that the accident was caused by a breach of their statutory duty under s. 81 (1)* of the Mines and Quarries Act, 1954, in that the loose hooks were a patent defect within the subsection. While admitting that projection of the hooks was prima facie a patent defect under s. 81 (1), the defendants contended (a) that the plaintiff had not shown that his injury was caused by a breach of s. 81 (1), because the hooks might have come loose immediately before the accident and, therefore, there would not have been a patent defect at the moment of the accident since no one could have seen it at that time; and alternatively (b) that they were protected by s. 157† of the

* The relevant provisions of the subsection are printed at p. 798, letter G, post.

† The relevant provisions of the section are printed at p. 798, letter H, post.

Act, because, in such circumstances, it would have been impracticable to remedy the defect.

Held: the defendants were liable to the plaintiff for damages for breach of their statutory duty under s. 81 (1) of the Act of 1954, for the following reasons—

(i) the liability under s. 81 (1) was absolute, and the breach of statutory duty started as soon as a defect became patent and continued until the defect was remedied.

Hamilton v. National Coal Board ([1960] 1 All E.R. 76) applied.

(ii) the meaning of “patent” was objective, not subjective; it meant “observable” and not “observed”, and a patent defect did not become latent because there was no one to observe it or because it had moved into darkness.

(iii) the defendants were not protected by s. 157, because the onus was on them to show that it was impracticable to avoid the contravention, viz., in the present case, that it was impracticable to avoid the hooks protruding, and they had failed to prove that.

Appeal allowed.

[As to breach of statutory duty on the part of a mine owner and as to the defences open to an owner, see 26 HALSBURY'S LAWS (3rd Edn.) 566, 568, paras. 1136, 1138.

As to the maintenance of machinery and apparatus in a coal mine, see 26 HALSBURY'S LAWS (3rd Edn.) 691, para. 1316.

For the Mines and Quarries Act, 1954, s. 81 (1) and s. 157, see 34 HALSBURY'S STATUTES (2nd Edn.) 578, 627.]

Cases referred to:

Brown v. National Coal Board, [1960] 3 All E.R. 594; [1961] 1 Q.B. 303; [1960] 3 W.L.R. 892.

Edwards v. National Coal Board, [1949] 1 All E.R. 743; [1949] 1 K.B. 704; 2nd Digest Supp.

Hamilton v. National Coal Board, [1960] 1 All E.R. 76; [1960] A.C. 633; [1960] 2 W.L.R. 313.

Appeal.

The plaintiff, James Arthur Sanderson, appealed from a judgment of His Honour JUDGE OULD, given at Wakefield County Court on Nov. 16, 1960, whereby he dismissed the plaintiff's claim against the defendants, the National Coal Board, for damages for personal injuries sustained by the plaintiff on Jan. 22, 1959, in the course of his employment by the defendants as a packer at Grigglesstone Colliery, which was a coal mine subject to the provisions of the Mines and Quarries Act, 1954. The plaintiff alleged that the accident was caused by the negligence of the defendants, their servants or agents, or by a breach of their statutory duty under s. 81 (1) of the Act of 1954. The defendants, by their defence, denied any liability for the plaintiff's accident and pleaded that, if they were in breach of any statutory duty, they relied on the defence under s. 157 of the Act. The county court judge found (a) that negligence was not proved, and (b) that the defendants were in breach of s. 81 (1) of the Act of 1954 but escaped liability under s. 157.

The facts appear in the judgment of HOLROYD PEARCE, L.J.

P. Stanley Price, Q.C., and *A. W. Lyon* for the plaintiff.

Marven Everett, Q.C., and *J. R. Pickering* for the defendants.

HOLROYD PEARCE, L.J.: The plaintiff appeals against a judgment of the learned judge of Wakefield County Court dismissing a claim for damages for personal injuries founded on negligence and breach of statutory duty. The plaintiff was employed as a packer in the defendants' colliery. He was working with a mate underground at the face of a seam two feet six inches high branching

off from the main gate. The only light was his cap light. A conveyor was moving gradually along the face where he was working towards the main gate where the main conveyor ran outby. He was packing with stones brought on the branch conveyor that ran beside him. One or more of the hooks which joined together the sixty segments of the conveyor's 260 yards of endless belt came unfastened and projected, so that, as the conveyor went past the plaintiff where he crouched, they caught his leg and dragged him. There was or should have been a beltman at the junction of the branch conveyor and the main conveyor, but the plaintiff's shouts were unheard. The conveyor was, therefore, allowed to run unchecked. The plaintiff had to hold on to an upright to stop himself being dragged towards the rollers at the end of the branch conveyor, and the hooks were thus torn out of his leg, causing injury.

The plaintiff's case, supported by his evidence and that of his fellow packer, was that the beltman was not at his post at the junction of the branch and main conveyors. The defendants' case was supported by a deputy and the beltman. According to the beltman's evidence, he had been doing his duty; it would have been very wrong for him to leave the belt. Part of the beltman's work was to look for defects in the belt. If he saw anything suspicious or any loose hook, he always stopped the belt. Sometimes, he said, he had to turn away from the belt, as his eyes could not look at it all the time without straining them. According to the defendants' evidence, the condition of the belt after the accident, apart from hooks sticking out, was satisfactory. The plaintiff admitted that hooks come loose regularly. If they are not too bad, he said, the beltman cuts the corner off the belt where they have come loose and lets the belt go on. It is the beltman's job to repair the belt. The judge accepted that the belt was in satisfactory condition, but it was conceded at the trial (in my view, rightly) by defendants' counsel that projection of the hooks was a patent defect under s. 81 (1) of the Mines and Quarries Act, 1954. The judge found that common law negligence was not proved, and against that finding there is no appeal. He found that the defendants were in breach of s. 81 (1) of the Act of 1954, but that they escaped liability by virtue of s. 157 of the Act. As to the disputed facts, the judge said:

"... there were two witnesses against two witnesses and, on the material parts of the evidence, the witnesses clashed violently. On the disputed matters, the plaintiff has failed to satisfy me. I cannot say one way or the other who is lying. I do not know which side to believe."

Therefore, so far as disputed matters are concerned, nothing was proved by either side. It is equally possible that the beltman was absent and negligent or that he was present and doing his duty.

The material words of s. 81 (1) of the Act are as follows:

"All parts and working gear . . . shall be of good construction, suitable material, adequate strength and free from patent defect, and shall be properly maintained."

The material words of s. 157 are:

"It shall be a defence in any legal proceedings to recover damages . . . in so far as the proceedings . . . are . . . based on an allegation of a contravention, in relation to a mine or quarry, of—(a) a provision of this Act . . . to prove that it was impracticable to avoid or prevent the contravention."

The judge was right in holding that the plaintiff had proved injury caused by a breach of s. 81 (1). It was argued before us by the defendants that the plaintiff had failed to prove that his injury was caused by a breach, for the hook might have broken loose immediately before the accident and there would then, at the moment of the accident, have been no patent defect, since there was no one who could have seen it and there was no practical possibility of remedying it. A defect, it is argued, was not patent when there was no one to see it. It was not proved by the plaintiff that there was any appreciable interval between the

extrusion of the hook and the accident, and it is said that, unless it was proved that there was time for anyone to observe or mend the hook, the defendants are not liable. Reliance was sought to be placed on *Brown v. National Coal Board* (1); but that case is not comparable, for it dealt with the position under another section (2) which lays on the manager personally a duty to take steps. Such a personal duty involves a different conception from the impersonal unqualified provision that all working gear shall be free from patent defect and shall be properly maintained.

In *Hamilton v. National Coal Board* (3) the House of Lords held that liability under s. 81 (1) was absolute. VISCOUNT SIMONDS said (4): "This is what is sometimes called an absolute obligation." Later in his speech he said (5):

"The word 'absolute' in this connexion has become part of the dictionary of the law. Sometimes the word 'continuing' is substituted for it. Either word means that, in effect, the employer warrants that the machine or other equipment which he is obliged to maintain will never be out of order. It is, no doubt, a difficult conception, but the employer has his refuge in the escape section of the relevant Act, so far as it applies."

Therefore, as soon as there is a patent defect, there is automatically a breach of statutory obligation or, as it were, breach of warranty. That breach starts when the defect becomes patent and continues until the defect is remedied. There is no room in that conception for a period of grace during which someone can observe or mend the defect. It is a notional breach without reference to negligence or reasonableness or practicability. The notion of practicability is only introduced when s. 157 has been brought into force. A patent defect is not latent when there is none to observe it. The natural meaning of the word "patent" is objective, not subjective. It means "observable", not "observed". A patent defect must be apparent on inspection, but it is not dependent on the eye of the observer; it can "blush unseen". In this case, although the defect was in darkness, it was patent. Had the plaintiff or his mate shone his lamp on it at the relevant moment, he would have seen it. The construction of the word "patent" for which the defendants contend involves the conclusion that a patent defect at the belt head becomes a latent defect immediately it has turned over the rollers and is making its hidden journey in the darkness, and that it is intermittently latent or patent according to its position. Such a construction is unreasonable and would severely limit the protection given by s. 81 (1) in a way that Parliament cannot have intended.

The judge was right, therefore, in holding that the plaintiff had established his *prima facie* right of action for breach of s. 81 (1). But I cannot, with all respect, accept his reasoning in respect of s. 157. He said:

"The evidence is quite clear—indeed, it is common ground—that this belting may for various reasons causing undue strain come adrift at any time without negligence on the part of anybody and without any warning. There may be belts which only come apart if they are not properly maintained, but that is not this case. I therefore rule that the defendants have proved that it was impracticable to avoid or prevent the breach. They get the benefit of the section immediately because it is common ground that this occurrence can happen without fault on anybody's part. If, however, the plaintiff could show that the defect existed, say, for four or five minutes before he was injured, the defendants would lose the benefit of s. 157, because, while they could not prevent the defect happening, they should prevent its continuing. That the plaintiff cannot show on the evidence.

(1) [1960] 3 All E.R. 594; [1961] 1 Q.B. 303.

(2) Section 48 (1) of the Act of 1954.

(3) [1960] 1 All E.R. 76; [1960] A.C. 633.

(4) [1960] 1 All E.R. at p. 77; [1960] A.C. at p. 639.

(5) [1960] 1 All E.R. at p. 78; [1960] A.C. at p. 639.

Therefore, although there is a *prima facie* breach of s. 81 (1), the defence under s. 157 succeeds."

The learned judge, with all respect, erred in saying that the plaintiff had, for the purposes of s. 157, to show that the defect existed, say, for four or five minutes before he was injured. He did not have to show anything. The onus was on the defendants; and they had proved nothing, save that such an accident could have happened without their negligence. The mere fact that an accident may have happened in a way which it was impracticable to avoid is beside the point. It is true that it may have happened so. But they had to prove that it probably happened so, and they have not done that. It is equally possible that the beltman was absent from his post and, therefore, failed to see the hook which he would otherwise have seen and remedied. It is equally possible that better arrangements could have been made. The evidence of impracticability is not strong, even had the judge believed the defendants' witnesses, but he did not. To get the valuable benefit of s. 157, the defendants must prove that it was impracticable to avoid the contravention. That is a matter which must be proved by evidence, not deduced by casual inference. In *Edwards v. National Coal Board* (6), TUCKER, L.J., said:

"It was, I think, a heavy burden. They [the National Coal Board] occupied a position between that of an absolute insurer and the ordinary occupier of property, but they start as insurers and have by evidence to divest themselves of this status."

In the present case, the defendants have proved nothing which could divest them of that status. I would, therefore, allow the appeal.

UPJOHN, L.J.: I agree with the judgment which has just been delivered, and do not desire to add anything.

DONOVAN, L.J.: I also agree. It was conceded at the trial that the protruding hook or hooks constituted a defect patent to the plaintiff. I think that this was a proper and, indeed, unavoidable concession; and, if the defect were patent to the plaintiff, it was equally patent to any informed person who chose to look at or examine the belt. The test here, I think, is purely objective. There was thus a breach of the absolute obligation imposed by s. 81 (1) of the Mines and Quarries Act, 1954. To avoid the consequences, the defendants have to show, under s. 157, that it was impracticable to avoid or prevent the contravention. In terms of this case, that means that it was impracticable to prevent the hook or hooks in question from protruding and remaining protruding as they did on this occasion. The defendants never began to prove that. The most that they established was that they were not negligent; that is, that they took all reasonable care. But the boundaries of practicability are wider than the boundaries of reasonable care; and over the boundaries of reasonable care the defendants never by their evidence tried to go. They may well be able to do so in some future case. It is too late to do so in this.

Appeal allowed. Leave to appeal to the House of Lords refused.

Solicitors: *Corbin, Greener & Cook*, agents for *Raley & Pratt*, Barnsley (for the plaintiff); *D. H. Haslam*, agent for *C. M. H. Glover*, Doncaster (for the defendants).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

Re TETSALL (*deceased*). FOYSTER AND ANOTHER v.
TETSALL AND OTHERS.

[CHANCERY DIVISION (Cross, J.), May 5, 9, 1961.]

Will—Legacy—Misdescription—Shares—Bequest of “my 750 ordinary shares” in named company—Testatrix possessed of 7,500 ordinary shares in company at date of will and date of death—Testatrix’ original holding consisted of 750 shares—Bonus issue of 6,750 received before date of will—Whether gift passed all testatrix’ shares in the company—Whether earlier wills admissible as evidence of intention—Whether gift failed for uncertainty.

On the death of her husband in 1941, the testatrix became entitled to 750 ordinary shares in a company. In 1951, as the result of a capitalisation of reserves, the company issued nine fully paid-up ordinary shares to every shareholder in respect of each share held by him or her, so that the testatrix became entitled to a further 6,750 ordinary shares in the company, making 7,500 shares in all. By her last will, dated Nov. 13, 1954, she bequeathed to her nephew, E.C.T., “my 750 ordinary shares” in the company, and divided her residuary estate among other beneficiaries. At the date of her will and at the date of her death, the testatrix held 7,500 ordinary shares in the company. She had made two earlier wills, the first in 1947 and the second in 1952, and both those wills contained a bequest to the nephew of “my 750 ordinary shares” in the company. On a summons by the executors to determine whether all the 7,500 shares in the company held by the testatrix, or only 750 of such shares, passed under the gift to the nephew, affidavit evidence as to the earlier wills was sought to be admitted on behalf of the nephew to show the intention of the testatrix to bequeath to him all her shares in the company.

Held: (i) the earlier wills were admissible in evidence, because this was a case of misdescription, and, therefore, the court was entitled to consider any evidence (including that contained in an earlier will) which might show that the testatrix had on other occasions used the same words to describe a subject-matter to which they did not properly refer.

Re Ofner, Samuel v. Ofner ([1909] 1 Ch. 60) applied.

(ii) the words of the testatrix’ bequest were not a misdescription of the 7,500 shares and, although it might be almost certain that she wished to give the 7,500 shares to her nephew, yet she had not used words which expressed that intention.

(iii) what the testatrix had misdescribed was a particular parcel of 750 shares and, although the gift of “my 750 ordinary shares” in the company was in terms a specific gift, it did not fail for uncertainty but passed 750 of the 7,500 ordinary shares.

Re Cheadle, Bishop v. Holt ([1900] 2 Ch. 620) applied.

[As to the admissibility of evidence to show a misdescription in a will, see 34 HALSBURY’S LAWS (2nd Edn.) 176, 186, 187, paras. 228, 238, 239; and for cases on the subject, see 44 DIGEST 636, 637, 4700-4706.]

As to the rule of construction in the case of misdescription in a will, see 34 HALSBURY’S LAWS (2nd Edn.) 227, 230, 232, paras. 284, 286 and 288.]

Cases referred to:

Asten v. Asten, [1894] 3 Ch. 260; 63 L.J.Ch. 834; 71 L.T. 228; 44 Digest 214, 407.

Cheadle, Re, Bishop v. Holt, [1900] 2 Ch. 620; 69 L.J.Ch. 753; 83 L.T. 297; 44 Digest 216, 423.

O’Brien, Re, Little v. O’Brien, (1946), 115 L.J.Ch. 340; 175 L.T. 406; 2nd Digest Supp.

Ofner, Re, Samuel v. Ofner, [1909] 1 Ch. 60; 78 L.J.Ch. 50; 99 L.T. 813; 44 Digest 616, 4437.

Adjourned Summons.

By their originating summons dated Jan. 14, 1960, the plaintiffs, as two of the trustees (the first defendant, Ernest Cecil Tetsall, being the third trustee) of the will of the testatrix, Margaret Ellen Tetsall, deceased, applied to the court under R.S.C., Ord. 55, r. 3 and r. 4, to determine the question whether, on the true construction of the will, the bequest therein to the first defendant of "my 750 ordinary shares in Charles R. Watson and Co., Ltd." (a) passed to the first defendant all the 7,500 shares in the company held by the testatrix at her death; or (b) passed to the first defendant 750 and no more of the shares in the company held by the testatrix at her death so that the remaining 6,750 of such shares so held by her formed part of her residuary estate; or (c) had some other, and if so what, effect.

A. A. B. Fuller for the plaintiffs, two of the trustees.

B. J. H. Clauson for the first defendant, the specific legatee and a trustee.

M. G. Johnston for the other defendants, residuary legatees.

CROSS, J.: The testatrix, Margaret Ellen Tetsall, made her last will on Nov. 13, 1954. After appointing executors, by cl. 2 she bequeathed to her nephew, Ernest Cecil Tetsall, who is the first defendant:

"... my 750 ordinary shares in Charles R. Watson and Co., Ltd. of Bury St. Edmunds together with any dividends accrued thereon at the time of my death all free of death duty and in the event of his predeceasing me I bequeath the same free of death duty to his wife Ann Tetsall."

After making a number of other bequests, she disposed of her residue among a number of persons who or whose representatives are the second to the thirteenth defendants. She died on Jan. 6, 1958, and probate of her will was granted on Apr. 2, 1958. At the date of her will and at the date of her death she was beneficially entitled to 7,500 ordinary shares in Charles R. Watson and Co., Ltd. The problem which is raised by this summons is, does the gift of "my 750 ordinary shares" in Charles R. Watson and Co., Ltd. pass all the 7,500 shares? Alternatively, does it pass 750 of those shares? Or, as a final alternative, does it fail for uncertainty and pass nothing at all?

The bequest is a specific bequest. It is not a bequest of 750 shares out of the testatrix' shareholding in the company. It is a bequest of a particular parcel of 750 shares described by her as "my 750 ordinary shares". What shares were they? I think there is no doubt that, in trying to solve this problem, I am entitled to know how the testatrix became entitled to the 7,500 shares which she had when she made her will. The facts are that her husband, who died on June 29, 1941, was beneficially entitled to 750 ordinary shares of the company. He made the testatrix his sole executrix and left his residuary estate, including these shares, to her. She was not in fact ever registered as owner of the shares; but a notice of the testator's death was indorsed on the certificate by the secretary of the company, and counsel on both sides agree that the fact that she was not registered as holder of the shares is irrelevant. She was for all practical purposes the owner of these shares. Then, in 1951, the company capitalised certain reserves and issued nine fully paid-up shares to every shareholder in respect of each ordinary share held by him or her. The result of that was that the testatrix became entitled to a further 6,750 shares, making her total holding 7,500. The additional shares, also, by mistake were registered in her husband's name instead of hers, but, again, nothing turns on that.

In spite of objection by counsel for the residuary legatees, I looked at certain earlier wills made by the testatrix and certain instructions for those wills which were in her handwriting. This is, I think, a case of misdescription, and in such a case the court is entitled to look at any evidence which shows that the testatrix on other occasions used the words in question to designate some person or object to which they do not properly refer, even though that evidence is contained in an earlier will or instructions for an earlier will (see *Re Ofner*,

Samuel v. Ofner (1)). But, having looked at them, I do not think that the wills and instructions in question constitute evidence of this sort. In June, 1947, before the capitalisation of reserves and the issue of new shares, the testatrix made a will which contained a bequest of "my 750 ordinary shares" to the first defendant. Of course, at that stage there was no misdescription since she owned only 750 shares. Then in September, 1952, after the issue of the new shares, the testatrix made a new will in which she made a gift to the first defendant in the same terms as those contained in her previous will, namely, "my 750 ordinary shares", with a substitutional gift in favour of his wife if he predeceased her. At the time when she made that will, and again when she made her last will in 1954, the words of the bequest were inappropriate to the situation because she had become the owner of 7,500 shares. But the fact that the earlier will would have carried all her shares if she had died immediately after making it and the fact that she repeated the bequest in the same terms after the issue of the new shares do not in the least tend to show that she was using the phrase "my 750 ordinary shares" to include the 7,500 shares. It is perfectly possible—indeed, probable—that she did not understand the import of the issue of the new shares and thought that she still had only 750.

Counsel for the first defendant referred me to several cases where the facts were that the testatrix had been possessed of some asset which had disappeared but might be said to have been replaced by some other asset which she possessed at the date of the will. In those cases the court was concerned to see whether it could trace the old asset which had disappeared into the new asset which existed when she made her will. This case does not seem to me to be like those cases at all. Here the 750 shares which she had acquired from her husband still continued to exist, and they exist today, though, no doubt, they were very much reduced in value by the issue of the 6,750 new "bonus" shares. If the testatrix had made no fresh will after 1947, when she made a bequest of all her "750 ordinary shares" to the first defendant, I do not see how it could have been argued that the whole 7,500 shares would have passed under the gift. The position then would be that, having made a gift which was intelligible in relation to the number of shares which she held when she made her will, she had subsequently acquired further shares but had made no alteration in her will. Her failure to alter her will might have been due to ignorance of or forgetfulness as to the issue of the new shares, or she might have thought that the new shares became an accretion to and part and parcel of the old shares. But there would have been, in those circumstances, no warrant for construing the gift of 750 shares, which was perfectly sensible when the will was made, as including the 7,500 (see *Re O'Brien, Little v. O'Brien* (2)). Counsel for the first defendant argues that the whole position is altered by the fact that, instead of leaving the 1947 will unrevoked, the testatrix made another will and, indeed, more than one other will, after the issue of the new shares, in which the same wording was used. That, of course, raised a case of misdescription. But what was the misdescribing? I see no reason to think that she was referring to the 7,500 shares. It is far more likely that she had misunderstood or forgotten about the issue of the additional shares and was still referring by the words "my 750 ordinary shares" to the original 750 shares. I have very little doubt that, if her attention had been called to the position, she would have phrased her gift differently and would have given all the shares to the first defendant. She did not pay anything for the additional shares; they came to her automatically because she was the owner of 750 shares which she had been given by her husband; and after the issue of the new shares the value of the old shares went down correspondingly. I think that it is almost, if not quite, certain that she would have wished all the 7,500 shares to go to the first defendant, but, unfortunately, it is not enough for me to be satisfied what a testatrix would have wished to happen to her property; I must be satisfied that the words which she has used, construed in the light of the

admissible evidence, achieve that result. For the reasons which I have tried to give, I am unable in this case to say that they do. A

That being so, what is the position? Do 750 shares pass, or does the whole gift fail for uncertainty? In that connexion I should refer to the decision of the Court of Appeal in *Re Cheadle, Bishop v. Holt* (3). There a testatrix made a gift of "my 140 shares in the Crown Brewery Company" to trustees on certain trusts. The position at the date of her will and at the date of her death was that she held 280 shares in the Crown Brewery Company of which forty were fully paid-up—they were £5 shares—and the other 240 were only paid-up to the extent of £2 10s. per share. It was not argued in that case by the legatees of the shares (indeed, on the facts I do not think that it could have been argued) that the whole 280 shares passed under the gift of "my 140 shares". What was argued was that the legatees had a right of selection and, therefore, they could take the forty fully paid-up shares and one hundred of the partly paid-up shares. On the other side, the residuary legatees first sought to counter that argument by putting in evidence by the solicitor who drew up the will to the effect that the testatrix intended to give 140 partly paid-up shares. Apparently she had never told him that she had any other shares. The Court of Appeal, affirming the decision of KEKEWICH, J., on that point, said that that evidence was not admissible because, to quote RIGBY, L.J. (4): B C D

"It is not a case of mere equivocation—a case in which the words used by a testator turn out to be equally descriptive of two distinct subject-matters."

Having failed to get in that evidence of intention, the residuary legatees next argued that the fact that the gift was a specific gift, i.e., that the testatrix was referring to some particular 140 shares, was inconsistent with a right of selection in the legatees. On that point, the Court of Appeal, reversing the judgment of KEKEWICH, J., held that the residuary legatees were right and that the legatees of the shares had no right of selection. It does not appear to have been argued by the residuary legatees that, on that footing, the gift failed for uncertainty because one could not say which of the shares were referred to by the gift of "my 140 shares"; but the Court of Appeal took the view that, as there were more than 140 partly paid shares out of which the gift could be satisfied, it should be treated as equivalent to a gift of 140 of the partly paid shares. That conclusion may perhaps be open to some criticism from the point of view of logic, because, having emphasised, when dealing with the suggested right of selection, that the gift was a specific gift, the court then appears to have treated it as equivalent to a general or demonstrative gift in order to prevent it failing altogether. But where one is dealing with a number of identical objects the conclusion makes a considerable appeal to one's common sense. In any case I could not assume that the Court of Appeal had not the possibility of a total failure of the gift in mind. It was a reserved judgment of the court, and they referred with approval to the judgment of SIR ROBERT ROMER, J., in *Asten v. Asten* (5), where the learned judge held on the facts of that particular case that the gift had failed for uncertainty. If necessary, therefore, I would be prepared to treat that decision as an authority binding on me to give 750 shares to the first defendant. This is really a stronger case, however, because, as I have indicated, I think that the testatrix was misdescribing a particular parcel of 750 shares. E F G H I

Order accordingly.

Solicitors: *Gibson & Weldon*, agents for *Kersey, Tempest & Latter*, Ipswich (for all parties other than the first defendant); *Moodie, Randall, Carr & Miles*, agents for *Bankes, Ashton & Co.*, Bury St. Edmunds (for the first defendant).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

AVIATION AND SHIPPING CO., LTD. v. MURRAY (INSPECTOR OF TAXES).

[COURT OF APPEAL (Holroyd Pearce, Upjohn and Donovan, L.JJ.), May 5, 8, 9, 1961.]

Income Tax—Discontinuance of trade—Shipping company—Acquisition of subsidiary's two tramp ships—Ships managed before and after acquisition by same management company—Subsequent sale of the two ships by shipping company—Whether permanent discontinuance of trade—Finance Act, 1954 (2 & 3 Eliz. 2 c. 44), s. 17 (3).

In 1947 the taxpayer company acquired all the issued capital of a company, which thus became its subsidiary company, in order to enable the taxpayer company to exercise an option of the subsidiary company to purchase two ships. Thereafter the taxpayer company's three ships and the two of the subsidiary were managed by a third company and chartered to a fourth. On Dec. 30, 1954, the taxpayer company took over the two ships of its subsidiary company, and there was thereupon a discontinuance of the trade of the subsidiary company and a succession to that trade by the taxpayer company within the Income Tax Acts. In February and March, 1955, the taxpayer company sold the two ships so acquired along with one of its own because they were old, slow and obsolete coal-burning ships requiring replacement and it bought three modern, faster diesel tramp ships in their place. On appeal against the taxpayer company's assessment to income tax, the Special Commissioners held that after December, 1954, the taxpayer company carried on one shipping trade which was a merger of its trade with that of its subsidiary and that, accordingly, the trade acquired from its subsidiary company was not permanently discontinued when the taxpayer company sold the two ships in February and March, 1955. On appeal,

Held: on the sale of the ships in 1955 there was no discontinuance of trade, because the taxpayer company, by the sale and replacement of the ships, was only replacing its stock-in-trade, but the trade itself was an organised enterprise seeking after profits by the use of the ships and that enterprise was not discontinued; it was thus immaterial whether, after the subsidiary company ceased to carry on business on Dec. 30, 1954, the taxpayer company's trade was or was not notionally to be regarded for income tax purposes as two separate trades (by virtue of s. 17 (3) of the Finance Act, 1954), for on neither hypothesis had there been a discontinuance.

Dictum of ROWLATT, J., in *Graham v. Green* ([1925] All E.R. Rep. at p. 692) applied.

Decision of DANCKWERTS, J. ([1961] 1 All E.R. 126) reversed.

[As to succession to a trade for income tax purposes, see 20 HALSBURY'S LAWS (3rd Edn.) 130, para. 231; and as to discontinuance where activities are continued by some other person, see *ibid.*, 135, para. 238; and for cases on the subject, see 28 DIGEST (Repl.) 65-68, 240-255, and 70, 265-267.

For the Finance Act, 1953, s. 19, see 33 HALSBURY'S STATUTES (2nd Edn.) 119; and for the Finance Act, 1954, s. 17, see 34 HALSBURY'S STATUTES (2nd Edn.) 296.]

Cases referred to:

Briton Ferry Steel Co., Ltd. v. Barry, [1939] 4 All E.R. 541; [1940] 1 K.B. 463; 109 L.J.K.B. 250; 162 L.T. 202; 23 Tax Cas. 414; 28 Digest (Repl.) 67, 251.

Graham v. Green, [1925] All E.R. Rep. 690; [1925] 2 K.B. 37; 94 L.J.K.B. 194; 133 L.T. 367; 9 Tax Cas. 309; 28 Digest (Repl.) 28, 119.

Appeal.

The taxpayer company appealed to the Special Commissioners of Income Tax against an assessment to income tax for 1956-57 made under Case I of Sch. D to the Income Tax Act, 1952, in the sum of £205,000 in respect of its profits as shipowners. On Dec. 30, 1954, the taxpayer company acquired from its wholly owned subsidiary, Ascot Shipping Co., Ltd., the only two ships of that company, making its total number of ships up to five, all of which at that time were chartered to British Iron and Steel Co. (Ore), Ltd. On Feb. 15, 1955, the taxpayer company sold one of the ships and on Mar. 14, 1955, it sold the other. It was common ground between the parties that the condition of "consanguinity" required by s. 17 of the Finance Act, 1954, applied as between the taxpayer company and the subsidiary company. The questions to be determined arose under s. 17 of the Act of 1954, and were: (i) whether the trade of the subsidiary company was permanently discontinued on Dec. 30, 1954; (ii) if not, whether the taxpayer company succeeded on that date to the trade until then carried on by the subsidiary company; (iii) if the taxpayer company did succeed to that trade, whether the trade was permanently discontinued when the second of the two ships was sold on Mar. 14, 1955; and (iv) if the trade was permanently discontinued on Dec. 30, 1954, whether the activities of the trade or part of them were carried on and fell to be treated as a separate trade by virtue of s. 17 (3) and, if so, whether such separate trade was permanently discontinued on Mar. 14, 1955.

The taxpayer company contended: (a) that the trade of the subsidiary company was permanently discontinued on Dec. 30, 1954; (b) that the taxpayer company carried on the activities of the subsidiary company after Dec. 30, 1954, and such activities accordingly fell to be treated as a separate trade by virtue of s. 17 (3) of the Finance Act, 1954, and such separate trade was discontinued on Mar. 14, 1955; (c) that if, on Dec. 30, 1954, there was a change in the persons carrying on the subsidiary company's former trade within the meaning of s. 17 (1) of the Finance Act, 1954, such trade was permanently discontinued on Mar. 14, 1955, when the second of the two ships was sold. The Crown contended: (i) that the trade of the subsidiary company was not permanently discontinued on Dec. 30, 1954, or on any subsequent date, but was carried on thereafter by the taxpayer company as part of its own trade; (ii) alternatively, that, if s. 17 (3) of the Act of 1954 applied to the transactions on Dec. 30, 1954, neither the activities of the subsidiary company's trade nor any part of them carried on by the taxpayer company thereafter as part of its own trade were permanently discontinued in the year ended Apr. 5, 1955; (iii) in the further alternative, that, if the trade or activities or any part of them were permanently discontinued after they became part of the taxpayer company's trade, s. 130 (1) of the Income Tax Act, 1952, did not apply because what was then discontinued was only part of a trade.

The commissioners held that there was a transfer of the subsidiary company's whole trade to the taxpayer on Dec. 30, 1954, and the case fell within s. 17 (1) of the Finance Act, 1954, that the taxpayer company thereafter carried on one trade, a shipping trade, which was a merger of the trade which it had previously carried on with the trade previously carried on by the subsidiary company, so that there was one business only, i.e., that of the person carrying it on. No trade was permanently discontinued on the sale of the ships to outsiders, nor did the trade pass to those outsiders. On Nov. 4, 1960, DANCKWERTS, J., allowed the taxpayer company's appeal by way of Case Stated against that decision ([1961] 1 All E.R. 126), holding that there had been a permanent discontinuance of the trade acquired from the subsidiary in March, 1955, this trade requiring to be treated as a separate trade by virtue of s. 17 (3) of the Finance Act, 1954. The Crown appealed to the Court of Appeal.

Hilary Magnus, Q.C., and A. S. Orr for the Crown.

F. N. Bucher, Q.C., and P. M. B. Rowland for the taxpayer company.

UPJOHN, L.J., delivered the first judgment at the request of HOLROYD PEARCE, L.J.: This appeal involves the short point whether the sale of a ship on Mar. 14, 1955, leads to the conclusion that by reason of such sale the trade or business was discontinued on that day for the purposes of the Income Tax Acts. We are not concerned with any detailed question of construction of the Acts, but to make the point intelligible it is necessary to state briefly the relevant income tax provisions. The problem arises under an assessment of income tax under Case I of Sch. D (s. 122 of the Income Tax Act, 1952) in respect of profits earned by the taxpayer company, carrying on its trade of shipowner. The normal rule is that income tax is charged on the actual profits or gains of the year preceding the year of assessment (see s. 127 of the Income Tax Act, 1952); but there are special provisions which deal with the setting up of a new trade and the permanent discontinuance of an old one. When a new trade is set up, the trader is normally assessed on the profits or gains of his first year for the first three years of his trade. In the case of a permanent discontinuance, he is assessed, not on the profits of his penultimate year but on his last year, and the Crown has the right to re-open the accounts for the penultimate year.

While it is a basic rule of income tax law that it is the trade rather than the trader which is taxed, nevertheless, if in any year of assessment there is a change in the persons engaged in carrying on the trade, a special rule is introduced, viz., tax is charged on the person transferring the trade as though he had permanently discontinued it at the date of change, and on the person taking over the trade as though a new trade had been set up and commenced by him (see s. 19 of the Finance Act, 1953). This rule is subject to the exception contained in s. 17 of the Finance Act, 1954. That section provides that, in the case of interrelated companies satisfying the conditions laid down in the section, if one takes over the business of another, then the trade is not treated for the purposes of the Income Tax Acts as a permanent discontinuance and a new trade, but the realities are observed, viz., the trade is treated as continuing, and so the conventional assessment is made on the profits of the preceding year, and by virtue of Sch. 3 to that Act the tax is apportioned between the transferor and transferee companies. That section is admittedly applicable to the questions with which we are concerned in the present case.

With those preliminaries I proceed to the facts which are stated very fully in the Case Stated and I shall therefore deal with them shortly.

The taxpayer company has carried on for many years the business of ship-owners. It had a fleet of three deep-sea tramp ships and, as is usual with ship-owning companies, those ships were managed by managers, in this case Purvis Shipping Co., Ltd. which I will call "Purvis". At all material times, these ships were habitually employed on extended time charter to the British Iron and Steel Co. (Ore), Ltd., to which I will refer as "B.I.S.C.O."

In 1947 the taxpayer company acquired the whole issued capital of the company now known as Ascot Shipping Co., Ltd., to which I will refer as "Ascot". The reason for that was that the taxpayer company required further ships, of which there was a great shortage at the end of the war, and Ascot had an option to purchase two ships which could conveniently be run together with the existing three ships belonging to the taxpayer company. Ascot therefore exercised the option and acquired these two extra ships. I mention these details because counsel for the taxpayer company laid great emphasis on this historical event, although for myself I can ascribe no importance to it.

Purvis managed these ships on behalf of Ascot, and, like the other three ships, these ships were habitually employed on extended time charter to B.I.S.C.O. In truth the fleet of five ships was treated as one fleet and managed as such by Purvis, and they were always employed on time charter to B.I.S.C.O.

In law, however, it is not in doubt that each company was carrying on a separate trade as shipowners. Each company employed its own officers and men, and each had separate agreements with Purvis. The boards of directors of the companies were, I believe, identical; and, in accordance with the provisions of the Companies Act, 1948, as Ascot was a wholly owned subsidiary of the taxpayer company, consolidated accounts were put before the shareholders of the taxpayer company.

In 1954 it appeared to the board of directors of the taxpayer company that the continued existence of Ascot as a separate company served no useful purpose. Accordingly, as from Dec. 30, 1954, the taxpayer company took over all the assets of Ascot at their written-down book value in Ascot's books; Ascot declared a large dividend, which was received by the taxpayer company, and the shares in Ascot, which by this time had become a mere shell, were disposed of. The reality of this was plain for all to see. Ascot ceased to carry on business from Dec. 31, 1954, and the taxpayer company carried on one trade as shipowners owning five ships. On the occasion of this transfer, by agreement with B.I.S.C.O. the time charters in respect of Ascot's two ships, named respectively *Avisvale* and *Avismoat*, were transferred to the taxpayer company and all the officers and men on these ships, formerly employed by Ascot, were employed thereafter by the taxpayer company.

Before the Special Commissioners the first issue on these facts was whether there was a transfer of the trade from Ascot to the taxpayer company on Dec. 30, 1954, or whether, in view of the finding of the commissioners that there was no goodwill in the owning of a tramp ship, there was no transfer of Ascot's trade to the taxpayer company but only of its assets. This was vital to the application of s. 17 (1) of the Finance Act, 1954. Had the taxpayer company succeeded in its argument, the tax position would have fallen to be determined under s. 17 (3) of that Act.

However, I do not believe that it would have made the slightest difference to the determination of the particular question we have to determine, viz., whether there was a permanent discontinuance in March, 1955, had the matter fallen to be dealt with under sub-s. (3) rather than sub-s. (1). However, the commissioners decided that there was a transfer of Ascot's whole trade to the taxpayer company on Dec. 30, 1954. The taxpayer company appealed, but abandoned its appeal before *DANCKWERTS, J.*, and that is not in issue before us. It follows that, as s. 17 (1) applies on that succession, in order to ascertain the tax position arising as a result of the succession from Dec. 31, 1954, the taxpayer company must be treated as continuing its trade with three ships and as carrying on a second trade, formerly Ascot's, with two ships; in other words, for income tax purposes only, it is to be treated after the succession as carrying on two trades, and there must be an apportionment of tax in regard to Ascot's trade between Ascot and the taxpayer company as at Dec. 30, 1954.

All this is really a matter of history, although it is essential to have it in mind when we consider the problem which we have to determine. That problem depends on these facts. They are set out in para. 7 of the Case Stated, and again I recapitulate them only in the briefest form. The taxpayer company sold *Avisvale* to a foreign shipping company on Feb. 15, 1955, and *Avismoat* to another foreign shipping company on Mar. 14 of the same year. The taxpayer company also sold one of its own ships at the same time to another company. The reason for these sales in reality was perfectly clear. The two ships of Ascot and the one ship of the taxpayer company were old, slow and obsolete coal-burning ships and they required replacement. They were at once replaced by the taxpayer company, which purchased three modern, faster diesel tramp ships.

The whole question is whether, on the sale of the last of the ships formerly owned by Ascot, there was a permanent discontinuance of that trade. Counsel

for the taxpayer company contended that the relevant finding of the Special Commissioners, to be found in sub-paras. (3), (5) and (6) of para. 13, was to the effect that as from and after Dec. 30, 1954, in real truth and law, apart from income tax hypotheses, the trade of Ascot was thereafter transferred and merged in that of the taxpayer company, and that, when considering the legal result of the March transactions for tax purposes, one must consider the real facts, and the real facts only, at March, 1955. The true facts were that the taxpayer company was carrying on one trade and had sold three out of five ships with a view to replacement, and on that footing it is perfectly clear that there would be no discontinuance of the trade then being carried on by the taxpayer company. That, he says, was their finding.

Counsel for the taxpayer company then says that this is the wrong approach, and he contends that the hypothesis applicable when dealing with the succession in December, 1954, must be continued for the purpose of considering the tax position arising as the result of the sales in 1955 and the matter must be regarded as though Ascot's trade was still being carried on; and then further legal fictions must be introduced: Ascot must be regarded as notionally selling those ships in February and March, 1955, and, he says, that can only have taken place with a view to the discontinuance of business for Ascot was, at that time, a mere shell. Since December, 1954, he submits that Ascot had not been trading notionally as a shipowner but as a trader in two ships, so that when the ships were sold the trade necessarily ceased. Ascot had no cash available to purchase any ships, and so could not have intended to purchase replacement ships in March, 1955. Indeed he makes the point that the whole scheme of replacement, as is clear from the Case Stated and the documents annexed thereto, was a scheme promulgated by the directors of the taxpayer company in August and September, 1954 and had nothing to do with Ascot. Therefore, he says, this notional trade carried on by Ascot must be looked on notionally as having ceased in March, 1955.

I cannot accept this argument, based as it is on a mountain of fictions. It seems to me that the reality of the whole matter must be looked at as the commissioners looked at it. The question must be asked, why were the ships sold in reality? I have already given the answer, they were sold as part of the stock-in-trade for replacement. Whether the trade of Ascot is looked on as having merged in that of the taxpayer company (in which case there has only been the sale of three out of five ships) or whether the taxpayer company is regarded as still carrying on two trades (i.e., its own trade in three ships and Ascot's trade in two ships) in either event it seems to me clear that the real facts must be looked at, and, even if the taxpayer company is to be deemed to carry on Ascot's former trade, it was not permanently discontinuing its trade, it was replacing its ships by other ships and, as I have said, was only changing its stock-in-trade.

I am unable myself to agree with the conclusion of the learned judge, who accepted the view that Ascot was notionally continuing its trade in two ships and that that trade was permanently discontinued when the ships were sold. It seems to me that that decision, with all respect, runs counter to the clear facts of this case. I agree with the decision of the Special Commissioners. I would allow the appeal and restore their decision.

DONOVAN, L.J.: For the purposes of income tax, trading profits are normally computed on the amount accruing in the preceding year. When a trade begins, however, as well as when it ends, a departure from the normal rule is inevitable. When a trade begins there is no preceding year; and when it ends the trader may make no profit in his last year and yet have made a big profit in the preceding year; or it may be the other way round. Accordingly, the Income Tax Act, 1952, provides, by s. 128 and s. 129, to put the matter

very broadly, that when a trade is "set up and commenced" the trader shall be assessed on his actual profits for a period which may extend to the first three years; and by s. 130 that when it is "permanently discontinued" he shall be assessed on the actual profits of the last two years.

When a trade is neither begun nor ended, however, but instead is taken over by somebody else, the same treatment is applied. (I am ignoring, for the sake of simplicity, certain statutory exceptions.) The person acquiring the trade is taxed on its actual profits for up to the first three years after its acquisition. The person disposing of the trade is taxed on his actual profits from the trade for its last two years in his hands. The Act achieves this result by enacting that in such a case of "succession" the person succeeding to the trade is to be taxed "as if" the trade had been set up and commenced at the date of such succession; and the person disposing of the trade taxed "as if" it had been permanently discontinued as at the same date: see s. 145 (2) of the Act of 1952.

It follows from this that in a case where the successor already carries on a trade of the same kind as the one he acquires, for the purpose of assessment to income tax he is treated for a time almost as if he carried on two businesses, for the actual profits attributable to the trade he has taken over must be separately ascertained for up to three years after the takeover and added into the global Case I assessment on the trader. This operation may be easy where the acquired business remains readily identifiable, but it is not so easy in a case where it does not, and LORD GREENE, M.R., pointed out the difficulties in *Briton Ferry Steel Co., Ltd. v. Barry* (1). Where the acquired business is absorbed into, or merged with, a business already carried on by the successor, the statutory direction to tax the profits of the acquired business on an "actual" basis for up to three years may involve a very artificial operation. For a start, the acquired business has somehow to be separately identified so that its separate profits can be computed; and where there is absorption or merger, no doubt some artifice has to be resorted to, e.g., a proportion sum based on what capital sums were employed in the respective businesses before the merger.

During the argument in the present case this process has at times been called not merely artificial but "a pretence" and "imagination". In a sense so it is, because the outsider looking at the result of the absorption or the merger would say: "There is only one business now, not two". Nevertheless, it must not be forgotten that, in order that these income tax provisions relating to succession shall apply, the trade must be taken over *and continued*. It may be continued as part of a larger whole in which it loses much of its separate identity, but that is immaterial.

In the present case there was a succession by the taxpayer company to the trade of Ascot, but owing to the operation of s. 17 of the Finance Act, 1954 (which deals with certain associated companies), the foregoing rule of computation was excluded. The taxpayer company was assessed to income tax on the preceding year in respect of the profits from its own trade, and on the same basis in respect of the profits of the trade of Ascot, to which it had succeeded. It is claimed, however, that within some three months of this succession the trade of Ascot so taken over was permanently discontinued.

The facts of this case are such that, on this succession, Ascot's business was so absorbed in the business carried on by the taxpayer company that its separate identification needed some imagination, but not so much as in some other cases. But the question posed by the statute, when it is claimed by the successor, the taxpayer company, that it has permanently discontinued the business to which it succeeded, seems to me neither to require nor to allow the exercise of any imagination.

Section 130 (1) of the Income Tax Act, 1952 (and the wording of para. 1 (2) of Sch. 3 to the Act of 1954 is similar) reads: "Where in any year of assessment a

(1) [1939] 4 All E.R. 541; 23 Tax Cas. 414.

A trade . . . is permanently discontinued " and so on. Despite this language, counsel for the taxpayer company wants us to exercise, if need be, the same degree of imagination or make-believe as he says the rules regarding succession to a trade sometimes involve. As I read their decision, the Special Commissioners took the view that, when they had to decide the question, " Is Ascot's trade now discontinued? ", they had to look at the facts with the eye of cold reality; and so
 B looking at the facts in this case all they could see was one enlarged business and no discontinuance of that part of it which came from Ascot. I would not quarrel with that approach or with that conclusion.

Counsel for the taxpayer company supported his contention with arguments of some subtlety based on s. 17 (3) of the Act of 1954, and the content of para. 1 (2) of Sch. 3 to that Act. I hope I shall be forgiven if I do not pursue these, because it had to be admitted by counsel that none of them is really conclusive.
 C What I think is conclusive is that s. 130 of the Act of 1952, and para. 1 (2) of Sch. 3 to the Act of 1954, dealing with discontinuance, pose a plain question of fact, and I think that here the commissioners gave a reasonable answer to it.

Counsel for the Crown takes a different line, but leading to the same destination. He says that the trade taken over from Ascot does not cease merely by
 D the two ships being sold and replaced. I agree with that, too; and I do not think that this conclusion is to be overthrown by the facts which counsel for the taxpayer company stresses, viz., that the taxpayer company acquired the shares in Ascot originally simply to get the option, which Ascot had, to buy the two ships in question; and it was the taxpayer company's money which bought the replacements, and as part of the taxpayer company's policy.

E It has to be accepted that the taxpayer company succeeded to a separate trade carried on by Ascot. A trade is an organised seeking after profits, as a rule with the aid of physical assets. But the enterprise is not the same thing as the assets by which it is carried on. I should like to adopt and apply that which ROWLATT, J., first said in *Graham v. Green* (2) when speaking of a trade
 F "... there is something organic about the whole which does not exist in its separate parts." So here, in spite of the absence of goodwill in the case of a tramp steamer, I think there is something organic about the enterprise of running them which is distinct from the vessels themselves, so that when they are sold and replaced it cannot be said that on that account alone the enterprise has been discontinued. I agree that the appeal should be allowed.

HOLROYD PEARCE, L.J.: I agree with my Lords.

Appeal allowed. Leave to appeal to the House of Lords granted.

Solicitors: *Solicitor of Inland Revenue; Clifford-Turner & Co.* (for the taxpayer company).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

CROSSLAND (INSPECTOR OF TAXES) *v.* HAWKINS.

[COURT OF APPEAL (Holroyd Pearce, Upjohn and Donovan, L.JJ.), May 1, 2, 3, 1961.]

Income Tax—Settlement—Children—Arrangement—Company exploiting taxpayer's services—Taxpayer a director—Shares issued to trustees for taxpayer's children—Taxpayer aware of but not a party to transaction—Dividend paid from company's receipts from exploitation of taxpayer's services—Whether an arrangement—Whether taxpayer provided funds for the settlement—Income Tax Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 10), s. 397, s. 403.

In 1954 a company was incorporated with a nominal capital of £100. The subscribers to the memorandum of association, each of whom took one share, were two clerks of the taxpayer's solicitors. The taxpayer was a director and the business of the company was, among other matters, the making of engagements with artists and others and the assignment of their services. In December, 1954, the company made a service agreement with the taxpayer, who was an actor, under which it could assign or lend his services to a third party subject to his approval, which was not to be unreasonably withheld. The agreement was for two stage or film productions within three years. The company was to pay the taxpayer £50 a week for his services, and it would receive a much greater sum for exploiting them. On Mar. 3, 1955, the grandfather of the taxpayer's children made a settlement of £100 on trust to apply the income of the fund for the benefit of the children, and at the end of the trust period to hold the capital for the children then living. On the same date, under a power in the settlement, the trustees, who were the taxpayer's wife and his accountant, appointed the trust property and its income to each of the three children on their attaining twenty-five years of age in equal shares absolutely. The two shares in the company were transferred to the trustees of the settlement. They applied the £100 trust fund in subscribing for the remaining ninety-eight shares of the company, which were issued to them at the end of March, 1955. In 1956 the company received a sum of £25,000 for the taxpayer's services in relation to a film, and declared a dividend of £500 free of tax, which the trustees applied for the benefit of the children. Tax repayment claims were submitted by the taxpayer as the children's guardian, claiming back tax deducted at source on payment of the dividend, the claim being in respect of small income relief and personal allowances. On appeal the General Commissioners found, in relation to the execution of the settlement, that the taxpayer "was aware that steps were being taken to put into effect proposals of the accountants and solicitors, but he was not consulted with regard to them. He was not present at any meeting when the matter of the settlement was discussed or when the deed of settlement was made". They held that there was no "arrangement" constituting a settlement under s. 403* of the Income Tax Act, 1952, to which s. 397 (1)* could apply, and thus that the income applied for the benefit of the children was not required by s. 397 (1) to be treated as income of the taxpayer. It was conceded that if there were an "arrangement" within s. 397 the taxpayer had provided funds for the purposes of the settlement constituted by the arrangement, and thus had made himself a settlor within s. 403.

Held: (i) there was an "arrangement" within s. 397 of the Income Tax Act, 1952, and accordingly the tax re-claimed was not repayable, for the following reasons—

(a) it was not necessary in order to constitute an "arrangement" within s. 397 that the whole of the matter should have been in contemplation at the

* The relevant terms of s. 397 and s. 403 are set out at p. 816, letters C to F, post.

outset; in the present case there was sufficient unity about the matter (the company being formed, the service agreement executed and the settlement made within a twelvemonth) to justify the whole being regarded as an arrangement for the purpose of securing a lessening of the burden of tax, even though the final steps were left unresolved at the outset.

(b) in the year to which the repayment claim related the "arrangement" was complete and funds were provided in that year for the purposes of the settlement to which s. 397 (1) referred.

(ii) the decision of the General Commissioners that there had not been an "arrangement" within s. 397 was a decision of mixed fact and law and was open to review by the court; in any event, however, it was one which, on the evidence, could not reasonably have been reached.

Edwards v. Bairstow ([1955] 3 All E.R. 48) applied.

(iii) moreover, the taxpayer had provided funds for a settlement constituted by the deed of settlement alone because—

(a) the inference was that the two shares originally held by clerks to his solicitors were beneficially owned by the taxpayer, with the consequence that the transfer of them to the trustees of the settlement was a provision of funds for the settlement, and

(b) the taxpayer had been aware of the proposals of his accountants and solicitors, and that steps were being taken to put them into effect, and, on the facts, the dividend which ultimately was declared was provided by the taxpayer for the purposes of the settlement.

Appeal allowed.

[As to what constitute settlements on children for income tax purposes, see 20 HALSBURY'S LAWS (3rd Edn.) 573, para. 1117; and for cases on the subject, see 28 DIGEST (Repl.) 278-283, 1239-1255.

For the Income Tax Act, 1952, s. 397 and s. 403, see 31 HALSBURY'S STATUTES (2nd Edn.) 376, 380.]

Cases referred to:

Copeman v. Coleman, [1939] 3 All E.R. 224; [1939] 2 K.B. 484; 108 L.J.K.B. 813; 22 Tax Cas. 594; 28 Digest (Repl.) 282, 1251.

Edwards v. Bairstow, [1955] 3 All E.R. 48; [1956] A.C. 14; 36 Tax Cas. 207; [1955] 3 W.L.R. 410; 28 Digest (Repl.) 397, 1753.

Hood-Barrs v. Inland Revenue Comrs., [1946] 2 All E.R. 768; 176 L.T. 283; 27 Tax Cas. 385; 28 Digest (Repl.) 282, 1250.

Inland Revenue Comrs. v. Payne, *Inland Revenue Comrs. v. Gunner*, (1941), 110 L.J.K.B. 323; 23 Tax Cas. 610; 28 Digest (Repl.) 279, 1242.

Inland Revenue Comrs. v. Prince-Smith, [1943] 1 All E.R. 434; 168 L.T. 406; 25 Tax Cas. 84; 28 Digest (Repl.) 282, 1252.

Case Stated.

The taxpayer made a claim on behalf of his three infant children for repayment of income tax. The claim was objected to by the inspector of taxes and considered by the General Commissioners of Income Tax for West Brixton. The income involved comprised a dividend of £500 by a company of which the shares were owned by trustees for the benefit of the children, of which the taxpayer was a director and of which the dividend was paid out of funds produced by a service contract with the taxpayer. The taxpayer contended that the settlement of the income was a written settlement of Mar. 3, 1955, of which the settlor was a Mr. Horace George Beadle, that the taxpayer was not a party to any arrangement in connexion with that settlement and did not provide or undertake to provide funds for the purchase thereof and so was not a settlor within the meaning of s. 403 or s. 397 of the Income Tax Act, 1952, and that as guardian of the children he was entitled to the repayment. The Crown contended that the formation of the company on Dec. 3, 1954, the taxpayer's service agreement with the company on Dec. 10, 1954, the settlement of Mar. 3, 1955, and the acquisition, on Mar. 31,

1955, of the shares in the company formed an arrangement and therefore a settlement within s. 403 of the Act of 1952, and that the taxpayer was a settlor within the section as either the person by whom the settlement was made or who had provided funds directly or indirectly for the purpose of the settlement. The income therefore fell to be treated as the income of the taxpayer under s. 397 of the Act, and the refund claimed should be refused. The commissioners found that there was no arrangement to which s. 397 of the Act of 1952 should apply and that the taxpayer was not a settlor within the meaning of s. 403 of the Act, and the repayment was therefore due. On Nov. 14, 1960, DANCKWERTS, J., dismissed the Crown's appeal against that decision. The Crown appealed to the Court of Appeal.

B. L. Bathurst, Q.C., E. Blanshard Stamp and A. S. Orr for the Crown.
R. E. Borneman, Q.C., and C. N. Beattie for the taxpayer.

DONOVAN, L.J., delivered the first judgment at the request of **HOLROYD PEARCE, L.J.**: The heavy incidence of surtax on large incomes has for some time led artists and others in the world of entertainment to adopt the device of forming a limited company which they control, and, by means of a service agreement, giving the company the right to their services. In return, the company pays the artist some modest salary. The company then hires the artist out to whoever requires his services, and itself obtains the consideration for them. From its profits, the company must distribute a reasonable dividend, if it is to avoid surtax on the whole of its profits—see the Income Tax Act, 1952, s. 245—but it is allowed to make such reserves as are required for the maintenance and development of the business; and, where the business depends on the fortunes of a particular artist, these reserves may be considerable. In this way, surtax on the whole of the artist's earnings is reduced to surtax on the salary he gets from the company, plus such dividend as is distributed to him; and, when eventually the company is wound up, the accumulated reserves of past years will come to him as capital.

All this is perfectly legitimate, and indeed understandable in the case of persons whose high earnings may be short-lived. Mr. Hawkins, the present taxpayer, adopted such a scheme in May, 1954, using a company called Westmead Productions, Ltd., with a nominal capital of £100. The present appeal is not concerned with that scheme, but it may be useful to bear its existence in mind. The service agreement in that case was to last for five years only from April, 1954, and was confined to the services that the taxpayer was to render in the making of three productions, being stage plays or films.

On Dec. 3, 1954—the same year—there being presumably additional engagements in prospect, the scheme was repeated, this time with a new company called Roehampton Productions, Ltd. Again the capital of the company was a nominal capital of £100, and at first two shares alone were issued to the subscribers to the memorandum of association, who were, it would seem, clerks in the office of the taxpayer's solicitors. The business which the company was to carry on included the purchase and sale of real and personal property of all kinds, and in particular copyrights: the business of theatre and cinema proprietors and managers: the making, production and exploitation of motion pictures, and the making of engagements with artists and others, and the assignment of their services.

The service agreement with the taxpayer followed within a few days, on Dec. 10, 1954. It was declared to be subject to the taxpayer's existing engagements with Rank Productions, Ltd., and with the company Westmead Productions, Ltd., to which I have already referred. By the present agreement, the company agreed to engage the taxpayer, and he agreed to serve it as an actor or writer in two stage or film productions during three years from Dec. 10, 1954. It was provided, among other things, that—with the taxpayer's approval, which he was not unreasonably to withhold—the company could assign or lend his services to a third party. The company was to pay the taxpayer £50 a week and expenses

A during each week that he rendered services. The taxpayer was to be entitled to refuse to render any service which he reasonably thought would be detrimental to his reputation. The agreement is exhibited to the case, and I need not abstract it further. So far, the familiar pattern was followed: The company, and not the taxpayer, would receive the enviable salary for his work as an artist, and all the taxpayer would get would be £50 a week, at least until the company was wound up, and thus surtax would be reduced.

B Counsel for the taxpayer has strenuously contended before us that in the beginning nothing more was intended as a surtax saving operation. In particular, the settlement of the shares of this company which followed after an interval of about three months was not contemplated from the beginning, as the Crown in one part of its argument asked us to infer. There is no express finding in the Case Stated on this point; indeed the Case is not very fully or happily stated at all, but one conclusion is obvious and not, I think, disputed. The taxpayer was not going to make a present of his services, less £50 a week, to two clerks in his solicitor's office, who on the face of things were at the beginning the only shareholders in the company. At some time he would want to have the money which had escaped surtax for himself, e.g., in a liquidation of the company, D or to bestow it on others whom he wished to benefit, e.g., his family. Otherwise, the whole operation was pointless. I will accept for the moment the proposition that the family settlement which followed was not decided on at the outset; but what is important, I think, is that the eventual enjoyment by some individual or individuals of the money which had escaped surtax must have been in contemplation at the outset. Otherwise, as I say, the scheme had no rational E purpose.

The subsequent events were these:—At some time not specified in the Case, but which I think must have been before Mar. 31, 1955, the two solicitor's clerks transferred their shares, one to the taxpayer's wife and the taxpayer's accountant, to be held jointly, and one to the accountant himself. On Mar. 3, 1955, a Mr. Beadle, who is the grandfather of the taxpayer's children, made F a settlement of £100 of his own money for their benefit. The taxpayer's wife and his accountant were the trustees. The trustees were to stand possessed of the trust fund on trust to pay the income to, or apply it for the benefit of, the children of the taxpayer and his wife, in such proportions as they thought fit. At the end of a trust period defined in the settlement, the capital was to go to such of these children as were then living in equal shares, with certain contingent remainders over. Notwithstanding these provisions, the trustees were G empowered to appoint by deed all or any part of the trust property to any one or more of the beneficiaries under the settlement, either absolutely or contingently.

On the same day, Mar. 3, 1955, the trustees exercised this power and appointed H the trust property and its income to such of the three children of the taxpayer as should attain twenty-five, and if more than one, in equal shares, absolutely. The trustees of this settlement then used £98 of this £100 in subscribing for the ninety-eight unissued shares of Roehampton Productions, Ltd., which were issued to them on the same Mar. 31, 1955. They thus became the sole owners of the equity in this company, which had the prospect of receiving large sums under the service agreement with the taxpayer. The other shareholder was the accountant with his one share.

That prospect of dividend, however, did not mature for some time, during which the trustees got nothing on their shares, but at some time during 1956 the company received £25,000 for the lending or assigning of the taxpayer's services to somebody, to act in a film called "Fortune is a Woman". Then, on Oct. 18, 1956, the company declared a dividend of £500 free of tax which went to the trustees of the settlement. They in turn applied the bulk of this for the benefit of the taxpayer's three infant children as follows:—Nicholas £225; Andrew £153; Caroline £104. In due course, repayment claims were submitted

to the Inland Revenue by the taxpayer as the children's guardian, claiming back tax deducted at source from this dividend, to the extent that the children were entitled to small income relief and personal allowances. The inspector of taxes opposed the claim. The General Commissioners on appeal by the taxpayer allowed it; and their decision has been upheld by the learned judge.

The Crown says that the income so received or enjoyed by the children under the deed of settlement is deemed to be the taxpayer's income by virtue of s. 397 of the Income Tax Act, 1952. This reproduces s. 21 of the Finance Act, 1936, by which the growing habit of saving surtax by settling capital or income on one's children was checked. Section 397 (1) and (2) is as follows:

"(1) Where, by virtue or in consequence of any settlement to which this Chapter applies and during the life of the settlor, any income is paid to or for the benefit of a child of the settlor in any year of assessment, the income shall, if at the commencement of that year the child was an infant and unmarried, be treated for all the purposes of this Act as the income of the settlor for that year and not as the income of any other person.

"(2) This Chapter applies to every settlement, wheresoever it was made or entered into, and whether it was made or entered into before or after the passing of this Act, except a settlement made or entered into before Apr. 22, 1936, which immediately before that date was irrevocable."

Section 403 is a definition section, and provides among other things:

" 'settlement' includes any disposition, trust, covenant, agreement, arrangement or transfer of assets;

" 'settlor', in relation to a settlement, includes any person by whom the settlement was made or entered into directly or indirectly, and in particular (but without prejudice to the generality of the preceding words of this definition) includes any person who has provided or undertaken to provide funds directly or indirectly for the purpose of the settlement . . . "

The rest of the section is immaterial. The true construction of the word "arrangement" in that definition is not in dispute. It will be found in the cases cited to us, which I will mention, but need not in the circumstances read. They are *Copeman v. Coleman* (1), *Inland Revenue Comrs. v. Prince-Smith* (2), *Inland Revenue Comrs. v. Payne* (3) and *Hood-Barrs v. Inland Revenue Comrs.* (4). The argument for the Crown is as follows. First, here there is a settlement in the ordinary sense of the word, viz., the deed of settlement of Mar. 3, 1955. The taxpayer did provide money for the purpose of that settlement, the means of such provision being the service agreement producing money for the company, and the company in turn distributing part of the money to the trustees. Alternatively, it is said that the formation of a company, the service agreement and the deed of settlement together form an arrangement within the terms of s. 403, and so are a settlement for the purposes of s. 397. For that settlement likewise the taxpayer provided funds and is therefore a settlor.

It will be convenient to deal with this alternative argument first, because it was the only argument advanced to the General Commissioners, and secondly because counsel for the taxpayer agrees that, if there is such an arrangement here, then the taxpayer was a settlor within the definition and must fail in this appeal. What he urges in opposition to the Crown's argument is that to constitute an "arrangement" for this purpose, the whole of it must be in contemplation at the outset. Here it was not, and he prays in aid what the commissioners say in para. 7 of the Case Stated, after hearing all the evidence, viz., that "there was no arrangement to which s. 397 of the Income Tax Act, 1952, should apply". Therefore the taxpayer did not provide funds for any such "arrangement", for when

(1) [1939] 3 All E.R. 224; 22 Tax Cas. 594.

(2) [1943] 1 All E.R. 434; 25 Tax Cas. 84.

(3) 23 Tax Cas. 610.

(4) [1946] 2 All E.R. 768; 27 Tax Cas. 385.

he agreed to sell his services to the company, the deed of settlement was not in being, nor, says counsel for the taxpayer, so far as the evidence goes, was it in contemplation.

After careful consideration, I am unable to accept these propositions. In the first place, I do not think that the language of s. 397 requires that the whole of the eventual arrangement must be in contemplation from the very outset. Confining oneself for the moment to the facts of this case, and remembering that income tax is an annual tax, one finds the whole "arrangement" conceived and in being in the one income tax year, 1954-55. The company is formed, the service agreement executed, and the deed of settlement made, all in this one year. Even were it otherwise, I think that there is sufficient unity about the whole matter to justify its being called an arrangement for this purpose, because the ultimate object is to secure for somebody money free from what would otherwise be the burden or the full burden of surtax. Merely because the final step to secure this objective is left unresolved at the outset, and decided on later, does not seem to me to rob the scheme of the necessary unity to justify its being called an "arrangement." Particularly is this so in a case such as the present, when one recalls certain other features of it. Thus, though not on the register of members, the taxpayer was a director of the company. He entered into this contract for services for a consideration which is a fraction in value of what he gives to the company in return. He, as a director, has to agree to the issue of the ninety-eight shares to the trustees: he as a director has to agree to the interim dividend of £500, free of tax, being paid on this £100 of capital. Bearing in mind the ultimate object of securing money free from the burden—or the full burden—of surtax, can it matter for present purposes that the precise way of securing this result was not decided on at the very outset? I think not. An alternative way of looking at the matter would be this: Here the repayment claim is made in the year 1956-57. In that year the arrangement is complete, and that is enough. It would be irrelevant that it came into being by instalments in the year 1954-55. The Revenue looks at the facts of the year being taxed or for which repayment of tax is being sought, and asks in this year "Is it true to say that there is a settlement of the kind mentioned in the section, and in this year is it true to say that the settlor has provided funds for the purpose of the settlement?" Naturally, the finding of the commissioners in para. 7 of the Case Stated is much relied on, but it is by no means a clear finding of fact that no "arrangement" existed. I construe it as a finding that the various steps taken did not constitute an arrangement within the meaning of s. 397—which at the very least would be a mixed question of fact and law. In any event, on the facts, I do not think a finding of "no arrangement" could be regarded as reasonable.

That is strictly enough to conclude the present case, for it is conceded that, if there be an arrangement within the meaning of s. 397, then the taxpayer did indirectly provide funds for the purpose of the settlement constituted by such arrangement, and that accordingly the dividend must be regarded as his income and not that of his children. I would say a word or two, however, regarding the first argument of the Crown, viz., that the taxpayer provided funds for the settlement constituted by the deed of Mar. 3, 1955, regarded alone, and is therefore a settlor in relation to it. This seems to have been the primary argument before DANCKWERTS, J., and he rejected it, taking the view that the taxpayer could not be regarded as providing funds for a settlement of which he was not the settlor, and to which he contributed nothing, unless somehow the formation of the company and the service agreement could be read into the settlement. This he declined to do, because the deed of settlement came later in date, and because he took the view that para. 2 (j) of the Case Stated was a finding that there was no comprehensive arrangement at the outset of which the deed of settlement formed part. The finding is as follows (see para. 2 (j) of the Case Stated):

"The [taxpayer] was aware that steps were being taken to put into effect proposals of the accountants and solicitors, but he was not consulted with

regard to them. He was not present at any meeting when the matter of the settlement was discussed or when the deed of settlement was made."

The learned judge then comments on that in this way:

"Consequently, he was not a party in any way to any scheme under which a company was to be formed, a contract to be made with the company for his services and then a settlement to be made which would involve benefits from the first transaction for his children. He was quite obviously not a party in any way, and that seems to me a most material factor in the case."

I regret that I cannot go that length. When asked what the "proposals" of the accountants and solicitors were, counsel for the taxpayer conceded that they included this deed of settlement. The taxpayer therefore was aware of this item in the proposals, and that steps were being taken to put them into effect, albeit that he may not have been consulted when the terms of the settlement were discussed, or the settlement signed. Even if the matter stopped there, I should in those circumstances have little difficulty in holding that, when the dividend was ultimately declared, it came from funds indirectly provided by the taxpayer for the purpose of the deed of settlement. However, the matter does not stop there. On Dec. 10, 1954, when the taxpayer agreed to give his services to the company for a fraction of the reward the company would get by lending him to some theatrical or film producer, the two shareholders in the company were either the two solicitor's clerks, or the taxpayer's wife and the accountant jointly as to one share and the accountant as to the other. If it were the two solicitor's clerks, the irresistible inference from the facts is that they were mere nominees for the taxpayer. It can hardly be imagined that they were free to exploit the service agreement for their own individual benefit. If, therefore, the beneficial ownership of the shares was in the taxpayer, then when he later transferred or concurred in transferring, or concurred in the issue of, shares to the trustees of the deed of settlement, so that they became the only shareholders, he was in fact concurring that the equity in the company should pass from him to them; and when eventually there is a fund of profit derived from the taxpayer's services and a distribution of part of it to the trustees, again I see no difficulty in holding that the result of all that has gone before is that he has provided funds indirectly for the purposes of this settlement.

However, if at the date of the service agreement the two persons who afterwards became trustees of the settlement were the shareholders, then two conclusions would seem to me to follow; (i) that the idea of this family settlement was in mind at the outset, and (ii) that by this agreement the taxpayer was taking steps to see that the trustees would eventually get funds. When that event happened, it was he who indirectly provided the money.

It remains only to notice one other point in the argument of counsel for the taxpayer, viz., that the use of the word "purpose" in s. 403 of the Act in the singular shows that the legislature had in mind only those cases where the provision of funds or the undertaking to provide them were contemporaneous with the settlement. I have said enough, I think, to make it clear that I cannot accept this argument, which I think is altogether too refined. The statute seems to me to use the word "purpose" and "purposes" indiscriminately, see, e.g., s. 401 (3) (a). For those reasons I think that this appeal should be allowed.

HOLROYD PEARCE, L.J.: I agree with DONOVAN, L.J. It is clear that the sequence of events in question was intended to lessen the incidence of surtax. The natural inference from that sequence of events is that an arrangement was made which would come within s. 397 of the Income Tax Act, 1952, as interpreted by the definitions in s. 403. It is argued that that natural inference was on the evidence found to be wrong, but in my judgment all the facts point to the conclusion that it is correct.

Are we then bound to uphold the bald conclusion (unsupported by reasons) that

“(i) there was no arrangement to which s. 397 of the Income Tax Act, 1952, should apply and (ii) the [taxpayer] was not a settlor within the meaning of s. 403 of the said Act”?

That conclusion is not a finding of fact. It is a mixed finding of law and fact, and is thereby more easily assailable. For an error in such a mixed finding need not be due to any element of unreason such as is necessary to justify an interference with a pure finding of fact. An error may well have arisen from a mistake of law in the application of two complicated sections to a not uncomplicated sequence of events.

The only guidance that one can obtain from the statement of facts seems to confirm that it was a mistaken view of the law that led to the mixed conclusion of law and fact. Paragraph 2 (j) says:

“The [taxpayer] was aware that steps were being taken to put into effect proposals of the accountants and solicitors, but he was not consulted with regard to them. He was not present at any meeting when the matter of the settlement was discussed or when the deed of settlement was made.”

The clear inference is that proposals had been made by his accountants and solicitors and that he was aware that steps were being made to carry them out, but that the fact that he was not consulted about the details of the settlement and was not present when the deed was made had a bearing on the result. In truth that fact was irrelevant. The proposals were clearly proposals for achieving the result that has been achieved, viz., a family settlement financed by dividends produced by the taxpayer's contract to sell his services to the company at an inadequate and uncommercial rate. Had the proposals been of any other nature the case must inevitably have so stated. The foundation of those proposals was his earning power and they needed not merely his assent but his active participation. He personally entered into the contract to serve for an inadequate remuneration, he was himself a director of the company when the shares were allotted to the trustees, when the large profit was made by the company's use of the contract and when the dividend was declared. And above all he himself created the source of the company's profit by acting in the film “Fortune is a Woman”.

The mere fact that he did not concern himself with some of the “steps” in the legal machinery involved does not make it any the less his arrangement within the section. A man does not avoid the incidence of s. 397 by merely being absent from and leaving to his solicitors and accountants certain parts of the legal machinery if he is aware of the proposals for an “arrangement” or a settlement and actively forwards them by personally carrying out and assisting in the vital parts in which his performance and co-operation are necessary. Nor can he avoid liability by merely giving his solicitors carte blanche to effect some scheme for the benefit of his family and refusing to concern himself with its precise form. The commissioners would appear by the wording of the Case to have been unaware of this principle, and in my judgment it must have been this error that led them to a wrong conclusion.

It is contended that the proposals which the taxpayer was intending to forward were directed to some different avoidance of surtax and that he did not have in mind this precise settlement. With all respect to the learned judge who held a contrary view, I cannot agree that that fact, if proved, could have the effect of taking this arrangement out of s. 397, since he was actively carrying out personally some of the steps necessary to the arrangement and his solicitors and accountant were acting in the other steps; but in any event such a contention was not made out on the facts and there is nothing in the Case to suggest it. Moreover, in my judgment, even if the commissioners' conclusion was one of

fact alone, the observations of VISCOUNT SIMONDS and LORD RADCLIFFE in *Edwards v. Bairstow* (5) apply, and I would hold that the only reasonable conclusion from the facts in the Case is that there was an arrangement to which s. 397 applies and that the taxpayer was the settlor within s. 403.

UPJOHN, L.J.: I agree with both the judgments that have been delivered and do not desire to add anything.

Appeal allowed. Leave to appeal to the House of Lords granted.

Solicitors: *Solicitor of Inland Revenue; J. D. Langton & Passmore* (for the taxpayer).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

PRACTICE NOTE.

Re THE AGREEMENT BETWEEN THE MEMBERS OF THE REINFORCEMENT CONFERENCE.

[RESTRICTIVE PRACTICES COURT (Diplock, J., Mr. W. Wallace, Mr. W. G. Campbell and Sir Godfrey Mitchell), November 16, 1960, June 12, 1961.]

Restrictive Trade Practices—Court—Practice—Statement of case—Agreed amendment—Procedure.

Application.

This was an application by the respondents to amend the statement of case that they had filed, the amendments being shown on a copy that was put before the court.

R. I. Threlfall for the respondents.

J. F. Donaldson for the Registrar.

R. I. Threlfall: I understand that there is no objection to the proposed amendments, and that it is desired that the Registrar's answer should be amended consequentially, to which the respondents do not object.

J. F. Donaldson: Where parties agree about amendments, would it be a convenient course that an amended copy should be filed? Copies could, perhaps, be initialled and exchanged, and the matter could be mentioned to the court on the next convenient occasion, e.g., when an application came before the court or when the case came on for trial.

DIPLOCK, J.: The application will be granted in this case as asked. The procedure suggested will be suitable in future for this kind of application.

Order accordingly.

On June 12, 1961, following on the termination of the agreement, the court* made an order under s. 20 (3) of the Restrictive Trade Practices Act, 1956, and the respondents gave the usual undertaking.

Solicitors: *Claremont, Haynes & Co.* (for the respondents); *Treasury Solicitor.*

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

* DIPLOCK, J., SIR STANFORD COOPER, Mr. W. L. HEYWOOD and Mr. W. G. CAMPBELL.

A SWEETWAY SANITARY CLEANSERS, LTD. v. BRADLEY.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Ashworth and Lawton, JJ.), May 10, 1961.]

B *Road Traffic—Licence—Goods vehicle—C licence—Carriage for hire or reward—Effluent from septic tanks which carrier cleansed for inclusive charge—Carriage of effluent by motor vehicle to farm—Disinfectant added to effluent—No separate charge for removing effluent from premises, or for delivering it to farm—Whether carriage for reward—Whether carriage of own goods—Road and Rail Traffic Act, 1933 (23 & 24 Geo. 5 c. 53), s. 1 (1), (5) (b), s. 2 (4).*

C A limited company which carried on the business of emptying and cleansing septic tanks used a vehicle with a C licence to empty and clean a customer's tank. The vehicle, which was fitted with a pump and a tank, put disinfectant into the customer's septic tank, then pumped out the contents into the vehicle tank, then disinfected the customer's drain lines, put some disinfectant into the vehicle tank, drove along the highway to a farm about a quarter of a mile away, and there discharged the effluent from its tank and spread it on the ground as manure. The company made a standard charge for cleansing a septic tank. This charge, which was the same irrespective of whether the effluent was removed from the customer's land or not, and of the distance, if any, which the vehicle travelled to discharge the effluent, was expressed to be "for hire of equipment and labour". The company neither paid nor charged the farmer expressly for the effluent or for spreading it. On a summons alleging that the company had used the vehicle for the carriage of goods for hire or reward, contrary to the terms of the C licence, and to the provisions of the Road and Rail Traffic Act, 1933*,

F **Held:** the effluent was "goods" within the meaning of the Road and Rail Traffic Act, 1933, the vehicle was a goods vehicle, the effluent was carried "for reward", because its removal was an essential part of the operation of cleansing the septic tank for which the charge was made; the operation did not involve the effluent in being "subjected to a process or treatment" within the meaning of s. 1 (5) (b) of the Act*, so that the company was not within the exception created by that enactment but was guilty of the offence charged.

G **QUAERE** whether a person can carry his own goods "for hire or reward" within the meaning of the Act.

[As to carriage of goods for hire or reward, see 33 HALSBURY'S LAWS (3rd Edn.) 737, para. 1252, 740, para. 1255.

H For the Road and Rail Traffic Act, 1933, s. 1, s. 2, see 24 HALSBURY'S STATUTES (2nd Edn.) 675-679, and for the Road Traffic Act, 1960, s. 164, s. 168 (3), s. 191 (1), Sch. 13, para. 8, see 40 HALSBURY'S STATUTES (2nd Edn.) 853, 857, 877, 957.]

Case Stated.

I The appellant company appealed by Case Stated against its conviction, on Feb. 17, 1960, by a magistrates' court sitting at Evesham, on an information preferred by the respondent prosecutor, on behalf of the Traffic Commissioners of the West Midland Traffic Area, charging the appellants with failure to comply with the special condition attached by virtue of s. 2 (4) of the Road and Rail Traffic Act, 1933, to their private carriers' C licence, in that on Dec. 18, 1959, at Evesham, they used a goods vehicle for the carriage of goods for hire or reward. The facts, which are summarised in the headnote, are stated in the judgment of LORD PARKER, C.J.

* The relevant provisions of the Act of 1933, which have now been replaced as set out in the footnotes, post, are printed at pp. 822, 823, post.

M. A. B. King-Hamilton, Q.C., and J. R. C. Samuel-Gibbon for the appellants. *J. R. Cumming-Bruce* for the respondent.

LORD PARKER, C.J.: In these proceedings the appellants appeal from a decision of the justices for the county of Worcester, sitting at Evesham, by which they convicted the appellants of an offence against the Road and Rail Traffic Act, 1933, in that they failed to comply with the special condition attached by virtue of s. 2 (4) of that Act (1) to a private C carriers' licence, namely, not to use that vehicle on the road for the carriage of goods for hire or reward (2).

Before referring to the relevant sections, I should quite shortly refer to the facts. The appellants are a private limited company carrying on the business of emptying and cleansing septic tanks, cesspools and the like. They have in fact three vehicles, but only one of them, the one with which we are now concerned, is the subject of a C licence, and these proceedings were instituted by way of a friendly test case to decide whether persons carrying on that business, which involves carrying effluent along the road for a shorter or longer distance, can do so under a C licence, or whether they ought to have a B licence.

On Dec. 18, 1959, by arrangement with the proprietor of a country club, this vehicle went to the club premises and there emptied and cleaned a septic tank. The operation involved pumping into the septic tank some disinfectant, then the pumping out of the contents of the septic tank into the tank mounted on the vehicle, and thirdly, the disinfecting of the drain lines from the house to the septic tank. That operation having been completed, the vehicle was driven, after some disinfectant had been put into the tank containing the effluent, along the highway to a farm some quarter of a mile distant. There, by arrangement with the owner of the farm, the effluent was discharged and spread on the ground in the manner of a manure. The appellants charged the secretary of the club the sum of £3 10s., expressed to be for hire of equipment and labour. In fact, it was found that that was the standard charge for this job. On occasions more was charged, depending on the size of the tank to be emptied and the number of hoses which had to be used. It also appears that if a customer whose septic tank or cesspool had been emptied desired the effluent to be spread on his own land, the appellants would do so, otherwise they would take it away and dispose of it at the nearest possible place, in the present case this farm a quarter of a mile away, but in other cases up to two or three miles away. No variation was made in the price according to whether the owner of the premises desired the effluent to remain on his land or to be removed from his land.

Several points arise. The first question is whether this effluent is goods for the purposes of the Act. So far as that is concerned, s. 36 of the Act of 1933, the definition section, provides (3): " ' Goods ' includes goods or burden of any description ", and indeed it is conceded by leading counsel for the appellants, for whose argument the court is indebted, that effluent in the present case for the purposes of this Act must be goods.

It is also clear that this vehicle was a goods vehicle. Section 1 of the Act provides (4):

" (1) Subject to the provisions of this Part of this Act, no person shall use a goods vehicle on a road for the carriage of goods—(a) for hire or reward; or (b) for or in connexion with any trade or business carried on by him, except under a licence.

(1) Part 1 of the Road and Rail Traffic Act, 1933, which included the provisions considered in this case, has now been repealed and replaced by Part 4 of the Road Traffic Act, 1960, which came into force on Sept. 1, 1960. The special condition formerly imposed by s. 2 (4) of the Act of 1933, is now imposed by s. 168 (3) of the Act of 1960.

(2) The offence was charged under s. 9 (1) of the Act of 1933, to which s. 168 (5) of the Act of 1960 corresponds.

(3) This provision is now made by s. 191 (1) of the Act of 1960.

(4) Section 1 (1) of the Act of 1933 is now s. 164 (1) of the Act of 1960; s. 1 (2) is now part of s. 191 (1) of the Act of 1960.

A “ (2) In this Part of this Act the expression ‘ goods vehicle ’ means a motor vehicle constructed or adapted for use for the carriage of goods . . . ”.

It is perfectly clear in this case that this vehicle was in fact adapted by the appellants for the carriage of effluent. Indeed, if there were any doubt about the matter it is to be observed that s. 1 (7) excepts (5) from the need for a licence vehicles used by a local authority for, amongst other things, the disposal of refuse, night-soil or the contents of cesspools.

B The real question in this case is whether the carriage of the effluent was a carriage of goods which the appellants were entitled to carry under a C licence. The relevant provisions so far as a C licence is concerned are to be found in s. 2 (4), which reads as follows (6):

C “ A private carrier’s licence (in this Part of this Act referred to as ‘ a C licence ’) shall entitle the holder thereof to use the authorised vehicles for the carriage of goods for or in connexion with any trade or business carried on by him, subject to the condition that no vehicle which is for the time being an authorised vehicle shall be used for the carriage of goods for hire or reward.”

D Accordingly, as it seems to me, in considering this subsection one has to ask oneself first: were goods being carried in connexion with any trade or business carried on by the appellants? The answer to that is clearly: yes, they were carrying on the business of contractors for the purpose of cleaning out cesspools and septic tanks, a business which involved on occasions carrying the effluent away in the vehicle.

E The next question is whether, that being so, any reward was being paid to the appellants in respect of the carriage of the goods. The last question is, if so, was the transaction covered by one of the exceptions set out in s. 1 (5), where it is said (7) that certain matters shall not be deemed to constitute a carrying of the goods for hire or reward. The main argument raised on behalf of the appellants in this case was that the reality of the situation was that the contract between the club and the appellants was for the cleaning out of the cesspool; that that was what the appellants were being paid for, and if in fact any part of the £3 10s. was to be notionally allocated to the carriage of the effluent for a quarter of a mile to the farm it was *de minimis*, and that, looked at in a common-sense and broad way, no part of this carriage of effluent was for hire, or reward. I feel that the position is really the other way round. Several operations are involved in the cleaning out of a cesspool. There is the cleaning out, disinfecting and cleaning of the pipes and drains, and there is also the disposal of the effluent. From the owner’s point of view the thing that he really wants is that the effluent should be removed, unless the case is one of those rare cases where he wants it on his own land and it is for that that he is paying the amount charged. In any event I find it quite impossible to say that the cost of carriage, albeit only for a quarter of a mile, involved in the disposal of the effluent, can be regarded in any way as *de minimis*. It seems to me that one must look on the matter as one in which a substantial part of the charge of £3 10s. is referable to the disposal of the effluent as opposed to the actual cleaning out of the cesspool. That being so, the sole question is whether the appellants can bring themselves into one or other of the exceptions laid down in s. 1 (5) of the Act. We have been referred to, and reliance has been placed on, para. (b) of that subsection, which provides (8):

“ the delivery or collection by a person of goods which have been, or are to be, subjected to a process or treatment in the course of a trade or

(5) This exception is now made by Sch. 13, para. 8, to the Act of 1960.

(6) This provision is now made by s. 166 (4) and s. 168 (3) of the Act of 1960.

(7) These exceptions are now set out in s. 164 (5) of the Act of 1960.

(8) Similar provision is now made by s. 164 (5) (b) of the Act of 1960.

business carried on by him . . . shall not be deemed to constitute a carrying of the goods for hire or reward."

It is suggested that the adding of the disinfectant which is mixed with the effluent during its carriage in the vehicle is to be regarded as a process or treatment of the effluent. For my part, I find, as indeed did the justices, that it is quite impossible in any sense to look on what happened in this case as subjecting the goods to any process or treatment.

A further point has been raised, a matter of some interest, which is this: it is said that when the effluent was pumped into the tank of the vehicle, and the owner had evinced an intention that it should be taken away and not left on his own land, there was a passing of the property in the effluent to the appellants. If that is so, it is said that a man cannot carry his own goods for hire or reward within s. 2 (4) of the Act. For my part, I am far from satisfied that the property did pass. It is certainly a very artificial way of looking at it. True, if one were considering this as a matter of the criminal law, it might be said that the owner, once he had said he did not want the effluent on his own land, had in fact abandoned it and the property for the purposes of the criminal law had passed to the appellants. However, dealing with the present case, that seems to me to be the height of artificiality. Here, the position is that nobody wanted the effluent, least of all the appellants. The appellants had no use for it. All they wanted to do was to get rid of it at the earliest opportunity, as they did, on a farm a quarter of a mile away. Indeed, if they had been given the option of taking it or refusing to take it, it is clear that if they could they would have refused to take it. They did not intend to have any property in the goods, nor did the owner intend to part with any property. The truth of the matter is that inferentially the appellants were independent contractors on behalf of the club to remove the effluent. Accordingly, it becomes unnecessary to consider the second limb of the argument: whether even if the property had passed it could be said that there had been no offence on the ground, so it is said, that a man cannot carry his own goods for hire or reward. I, myself, would like to keep that point open for future decision.

I should add that we have been referred to a number of cases (9). For my part, I find it unnecessary to refer to them. It seems to me that on the facts of this case it is plain that the vehicle was being used for the carriage of goods for hire or reward, albeit that carriage was in connexion with their trade or business. The justices themselves, in so far as the question involves fact, have clearly found that part of the consideration of the £3 10s. which was paid by the club must be considered as having been referable to such removal. I think that the justices came to a right conclusion, and that this appeal should be dismissed.

ASHWORTH, J.: I agree, and for my part would reserve the same points as those to which LORD PARKER, C.J., has referred.

LAWTON, J.: I agree.

Appeal dismissed.

Solicitors: *Jaques & Co.*, agents for *Wellington & Clifford*, Gloucester (for the appellants); *Treasury Solicitor* (for the respondent).

[Reported by HENRY SUMMERFIELD, ESQ., Barrister-at-Law.]

(9) The following cases were referred to in argument:—*Carpenter v. W. Lusty & Sons, Ltd.*, [1957] 1 Lloyd's Rep. 16; *Corbett v. Barham*, [1954] Cr. L.R. 471; *Spittle v. Thames Grit & Aggregates, Ltd.*, [1937] 4 All E.R. 101; *Williams v. Phillips*, (1957), 41 Cr. App. Rep. 5; *George Wimpey & Co., Ltd. v. John*, [1951] 1 All E.R. 307n.

ROOKES v. BARNARD AND OTHERS.

[QUEEN'S BENCH DIVISION (Sachs, J.), April 24, 25, 26, 27, 28, May 1, 2, 3, 4, 5, 19, 1961.]

Trade Union—Conspiracy—Unlawful means—Threats to strike in breach of contract with employers—Threats made to procure dismissal from employment of plaintiff who had resigned from union—Plaintiff dismissed from employment as result of threats—Whether members of union protected from liability for conspiracy and intimidation—Trade Disputes Act, 1906 (6 Edw. 7 c. 47), s. 1, s. 3.

Tort—Intimidation—Threat to break contract unlawful act for purposes of establishing tort—Proof of special damage where harm results from threats made by number of people individually.

Threats to break a contract constitute unlawful means in relation to the tort of conspiracy and unlawful acts in relation to the tort of intimidation; where, therefore, the plaintiff suffers injury through the defendant having threatened to break his contract with a third party such threats are actionable as the tort of intimidation where the defendant is acting alone and as the tort of conspiracy where the defendant is acting in combination with others (see p. 831, letters B to E, post).

Cooper v. Millea ([1938] I.R. 749), *Riordan v. Butler* ([1940] I.R. 347), and dictum of HARMAN, J., in *Huntley v. Thornton* ([1957] 1 All E.R. at p. 251) followed.

The plaintiff was a senior draughtsman employed by British Overseas Airways Corporation in their design office at London Airport. Up to Nov. 24, 1955, he was a member of a trade union, the Association of Engineering and Shipbuilding Draughtsmen (known as A.E.S.D.). In 1949 A.E.S.D., on behalf of the union as a whole and its members, had made an agreement with the corporation not to strike and that agreement became part of each contract of employment made between the corporation and members of A.E.S.D. An understanding known as the "100% membership agreement", which was not legally binding, also existed between A.E.S.D. and the corporation to the effect that once the corporation accepted from the union a declaration that all the employees in any particular section were members of the union the corporation would not thereafter recruit non-union members to the section but a member of the union could thereafter resign from the union without losing his employment. In about 1951 the design office was declared to have one hundred per cent. union membership. On Nov. 24, 1955, the plaintiff resigned from A.E.S.D. Thereafter the defendants, three union officials, took steps to press him to rejoin the union which included informing a senior personnel officer of the corporation that if the plaintiff did not rejoin the members of the union would request the corporation to discharge him. On Jan. 10, 1956, at a meeting of London Airport members of A.E.S.D. arranged by the defendants, a resolution was passed that if the plaintiff was not removed from the design office by 4 p.m. on Friday, Jan. 13, 1956, a withdrawal of labour at London Airport of all A.E.S.D. members would take place; a copy of the resolution was handed to the corporation's senior official in the design office and on Jan. 13, the corporation suspended the plaintiff from his employment. The resolution of Jan. 10 was then withdrawn. On Mar. 16, 1956, the corporation dismissed the plaintiff after giving him a week's notice in accordance with his contract of employment. It was agreed that at all material times up to Mar. 16 a trade dispute existed concerning the plaintiff's employment by the corporation while not a member of A.E.S.D. and that the defendants' acts were done in pursuance of the trade dispute. In an action by the plaintiff against the defendants for damages for wrongfully inducing the corporation

to terminate his employment and for wrongfully conspiring together so to do, the jury found that there was a conspiracy by members of A.E.S.D., to which each of the defendants was a party, to threaten strike action against the corporation to secure the plaintiff's dismissal from the design office; that a threat to take strike action against the corporation for that purpose was made by each defendant, and that the threats of strike action by the members of A.E.S.D. caused the dismissal of the plaintiff by the corporation. The jury awarded the plaintiff £7,500. The defendants contended that they were protected from liability, with regard to the conspiracy, by s. 1 of the Trade Disputes Act, 1906*, and with regard to the threats made by them individually by s. 3† of that Act.

Held: the defendants were not protected by the Trade Disputes Act, 1906, for the following reasons—

(i) the threat by each defendant, individually, made at a time when many others made the same threat to take strike action in breach of the 1949 agreement constituted the tort of intimidation since each defendant had threatened to do an unlawful act which, in the circumstances, was likely to harm the plaintiff and had been followed by reasonably foreseeable special damage to him, namely, his dismissal from employment.

(ii) accordingly, the defendants were not protected by s. 1 of the Act of 1906, since the acts done in pursuance of the conspiracy, viz., threats to take strike action in breach of contract, were acts which "if done without any such agreement or combination, would be actionable" viz., as constituting the tort of intimidation (see p. 832, letters G and H, post).

(iii) nor were the defendants protected by s. 3 of the Act since their acts not only interfered with the employment of the plaintiff but also involved the use of unlawful means, viz., threats of strike action in breach of contract (see p. 835, letter A, post).

Dicta of LORD LOREBURN, L.C., in *Conway v. Wade* ([1909] A.C. at p. 511), of SIR RAYMOND EVERSHED, M.R., in *D. C. Thomson & Co., Ltd. v. Deakin* ([1952] 2 All E.R. at pp. 374, 375) and of HARMAN, J., in *Huntley v. Thornton* ([1957] 1 All E.R. at p. 251) applied.

[As to torts arising out of the operations of trade unions where there is a trade dispute, see 32 HALSBURY'S LAWS (2nd Edn.) 521-524, paras. 819-822; and for cases on the subject, see 43 DIGEST 120-124, 1237-1265.]

For the Trade Disputes Act, 1906, s. 1, see 5 HALSBURY'S STATUTES (2nd Edn.) 886; for s. 3 of the Act, see 25 HALSBURY'S STATUTES (2nd Edn.) 1268.]

Cases referred to:

Conway v. Wade, [1909] A.C. 506; 78 L.J.K.B. 1025; 101 L.T. 248; 43 Digest 120, 1237.

Cooper v. Millea, [1938] I.R. 749.

Crofter Hand Woven Harris Tweed Co., Ltd. v. Veitch, [1942] 1 All E.R. 142; [1942] A.C. 435; 111 L.J.P.C. 17; 166 L.T. 172; 2nd Digest Supp.

Huntley v. Thornton, [1957] 1 All E.R. 234; [1957] 1 W.L.R. 321; 3rd Digest Supp.

Riordan v. Butler, [1940] I.R. 347; 2nd Digest Supp.

Thomson (D. C.) & Co., Ltd. v. Deakin, [1952] 2 All E.R. 361; [1952] Ch. 646, 666; 3rd Digest Supp.

Action.

In this action tried before SACHS, J., sitting with a jury, the plaintiff claimed damages against the defendants, members of the Association of Engineering and Shipbuilding Draughtsmen, for wrongfully inducing British Overseas Airways Corporation to terminate or alternatively suspend the employment of the

* Section 1 of the Trades Disputes Act, 1906, is printed at p. 832, letter I, post.

† The material terms of s. 3 are printed at p. 833, letter A, post.

A plaintiff with the corporation and for wrongfully conspiring together or with other persons so to do or to injure the plaintiff. By his defence each defendant denied that the acts alleged in the statement of claim were done by agreement and in conspiracy with the other defendants or one of them or with any other persons and contended that if the acts were done in combination they were done to further the legitimate and bona fide interests of the defendants and the members of the association in maintaining and protecting the principle of one hundred per cent. trade union membership within the corporation's design office at London Airport (where the plaintiff was employed). Further and alternatively the defendants contended that the acts were done in contemplation or furtherance of a trade dispute and that the defendants were protected by s. 1 and s. 3 of the Trade Disputes Act, 1906.

C At the hearing of the trial, in the absence of the jury, SACHS, J., heard argument, inter alia, on the effect of s. 1 and s. 3 of the Act of 1906, and on the tort of intimidation in relation to the facts of the case and he then ruled that threats to act in breach of contract constituted intimidation and were actionable in certain specified circumstances and informed the jury of this ruling in his summing-up. On the basis of the ruling and on the findings of the jury the defendants D failed in their plea that they were protected by s. 1 of the Act of 1906. The question whether they were protected by s. 3 of the Act was reserved for decision until after the jury had returned their verdict and is the subject of this report together with the reasons for the ruling made at the trial. The facts and the findings of the jury are fully stated in the judgment and the relevant terms of s. 1 and s. 3 of the Trade Disputes Act, 1906, are also set out therein.

E *Neville Faulks, Q.C., and S. C. Silkin* for the plaintiff.
John Thompson, Q.C., and Colin Duncan for the defendants.

Cur. adv. vult.

F May 19. SACHS, J., read the following judgment: The plaintiff at the beginning of January, 1956, was a senior draughtsman in the employ of British Overseas Airways Corporation (hereafter referred to as "the corporation") and had been one of the staff of their design office at London Airport for upwards of ten years. He was suspended by the corporation from his work there on Jan. 13, 1956, and was dismissed on Mar. 16, 1956.

G Up to Nov. 24, 1955, he had been a member of the Association of Engineering and Shipbuilding Draughtsmen, usually, and hereafter referred to as A.E.S.D. On that date, however, he resigned from the trade union. Over the period Nov. 24, 1955, to Mar. 16, 1956, the defendant Barnard was the chairman of A.E.S.D.'s Feltham branch, which included London Airport within its boundaries; the defendant Silverthorne was the divisional organiser of the area within which fell the Feltham branch—being a paid official of the union; and the defendant Fistol was the union's corresponding member; that is to say, H shop steward, at London Airport.

I On Apr. 1, 1949, there had come into force an agreement, referred to as the 1949 agreement, between the employers' and employees' sides of the draughtsmen planners and tracers panel of the National Joint Council for Civil Air Transport. That panel is called the joint panel and consisted on the one hand of representatives of a number of trade unions, including A.E.S.D., and on the other side representatives of employers, including the corporation. The representatives of A.E.S.D. on that panel were authorised by their executive to bind the trade union as a whole and the members individually. The terms of the 1949 agreement thus became part of the terms of each individual contract of employment between the corporation and members of A.E.S.D. It is relevant to note that this joint panel is to be distinguished from a panel referred to at trial which comprised solely employees' representatives (apparently in the main shop stewards) of certain trade unions, including A.E.S.D. at London Airport:

this panel can conveniently be referred to as the "employees' panel". It was the practice of each component union to notify to it any dispute that might arise between that union and the corporation in the hope and expectation of attracting the support of the other unions on the panel. A

The 1949 agreement included the following provisions:

" Clause 4. Disputes. The employers on the one hand and the employees on the other hand undertake that no lock-out or strike shall take place. In the event of dispute occurring whether arising in connexion with this agreement or otherwise the matter shall be dealt with as provided for in the constitution of the National Joint Council for Civil Air Transport. B

" Clause 15. Review. . . . No alteration or variation of this agreement shall take effect without the consent in writing of both parties hereto, excepting in accordance with any decisions taken by the National Joint Council for Civil Air Transport." C

In addition to the 1949 agreement there existed as between the trade unions on the joint panel and the corporation an understanding which apparently was not legally binding, and which has never been reduced to writing despite the desire of the trade unions that this be done. It was referred to as the " 100% membership agreement ". It related to the position when as regards any section or unit of the corporation's employees a trade union gave and the corporation accepted notice that all the employees in that section or unit were trade union members. D
No one who actually negotiated this understanding was called as a witness: but the most senior official of A.E.S.D. to give evidence (Mr. Holland, who was in office as assistant secretary from April, 1946, to Dec. 31, 1955) and Mr. Hinch, a senior personnel officer of the corporation, were in agreement as to their respective understandings of its effect, as follows. First, that once a declaration of one hundred per cent. membership had been made by a trade union and accepted by the corporation, the latter would not thereafter recruit any non-union staff for that section or unit: secondly, that a member of the trade union was not after such a declaration under an obligation to remain in it, could resign, and would not thereby lose his employment. The design office became the subject of a one hundred per cent. declaration about 1951 and it was the evidence of the plaintiff, uncontradicted by any other witness, that Mr. Holland in his official capacity then explained the position to the London Airport members of A.E.S.D. as being as above set out. E F

Between Nov. 24, 1955, and Mar. 16, 1956, the sequence of events included the following. On Dec. 6 the plaintiff attended before certain representatives of A.E.S.D., including the defendants Silverthorne and Fistal. He so attended in company with one Mr. Unwin who had also resigned from A.E.S.D. on Nov. 24. There was a conflict of evidence as to what occurred at that meeting and whether the two defendants made certain threats. The matter was left to the jury whether or not Mr. Unwin (who a few days later rejoined A.E.S.D.) was correct when he said in effect that the " main thing which struck him was that Messrs. Silverthorne and Fistal were bent on getting the whole place shut down to get us back into the union ". On Dec. 9 the defendant Silverthorne wrote to Mr. Holland a letter which ended up: G H

" The purpose of this letter, therefore, is to get a decision from the executive that in the event of this member refusing to remain in [A.E.S.D.], that the corporation be requested by the office committee to discharge him." I

Mr. Silverthorne informed Mr. Hinch of the position and Mr. Hinch then saw the plaintiff. To the latter he affirmed the point as to there being no understanding under which the plaintiff would, so far as the corporation was concerned, lose his job on resignation from the union. He stressed, however, the vulnerability of the corporation to strike action and the serious consequences to the

corporation of such action. There was a conflict of evidence between the plaintiff and Mr. Hinch as to what exactly the latter said after referring to this vulnerability, but it is obvious that his intention was to make clear the probability that if strike action took place the corporation would be unable to retain the plaintiff's services. On Dec. 30 the defendant Silverthorne wrote a letter to Mr. Hinch which stated that if the plaintiff did not very shortly rejoin the union "our members will, no doubt, take the strongest possible action against this non-unionist". On Jan. 9, 1956, the defendant Silverthorne wrote to the defendant Fistal, providing him with eighty copies for distribution amongst the members, a letter which included a paragraph stating:

"I take it, therefore, that a meeting has been arranged for Tuesday, Jan. 10, at 12.45 p.m. when our members should discuss the position with a view to informing the management forthwith that unless non-unionism is eliminated from the drawing office, withdrawal of labour will take place."

On the same date the defendant Barnard produced a memorandum entitled "100% Membership" of which also sufficient copies for distribution were sent to the defendant Fistal. This circular advocated the use of "all weapons" to produce the desired result of removing the plaintiff from his existing employment in the drawing office. On Jan. 10 a meeting of the London Airport members of A.E.S.D. was held and there was passed by a substantial majority of the sixty or so present a resolution in the following terms:

"We, the members of the A.E.S.D. inform B.O.A.C. that if the non-unionist Mr. D. E. Rookes is not removed from the design office by 4 p.m. Friday, Jan. 13, 1956, a withdrawal of labour of all A.E.S.D. membership will take place."

A copy of that resolution was duly handed by Mr. Fistal to the corporation's senior official, Mr. Finnemore in the design office. On Jan. 12 two meetings started at about the same time. The first was a meeting at Terminal House, convened at the employers' request, of the joint panel. The second was a mass meeting in a hangar in London Airport of the members of the unions on the employees' panel: this had been convened in the usual or expected way on the defendant Fistal having notified the position to the other shop stewards. At the latter meeting a resolution was passed that sympathetic action be taken by the other unions on the employees' panel if A.E.S.D. struck in accordance with the resolution of Jan. 10. The meeting at Terminal House took a great deal longer than that in the hangar, and during its continuance the news of the resolution to take sympathetic strike action admittedly reached the employees' representatives. If and in so far as it may be relevant and is permissible for me to draw inferences on the subject by virtue of the procedural agreement to which I will later refer (1), it seems probable that the employers' representatives would also have got to know the result of the hangar meeting as well: anyway they would have got to know of it in the following days.

In conformity with arrangements made at the Terminal House meeting, the corporation on Jan. 13 suspended the plaintiff from his work, and a little later at a meeting of the corporation's A.E.S.D. employees the resolution of Jan. 10 was withdrawn.

Between Jan. 13 and Mar. 16 there took place a series of unattractive events with which, for the purposes of this judgment, I can deal shortly. Suffice it to state that they included an occasion when the members of A.E.S.D., led by the defendant Fistal, were invited by the corporation to attend an intended inquiry by an official of the corporation on or about Feb. 23 into hitherto unspecified allegations as to the conduct and behaviour of the plaintiff in the design office—that is to say, conduct and behaviour in relation to what happened at the time of his resignation. The union representatives, however, on finding

(1) See p. 830, letters C to F, post.

that the plaintiff was to be there, preferred not to make any allegations in his presence and went away; no inquiry took place, and no allegations were ever specified to the corporation. The corporation, however, according to the evidence at trial, then said that they would treat the inquiry as "a managerial function": in fact they never sought information from Mr. Fistal, from the superintendent of the design office, from the plaintiff, or, so far as the evidence shows, from anyone else in the design office.

On Mar. 16 the plaintiff was dismissed, being given the week's notice appropriate to employees in his position.

At the conclusion of the evidence and before counsel addressed the jury a number of points were canvassed before me in their absence and agreement was reached on certain matters. First, that on the evidence it was clear that the terms of the 1949 agreement were, so far as applicable, part of the contract of employment of each of the members of A.E.S.D. employed in the design office of the corporation at London Airport. Second, that there was at all material times up to and including Mar. 16 a trade dispute in existence; that that trade dispute was of the nature stated in the further and better particulars of the defences as delivered on Feb. 13, 1958 (2); and that all the acts of the defendants complained of in the statement of claim were done in pursuance of that trade dispute. Thirdly, that the questions for the jury were to be those which were in fact left to them (3).

In addition it was agreed that the question whether s. 3 of the Trade Disputes Act, 1906, gave protection to the defendants should be left for decision until after the jury had given its answers to the agreed questions. In relation to this matter it was also agreed that the court should have power to draw either from the answers given by the jury or from the evidence as a whole such inferences of fact as might be requisite should any supplemental finding of fact not precisely covered by those answers become necessary: it was further agreed that any appellate court should have similar powers. The questions left to the jury and their answers were as follows:

1. Was there a conspiracy to threaten strike action by the members of A.E.S.D. against the corporation to secure the withdrawal of the plaintiff from the design office?

A.—There was.

If so,

(a) was Barnard a party?

A.—He was.

(b) was Silverthorne a party?

A.—He was.

(c) was Fistal a party?

A.—He was.

2. Was a threat to take strike action against the corporation to secure the withdrawal of the plaintiff from the design office made by

(a) Barnard?

A.—It was.

(b) Silverthorne?

A.—It was.

(c) Fistal?

A.—It was.

3. Did threats of strike action by members of A.E.S.D. cause

(a) the suspension of the plaintiff from his work at the corporation?

A.—They did.

(b) the dismissal of the plaintiff from the corporation?

A.—They did.

4. (a) What damages should be awarded to the plaintiff if the threats of strike action caused the plaintiff's dismissal?

A.—£7,500.

(2) The further and better particulars delivered on Feb. 13, 1958, stated that the trade dispute "concerned the continuation of the plaintiff in the employment of B.O.A.C. for such time as the plaintiff was not a member of A.E.S.D."

(3) The questions are printed at letters F to I, *supra*.

A Question 4 (b), "What damages should be awarded to the plaintiff if the threat of strike action caused the plaintiff's suspension (but not his dismissal)?" was not answered by the jury: this was in conformity with a direction given to them that no such answer should be given if their answer to question 3 (b) was in the affirmative.

B Before turning specifically to the effect of s. 3 of the Trade Disputes Act, 1906, it is necessary to mention a point of importance on which argument was addressed to me; which was decisive on the question whether s. 1 of that Act protected the defendants and which is accordingly germane to any decision relating to s. 3.

C It has long been regarded as settled at common law that it is an actionable wrong to intimidate other persons to make them act in a manner which they themselves have a legal right to do but which is likely to result and does result in loss to the plaintiff. It is equally well settled that a threat to do or to procure the commission of an unlawful act constitutes such intimidation. It was submitted by counsel for the defendants that the proper definition of "unlawful act" in relation to such intimidation excluded all acts which were not of themselves torts. On that footing he argued that threats of assault, libel, and trespass, were for this purpose unlawful acts, but that a threat to break a contract was not. Where in relation to such a definition of unlawful acts one places a threat to do something which is only actionable on proof of special damage it is not necessary here to pause to consider.

As regards threats to break a contract it seems to my mind to have been accepted now for a considerable time that they come within the category of unlawful means in relation to conspiracy and unlawful acts in relation to intimidation. In *Cooper v. Millea* (4), GAVAN DUFFY, J., took that view; stated it to be "incontestable" (5); and made it the basis of the decision in which he held certain threats of strike action to be tortious when the strike would have been in breach of contract as between the employees and their employer. The facts of that case are, indeed, somewhat parallel to those now under consideration. O'BYRNE, J., in *Mordan v. Butler* (6) took the same view in a case in which the unlawful acts consisted of threats by employees to cease work immediately, when under their contracts it was necessary for them to give a week's notice. Neither of the above cases was carried to appeal. The same view of the law was taken to be plain by HARMAN, J., in *Huntley v. Thornton* (7). There, after reviewing the authorities, he said (8) in relation to employees who threatened to strike:

"If, however, their actions amounted to threats of illegal strike action—that is to say, action to withdraw labour in breach of contract—then those acts were tortious and illegal."

That statement, however, related to a point on which the judgment did not ultimately turn.

It thus appears that although there is no direct decision in the courts of this country under which damages have been awarded to a plaintiff for an injury suffered through a defendant having threatened to break a contract with a third party, yet such judicial views as have been expressed on consideration of the precise point involved are in favour of holding such threats to be actionable if injury thus results.

In the absence of a direct decision in the sense which I have above indicated, it is, however, perhaps right to consider the point independently of the judgments to which I have referred. It seems difficult successfully to argue that a breach of contract is something that is lawful. The suggestion that there are cases in which someone who has made a contract has in the eyes of the law really put himself in the position of having an option to comply with its terms or

(4) [1938] I.R. 749.

(5) [1938] I.R. at p. 758.

(6) [1940] I.R. 347.

(7) [1957] 1 All E.R. 234.

(8) [1957] 1 All E.R. at p. 251.

alternatively to pay damages has been exploded. The argument that a man is entitled so to regard the position when his breach of contract may bring irreparable damage to the opposite party, or alternatively damage for which, having regard to his financial position he has no possible chance of paying, would not seem a hopeful one. In those circumstances it is hardly surprising that the common law should in regard to an individual (or corporate body) regard the powers of persuasion by lawful means as sufficiently great; draw the line at the making of threats to do that which he has no right to do; and regard such threats as tortious.

To my mind, the position could accurately be defined by stating that any "announcement of an intention to do something which the doer has no legal right to do" (the phrase that is used in *CLERK & LINDSELL ON TORTS* (11th Edn.), at p. 324), is capable of constituting a threat to do an unlawful act, and that there is no reason to exempt threats to break a contract.

One further point at the trial requires mention. It was submitted by counsel for the defendants that the threat of any one of the three defendants could not of itself be said to have caused the dismissal of the plaintiff; that the latter had thus failed to establish any special damage as against any of the three; that proof of special damage is an essential ingredient in the tort; and that, accordingly, no tort had been established against any defendant individually. In this behalf he prayed in aid a passage in the judgment of *SIR RAYMOND EVERSHED, M.R.*, in *D. C. Thomson & Co., Ltd. v. Deakin* (9), as to the difficulties inherent in coming to conclusions of fact where damage had to be proved in cases such as the present. With all respect I do not think that it can be said that where fifty men each make the same threat foreseeing that others will probably do so as well and that the cumulative effect will be to cause damage—even when they have not made a prior agreement with the others to make such threats—each can in turn be heard to say that no one of them had actually caused the damage and that, accordingly, no tort had been committed at all. In the present case, moreover, the form of the resolution (10) was such that each of those present authorised the defendant *Fistal* to convey to the corporation not only his own threat but the threats of each of the other members of *A.E.S.D.*, and thus actively authorised the making of his own threat in such a way that the threats of the others were bound to be simultaneously taken into account. Accordingly, I did not accept the submission made.

Having come to the above conclusions I ruled that threats to act in breach of the 1949 agreement would constitute intimidation and would be actionable as a tort if in the present case they were likely to harm the plaintiff and were followed by reasonably foreseeable damage. Of this ruling I informed the jury after the above-mentioned discussion and further so charged them in the course of the summing-up.

That is the basis on which the defendants failed in their plea that in relation to acts done in pursuance of the conspiracy of which the jury have found them to be party, they are protected by s. 1 of the Trade Disputes Act, 1906, which reads:

"An act done in pursuance of an agreement or combination by two or more persons shall if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable."

That, too, is the basis on which it now becomes necessary to examine the question whether s. 3 of the same Act protects them. Accepting, as I do, the submission of counsel for the plaintiff, that s. 3 must obviously be construed in

(9) [1952] 2 All E.R. at p. 374; [1952] Ch. at p. 688.

(10) See p. 829, letter D, ante.

A the same way as if the word "only" were repeated after the second "or" (11), the material part of it reads:

"An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only . . . that it is an interference with the . . . employment of some other person . . ."

B The precise question for consideration can be clearly crystallised by stating it in terms of pleading in two possible cases. In case 1 the statement of claim alleges: "The defendants conspired to injure the plaintiff by interfering with his employment and he thereby suffered damage" whilst the defence reads: "The defendants admit the facts set out in the statement of claim, but say that the acts complained of were done in furtherance of a trade dispute and rely on s. 3 of the Trade Disputes Act, 1906". In case 2 the statement of claim is varied only through the addition of words which I have italicised, and reads: "The defendants conspired to *use means of themselves unlawful* to injure the plaintiff by interfering with his employment and he thereby suffered damage" whilst the defence reads exactly the same as in case 1.

D The decision of the House of Lords in *Crofter Hand Woven Harris Tweed Co., Ltd. v. Veitch* (12) had (subject to a point to which I will refer later) made it clear that if in case 1 the defendants proved that the acts complained of in the statement of claim were done in furtherance of a trade dispute, they would be entitled to judgment without invoking the provisions of s. 3 of the Act of 1906, and that the reference in their defence to s. 3 is thus otiose. The argument for the defendants in the present case accordingly runs as follows: The common law is no different today than it was in 1906; if the reference to s. 3 is otiose in case 1 its provisions give no protection to the defendants which they have not already got at common law; accordingly the construction put forward by the plaintiff would result in the recited words of s. 3 having no effect in a case such as the present and such a construction should be rejected.

E The submission made on behalf of the plaintiff is that s. 3 should be construed in the light of what in 1906 was either thought to be the law or what was thought might be held to be the law; that in 1906 the common law had not been declared to be as stated in the *Crofter* case (12); that s. 3 ought so to be construed as if the word "only" was intended to exclude from its protection cases where there was resort to any act which was of itself unlawful; and that accordingly in case 2 the defence pleaded is of no avail—and would indeed in pre Judicature Act days have been demurrable. (It is perhaps as well to note that arguments can be adduced for the plaintiff depending on those words of s. 3 which are not recited above: but, in view of the conclusions which I have reached, it is not necessary to mention them save in so far as reference is made to them in the judgments about to be cited.)

G H The issue thus posed it is once more convenient initially to ascertain what guidance can be obtained, in the absence of a direct decision in this country, from judicial dicta. The first of these is to be found in *Conway v. Wade* (13), a case in which the question for decision was the meaning of the words "in furtherance of a trade dispute". LORD LOREBURN, the Lord Chancellor then as he also was in 1906, after reciting in full the wording of s. 3 said (14), with specific reference to the phrase "on the ground only that it induces some other person to break a contract" which in s. 3 immediately precedes the words "or that it is an interference with the trade, business, or employment of some other person":

(11) As enacted, s. 3 provides that an act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground "only that it induces some other person to break a contract of employment or that it is an interference with the . . . employment of some other person."

(12) [1942] 1 All E.R. 142; [1942] A.C. 435.

(13) [1909] A.C. 506.

(14) [1909] A.C. at p. 511.

"Let me see how this alters the pre-existing law. It is clear that, if there be threats or violence, this section gives no protection, for then there is some other ground of action besides the ground that 'it induces some other person to break a contract', and so forth. So far there is no change. If the inducement be to break a contract without threat or violence, then this is no longer actionable, provided always that it was done 'in contemplation or furtherance of a trade dispute'. What is the meaning of these words I will consider presently. In this respect there is a change. If there be no threat or violence, and no breach of contract, and yet there is 'an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills', there again there is perhaps a change. It is not to be actionable, provided that it was done 'in contemplation or furtherance of a trade dispute'."

That passage is of course obiter in so far as it does not relate to the precise question in issue in that case: but the speech as a whole was the subject of agreement both by LORD MACNAGHTEN and by LORD GORELL. Moreover that passage has from time to time been cited in a sense favourable to the plaintiff's contentions and no case has been brought to my attention in which it has been criticised. In addition it has been for many years accepted in text-books, including specialised text-books, as rightly stating the law—compare SLESSER AND BAKER on TRADE UNION LAW (3rd Edn.) (1927), at p. 261 and CITRINE ON TRADE UNION LAW (2nd Edn.) (1960), at pp. 476, 477.

In the two Irish cases, *Cooper v. Millea* (15) and *Riordan v. Butler* (16), already cited, the decisions are based on a similar view; are now of some twenty years' standing there; and are of persuasive effect.

More recently the same view has found support, albeit again obiter, in the judgments of SIR RAYMOND EVERSHED, M.R., in *D. C. Thomson & Co., Ltd. v. Deakin* (17) and HARMAN, J., in *Huntley v. Thornton* (18). In the former case the Master of the Rolls referred to the fact that such opinions as have been expressed on the point appear to support the contentions put forward by the plaintiff in the present case, and stated that he was himself inclined to that view; as regards the latter judgment I have already cited the relevant passage. It appears, therefore, that the trend of judicial opinion has been uniform over fifty years and of an authority which should result in it being followed by a judge of first instance.

Looking, however, at the matter as if it were res integra and apart from these judicial dicta to my mind the result would be the same. Unless the policy and object of the Act requires otherwise, any construction of a statute that enables a person to defeat or impair the obligation of his contract by his own act or otherwise to profit by his own wrong should if possible be rejected (see MAXWELL ON THE INTERPRETATION OF STATUTES (10th Edn.) at pp. 208, 209). The legislature was, in the Trade Disputes Act, 1906, careful to avoid giving to individual members of trade unions that licence which by s. 4 it gave to the trade unions themselves—to commit torts without being accountable in a civil action. If one takes into account the uncertainties as to the law of conspiracy which prevailed in 1906, clearly there is no reason to hold that the policy and object of that Act was other than to make sure that employees be as a general rule free to pursue by lawful means the furtherance of trade disputes—including, of course, disputes of which the objective is to secure the application of the "closed shop" practice. Such objectives can be lawfully and powerfully pursued by employees giving appropriate notice in accordance with their contracts of employment, with a view to going on strike when that notice expires. (Cases where the trade

(15) [1938] I.R. 749.

(16) [1940] I.R. 347.

(17) [1952] 2 All E.R. at pp. 374, 375; [1952] Ch. at pp. 688, 689.

(18) [1957] 1 All E.R. at p. 251.

A union or its members are bound by statute or voluntary agreement to refrain from strike action are, of course, exceptional.)

It follows that on first principles s. 3 should be so construed as to avoid giving employees freedom to use in furtherance of a trade dispute means which are of themselves unlawful or are in impairment of their obligations, and it would follow that it gives no cover to the defendant in case 2 (19).

B It may be apposite to add that whilst, when dealing here with the points at issue, I have assumed that the *Crofter* case (20) has settled the last of the relevant points in relation to the common law of conspiracy which were outstanding in 1906, there is at least a possibility that this may not be so. The *Crofter* case (20) dealt with a conspiracy in which the predominant purpose of those who combined was to further their own proper interests: the law is also settled in relation to cases where the conspiracy can in no way be said to have as its purpose the furtherance of a trade dispute—*Huntley v. Thornton* (21) was such a case. The case may, however, still have to be considered in which a jury holds that there were two equal concurrent purposes of a conspiracy, the one to further a trade dispute, the other something different. As to that it suffices to confess that the position at common law in such a case caused me some concern at one stage in the present trial—the stage when, just before counsel helpfully simplified the issues, I canvassed in my mind what questions might have to be left to the jury in relation to the defendants' actions after Jan. 13, 1956 (22).

For the foregoing reasons I have come to the conclusion that the defendants in the present case derive no protection from s. 3 of the Trade Disputes Act, 1906, any more than they do from s. 1. A member of a trade union who threatens to break his contract of employment is, when sued in the courts of this country, in just the same position as any other citizen: and in that respect it makes no difference whether he makes that threat individually, whether he makes it in combination with others, or whether he makes it in furtherance of a trade dispute.

It follows that judgment should be entered for the plaintiff for £7,500.

F [Counsel for the defendants having indicated that the damages and costs might have to be met by the defendants personally as it was not yet clear that they could be met out of the trade union funds, HIS LORDSHIP granted a stay of execution on terms that £1,000 was brought into court within thirty days.]

Judgment for the plaintiff.

Solicitors: *Lewis, Silkin & Partners* (for the plaintiff); *W. H. Thompson* (for the defendants).

[*Reported by WENDY SHOCKETT, Barrister-at-Law.*]

(19) See p. 833, letter C, ante.
(21) [1957] 1 All E.R. 234.

(20) [1942] 1 All E.R. 142; [1942] A.C. 435.
(22) See p. 829, letter I, ante.

Re MEAD'S TRUST DEED. BRIGINSHAW AND OTHERS v. NATIONAL SOCIETY OF OPERATIVE PRINTERS AND ASSISTANTS AND ANOTHER.

[CHANCERY DIVISION (Cross, J.), April 18, 20, 21, 25, June 8, 1961.]

Charity—Benefit to community—Convalescent home for members of a trade union and home for aged poor retired members—Trade union consisting of some, but not all, of the persons engaged in the printing industry—No means test for admission to convalescent home—Whether members of trade union could constitute a section of the public for the purpose of the law of charities.

Charity—Validation by Charitable Trusts (Validation) Act, 1954—Imperfect trust provision—Objects of trust partly charitable and partly not charitable—Property could be used exclusively for charitable purposes—Trust to provide convalescent home for members of trade union and home for poor retired members—Charitable Trusts (Validation) Act, 1954 (2 & 3 Eliz. 2 c. 58), s. 1 (1), (2).

The membership of a society, which was a trade union, was confined to persons employed in the printing trade, but not every person engaged in the trade was necessarily a member. In 1920 the society decided to set up a home as a war memorial and, with this object, land was purchased out of contributions by the society, its members, and other persons, and was conveyed to the trustees of a trust deed, executed on Sept. 27, 1920, which declared the trusts on which the property was held. Clause 2 of the deed expressed the intention that the home should be (a) a sanatorium for consumptive patients who were members of the society, (b) a convalescent home for members of the society, and (c) a home for aged members of the society who were no longer able to support themselves by working at their trade and for the wives of such members. By cl. 6 of the deed the home was to be managed by the trustees under the direction of the executive council of the society, and by cl. 8 the executive council was empowered to make rules and regulations dealing with, among other matters, the qualification and selection of inmates for the home. Under the trust deed and a supplemental deed, dated Dec. 6, 1948, the trustees were to be four officers of the society (viz., the two trustees, the president and the general secretary) and two other persons (one elected by members of the society and the other appointed from the members by the executive council). Under the society's rules, the main object of the society was to endeavour to improve the condition and protect the interests of its members, and a subsidiary object was "to provide and maintain a convalescent home for the benefit of members and their wives." A person wishing to become a member had to be proposed and seconded and admitted to membership by vote of a branch committee of the society or by the executive council. The rules provided for the payment of an entrance fee and contributions, and for the expulsion of a member for failure to pay contributions or for misconduct. The convalescent home and the home for aged retired members and their wives had been established, but it was found unnecessary to erect a sanatorium. The persons accommodated in the home for the aged were selected exclusively from the poor deserving members of the society, but no means test was required for admission to the convalescent home, which was supported chiefly by the society. On the question whether the trusts of the trust deed were charitable,

Held: (i) the trust, not being exclusively for the relief of poverty, was not a charitable trust, because members of a trade union, however numerous, like employees of a large company employing most, but not all, of the persons engaged in a particular industry, were not a section of the public for the purpose of the law relating to charities, and, moreover, the element

of self-help loomed large (see p. 840, letters F and H, and p. 841, letter E, post).

Observations of LORD SIMONDS in *Oppenheim v. Tobacco Securities Trust Co., Ltd.* ([1951] 1 All E.R. at pp. 34, 35) applied.

(ii) clause 2 of the trust deed was an "imperfect trust provision" within s. 1 (1)* of the Charitable Trusts (Validation) Act, 1954, and was validated by s. 1 (2)*, because there was nothing in the terms of the trust deed to prevent the trustees, e.g., from closing the convalescent home and applying the trust property to the provision of homes for aged retired members, who could not support themselves, and their wives, or from confining the potential beneficiaries of the trust to poor persons (both of which purposes were charitable purposes); accordingly, as from July 30, 1954†, the trust had been validated and the property had been held by the trustees for the benefit of those members of the society only who were from time to time poor persons and, in the case of the home for the aged, retired members and their wives (see p. 842, letter E, and p. 842, letter I, to p. 843, letter A, post).

✓ *Re Wykes' Will Trusts* ([1961] 1 All E.R. 470) considered.

[As to public benefit being a requisite of a charitable trust, see 4 HALSBURY'S LAWS (3rd Edn.) 209, 228, paras. 488, 508; and for cases on the subject, see 8 DIGEST (Repl.) 313, 314, 3-6, 320, 321, 49-57.

As to validation of imperfect charitable trusts, see SUPPLEMENT to 4 HALSBURY'S LAWS (3rd Edn.) para. 563; and for cases on the subject, see 8 DIGEST (Repl.) 394-397, 863-892, and Supplements.

For the Charitable Trusts (Validation) Act, 1954, s. 1, see 34 HALSBURY'S STATUTES (2nd Edn.) 68.]

Cases referred to:

Hall v. Derby Sanitary Authority, (1885), 16 Q.B.D. 163; 55 L.J.M.C. 21; 54 L.T. 175; 50 J.P. 278; 8 Digest (Repl.) 318, 42.

Hobourn Aero Components, Ltd.'s Air Raid Distress Fund, Re, Ryan v. Forrest, [1946] 1 All E.R. 501; [1946] Ch. 194; 115 L.J.Ch. 158; 174 L.T. 428; 8 Digest (Repl.) 321, 56.

Isaacs v. Market Bosworth R.D.C., [1960] 1 All E.R. 433; 124 J.P. 191; [1960] 1 W.L.R. 277.

Oppenheim v. Tobacco Securities Trust Co., Ltd., [1951] 1 All E.R. 31; [1951] A.C. 297; 8 Digest (Repl.) 321, 55.

Wykes' Will Trusts, Re, Riddington v. Spencer, [1961] 1 All E.R. 470; [1961] 2 W.L.R. 115.

Young's Will Trusts, Re, Westminster Bank, Ltd. v. Sterling, [1955] 3 All E.R. 689; [1955] 1 W.L.R. 1269; 3rd Digest Supp.

Adjourned Summons.

The plaintiffs, who were printers and members of the National Society of Operative Printers and Assistants (referred to hereinafter as "the society"), were the present trustees of a trust deed dated Sept. 27, 1920 (and made by John Compton Mead and others), which declared the trusts on which certain land, which had been conveyed to the then trustees by a conveyance of the same date, were held. The land had been purchased out of contributions received from the society, its members, and other contributors for the purposes of the trusts declared in the trust deed. By cl. 1 of the trust deed the trustees were to stand possessed of the land as a site for a memorial home to perpetuate the memory of those members of the society who had lost their lives in the 1914 war and for other purposes in connexion therewith thereinafter more particularly mentioned. By cl. 2 it was declared that it was intended that the home should ultimately include: (i) a sanatorium for consumptive patients who were members of the society; (ii) a convalescent home for members of the society recovering from

* The provisions of s. 1 (1) and s. 1 (2) are printed at p. 841, letter F, post.

† The date on which the Act of 1954 came into force.

illness of any kind; and (iii) a home for aged members of the society who were no longer able to support themselves by working at their trade and for the wives of such members.

By their originating summons, dated Dec. 16, 1960, the plaintiffs applied to the court for the determination of the following questions and for the following (among other) relief: (i) whether the trusts of the trust deed (a) were charitable, or (b) were not charitable, and were unenforceable and void; (ii) if the said trusts were not charitable (a) whether the plaintiffs, as the trustees of the trust deed, ought to transfer the assets held by them on the purported trusts of the trust deed to the trustees of the society after giving effect to the legal rights of other persons who had paid subscriptions or made donations to the trustees of the trust deed, or, alternatively (b) that directions might be given to the plaintiffs as to the trusts on which the said assets were held and as to the manner in which the plaintiffs should deal with or dispose of them.

J. A. Brightman, Q.C., for the plaintiffs, the trustees of the trust deed.

S. W. Templeman for the society.

B. J. H. Clauson for the Attorney-General.

Cur. adv. vult.

June 8. **CROSS, J.**, read the following judgment: In 1920 the National Society of Operative Printers and Assistants, a trade union which I shall call "the society", decided to set up a home to be known as the Natsopa Memorial Home to perpetuate the memory of those members of the society who had lost their lives in the first world war. Some land was purchased for a sum of over £13,000, part of which was contributed by the society and its members and the balance of which was subscribed by various well-disposed people. The land was conveyed to trustees by a deed dated Sept. 27, 1920. On the same day another deed was executed declaring the trusts on which the property was held. By cl. 2 it was said that it was intended that the home should ultimately be (i) a sanatorium for consumptive patients who were members of the society, (ii) a convalescent home for members of the society recovering from illness of any kind, and (iii) a home for aged members of the society who were no longer able to support themselves by working at their trade and for the wives of such members. Clause 3 provided that the trustees, as and when the necessary funds were provided, should erect or cause to be erected on the site a building or buildings suitable for the purposes of the home. Clause 4 stated that the funds required for the building, furnishing, equipping and maintaining of the home and for carrying it on should be provided—

"(a) by contributions to be made out of the funds of the society, (b) by subscriptions and donations to be received from members of the society or other persons . . ."

(c) by sale of any part of the property which was not required for the purposes of the home, (d) by mortgaging the property or any part thereof, (e) out of the rents and profits arising from the property, and (f):

"by any other means which may from time to time be approved by the executive council [of the society]."

Clause 6 provided that the home should be managed by the trustees under and subject to the direction and control of the executive council and that the executive council should appoint a managing committee to supervise and control the management of the home, to which committee the executive council could delegate its powers. By cl. 7 it was provided that all the money received by the trustees for the purposes of the home "whether in the nature of capital or income" should be applied by the trustees towards the payment of the cost of building, furnishing, equipping, maintaining and carrying on the home "in accordance with the directions of the executive council". By cl. 8 it was provided that the executive council should have the power "to make rules and regulations"

A dealing with a number of matters, for example, the engagement and dismissal of officers and servants, the qualification and selection of inmates for the home, and so on. By cl. 10 various powers of sale and mortgaging were granted to the trustees, but it was specially provided that they should not exercise such powers save "with the approval of the executive council" of the society. Clause 14 enabled the trustees, and therefore the executive council, to make alterations in the trust deed, and provided that no such variation should prejudice or affect the main object of the trust, namely, the establishment and maintenance of the Natsopa Memorial Home for the purposes stated in cl. 2 to that effect. By a supplemental deed dated Dec. 6, 1948, alterations in the trusteeship were introduced supplemental to those contained in cl. 13 of the original trust deed. The position in that respect now is that the trustees of the home are to be the two trustees of the society, the president of the society, the general secretary of the society, one trustee chosen by the members of the society by ballot, and one trustee being a member of the society appointed by resolution of the executive council. It will be seen, therefore, that, although the trustees are a separate body from the society, they are closely connected with the society as persons and must act in accordance with the directions of the executive council.

D The society, as I have said, is a trade union and I think that I should refer to some of its rules. Rule 1 provides that the membership of the society shall only be open to persons employed, broadly speaking, in the printing trade. Rule 2 sets out the objects of the society, the first object being "To endeavour to improve the condition and protect the interests of its members". A subsidiary object is "To provide and maintain a convalescent home for the benefit of members and their wives". Rule 3 provides for admission to membership. A person engaged in the printing trade would not necessarily be a member of the society. He has to be proposed and seconded and admitted to the membership by vote of a branch committee of the society or by the executive council. Other rules provide for the payment of an entrance fee and contributions, as in the case of the members of an ordinary club, and a member is liable to expulsion for failure to pay his contributions or for misconduct. Rule 33 refers to the benefits to be derived from membership, one of which is the convalescent home. There is set out in the appendix to the rules of the society regulations with regard to the admission of members or their wives to the home. They do not impose any means test on applicants for admission to the convalescent home. The funds for the purchase of the land and equipment were raised by a grant of £1,000 from the general funds, by a levy on the members of the society for three years, which produced £24,876, and by voluntary donations from various individuals. No sanatorium was erected, the incidence of consumption among the members rendering it, fortunately, unnecessary, but the convalescent home was established and it now offers accommodation for about fifty patients. The home for aged retired members and their wives was also established. It consists of six cottages for married couples and three sets of accommodation for bachelor and widower members. The persons accommodated in the homes for the aged are selected exclusively from the poor deserving members of the society. On the other hand, as I have said, no property qualification is required for admission to the convalescent home. The convalescent home is supported principally by the society whose annual contribution amounts to between £18,000 and £20,000. It has also a small investment income, derived from the proceeds of sale of land which had been sold, and it receives about £300 a year in donations. The voluntary donations down to 1960 amounted in all to about £32,000.

I From the date of its foundation until recently the trust has always been treated as a charity, but questions have arisen as regards that in proceedings between the trustees and the rating authorities as to the application of s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. Section 8 (1) (a) gives a measure of relief from rates to land

"... occupied for the purposes of an organisation (whether corporate or unincorporate) which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare..."

Quarter sessions held that the trust was entitled to relief, but that decision was reversed by the Divisional Court in *Isaacs v. Market Bosworth R.D.C.* (1). The basis of the decision was that, by reason of the control which the executive council exercised over the trustees under the provisions of the deed, it could not be said that the land was being occupied for the purposes of the trust as distinct from the purposes of the society. On that footing, the claim for relief obviously failed since it could not be suggested that the objects of the society were either charitable or otherwise concerned with the advancement of social welfare. The court did not decide whether, if the land could have been said to be occupied for the purposes of the trust as distinct from the purposes of the society, those purposes were charitable or concerned with the advancement of social welfare. That decision, however, raised in the minds of the advisers of the society the question whether or not the objects of the trust were charitable, and this summons was taken out asking for a declaration on that point. I have been asked by counsel to consider that question first apart from the provisions of the Charitable Trusts (Validation) Act, 1954. If, apart from that, the trust was not charitable, the question would then arise whether, and if so how, it is validated by the Act.

The objects specified in cl. 2 of the deed of Sept. 27, 1920, namely, a sanatorium for consumptive patients, a convalescent home, and a home for aged persons who are unable to support themselves, are clearly charitable objects. It is, however, also clear that, although the members of the society and their wives who are admitted to the home for the aged must necessarily be poor, that cannot be said of the occupants of the sanatorium or convalescent home. Counsel for the society, which has argued against the validity of the trust, submits that this fact makes it invalid. "It is well settled that a trust for the benefit of persons employed by a particular company is charitable only if it is exclusively a trust for the relief of poverty." Membership of a particular association, such as a trade union, is, so counsel submits, equivalent for this purpose to employment by a particular company. Counsel for the Attorney-General, on the other hand, submitted that the members of a trade union might well be a section of the public for the purpose of the law of charity. I always find the question whether or not the common characteristic which is shared by a number of persons is or is not such as to make them a section of the public, and not a fluctuating body of private individuals, very difficult. There appears to be no principle by reference to which it can be answered. A trust for the benefit of persons engaged in the printing industry in a particular country or district would be good if its objects were charitable: see *Hall v. Derby Sanitary Authority* (2). But a man may be engaged in the printing industry without being a member of the society. In this respect membership of the society resembles employment by some large company which employs most but not all of the persons engaged in the industry in question. Further, the considerations which led LORD SIMONDS, in *Oppenheim v. Tobacco Securities Trust Co., Ltd.* (3), to hold that the employees of a company, however numerous, could never form a section of the public for the purpose of the law of charity appear to apply equally to a trade union. The decision of DANCKWERTS, J., in *Re Young's Will Trusts, Westminster Bank, Ltd. v. Sterling* (4), though not necessarily in point, tends the same way. On this branch of the case counsel for the Attorney-General relied strongly on some passages in the judgment of LORD GREENE, M.R., in *Re Hobourn Aero Components, Ltd.'s Air Raid Distress Fund, Ryan v. Forrest* (5). LORD GREENE said:

(1) [1960] 1 All E.R. 433.

(2) (1885), 16 Q.B.D. 163.

(3) [1951] 1 All E.R. at pp. 34, 35; [1951] A.C. at pp. 307, 308.

(4) [1955] 3 All E.R. 689. (5) [1946] 1 All E.R. at p. 507; [1946] Ch. at p. 202.

A "I must not be taken to be suggesting . . . that the mere fact that the
benefits of a fund are confined to members or subscribers would be sufficient
of itself to exclude a fund from the category of charity. It all depends
on the facts of each individual case. For instance . . . if a number of
charitably-minded individuals in a parish got up a subscription for the
B purpose of providing a parish nurse for inhabitants unable to pay for
nursing, the fund so subscribed would not be any the less a charitable fund
because no person in the parish could obtain the services of the nurse unless
he or she became a member of the association and paid, let me say, half a
crown a year . . . That would not turn what was in essence a charity into
something which was not a charity. It is all a question, in these cases,
C of the real paramount and governing nature of the transaction."

What LORD GREENE, M.R., was referring to there was an association of the poor
inhabitants of an area who could not themselves pay the full amount of the
nursing fees but were prepared to pay a small contribution towards the expenses
of the nurse, the balance of those expenses being provided by wealthier or richer
well-disposed persons in the parish who were not themselves entitled to claim the
benefit of her services. That seems to me to be a very different case from this.
D In LORD GREENE's example, the association was brought into being for the pur-
pose of the arrangement the charitable character of which was in question.
Here the trade union existed independently of the trust. Even if all the funds
had, in fact, been provided by non-members—say, by employers in the industry—
I would have been of the opinion that the trust was not charitable. But in fact
E a large part of the funds came from the society and its members. The element
of self-help loomed very large and that, as LORD GREENE, M.R., pointed out in the
sentence which followed the passage which I have read, is a factor to be borne
in mind in these cases.

I turn now to consider whether the trust is validated by the Charitable
Trusts (Validation) Act, 1954. The relevant provisions of the Act are as follows.
Section 1 is:

"(1) In this Act, 'imperfect trust provision' means any provision declar-
ing the objects for which property is to be held or applied, and so describing
those objects that, consistently with the terms of the provision, the property
could be used exclusively for charitable purposes, but could nevertheless
be used for purposes which are not charitable.

"(2) Subject to the following provisions of this Act, any imperfect trust
provision contained in an instrument taking effect before Dec. 16, 1952,
shall have, and be deemed to have had, effect in relation to any disposition or
covenant to which this Act applies—(a) as respects the period before the
commencement of this Act, as if the whole of the declared objects were
charitable; and (b) as respects the period after that commencement as if
I the provision had required the property to be held or applied for the declared
objects in so far only as they authorise use for charitable purposes."

Counsel for the Attorney-General submitted that in this case the trustees,
although not obliged to do so, could apply the trust property exclusively for
charitable purposes since they could restrict admission to any branch of the
home to poor members of the society and so, in effect, make the trust a trust for
the relief of poverty. In this connexion he relied on the decision of BUCKLEY, J.,
in *Re Wykes' Will Trusts, Riddington v. Spencer* (6), where the judge held that a
gift of a fund to the directors of a company—

" . . . to be used at their discretion as a benevolent or welfare fund or for
welfare purposes for the sole benefit of the past, present and future employees
of the company "

was within the Act and took effect as from the commencement of the Act as a trust for the relief of poverty among the persons named. The operation which counsel for the Attorney-General invites me to perform in regard to this trust is far more drastic than that performed by BUCKLEY, J. A benevolent or welfare fund is closely akin to a trust for the relief of poverty. If Mr. Wykes had been told that the form of words which he had chosen was open to objection and had been advised expressly to confine the potential beneficiaries to poor persons, he would very likely have agreed without hesitation. In the same way the difference between a trust for charitable purposes and a trust for charitable or benevolent purposes, though very great in law, is very small from the point of view of the intentions of the settlor or testator. But to confine the potential beneficiaries of this trust to poor members of this society would almost certainly be contrary to the intentions of those who provided most of the money to build the convalescent home and have provided and are providing most of the money for its maintenance. There are probably not many printers who are "poor persons" within the meaning of the law of charity, and the result of the change would be drastically to cut down the number of members of the society who could qualify for "convalescent benefit".

Counsel for the society, which is anxious to recover the trust property and make a fresh start, submitted that the words "consistently with the terms of the provision", in s. 1 (1) of the Act, are an obstacle in the way of the Attorney-General. If they had been "consistently with the spirit of the provisions" I should agree, but the trust deed does not anywhere say that the only qualification for admission to the convalescent home is that the applicant is recovering from an illness. Indeed, cl. 8 expressly enables the executive council to make regulations dealing with the qualification and selection of inmates of the home. Further, there would, in theory, be nothing to prevent them closing the convalescent home and applying the whole trust property to the provision of houses for aged retired members who cannot support themselves, and their wives.

An alternative argument advanced by counsel for the society was that the trustees were under an obligation to carry out the orders of the executive council and that there was really no trust for any purpose other than the purposes of the society. This argument adopts the common-sense approach taken by the Divisional Court (7) to the question whether s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, applied to this case. But, much as I should like to do so, I do not feel that I can apply common sense so completely to this problem with which I am confronted. Although, no doubt, the trustees are, under the trust deed, bound to act in accordance with the directions of the executive council, the executive council, as I see it, was intended to act in a fiduciary capacity so far as the trust property was concerned. If the trust had been valid apart from the Act of 1954, it would not have been competent for the executive council to have directed the trustees to hand over the trust property to the society. It would have been the duty of the trustees to have refused to obey any such direction, and the Attorney-General and the court would have upheld their refusal. The truth is that the society, in order, I suspect, to obtain fiscal advantages, sought to dress up what was, from the common-sense point of view, part of its own property as an independent charitable trust. The so-called trust as declared was invalid, but the society can hardly complain if Parliament steps in and validates the trust by twisting its provisions into something which is contrary to the society's wishes. The society is clearly hoist with its own petard. I shall, therefore, declare that the trust has been validated by the Act and that, as from July 30, 1954, the trust property has been held by the

A trustees for the benefit of those members of the society only who are from time to time poor persons and, in the case of the home for the aged, retired members and their wives.

Declaration accordingly.

Solicitors: *Shaen, Roscoe & Co.* (for the plaintiffs and the society); *Treasury Solicitor.*

3. *[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]*

YOUNG v. YOUNG.

1 [PROBATE, DIVORCE AND ADMIRALTY DIVISION (Baker, J.), June 12, 1961.]

Variation of Settlement (Matrimonial Causes)—Post-nuptial settlement—Agreement made between husband and wife after decree nisi but before decree absolute—Agreement by husband to pay annuities for wife and children—Agreement by wife not to sue for maintenance—Payments to begin before decree absolute—No provision for revocation in event of decree not being made absolute—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 25.

An agreement made between husband and wife after decree nisi but before decree absolute, in which the husband covenants to pay annuities for his wife and children, commencing before decree absolute and so payable that initial payments are made before decree absolute, is a post-nuptial settlement which can be varied by the court under the Matrimonial Causes Act, 1950, s. 25.

The parties were married in 1935 and there were two children, one born in 1939, the other in 1942. On Apr. 12, 1945, the wife was granted a decree nisi of divorce and the custody of the children. On May 29, 1945, the parties executed a deed in which it was recited that "it [was] mutually agreed by and between the parties hereto that in lieu of the wife" applying for permanent maintenance the husband would and thereby did covenant to pay as from Apr. 1, 1945, during their joint lives annuities for the wife and for the children (until the age of sixteen), payable by equal monthly payments, the first payments to be made on May 1, 1945. The wife covenanted not to apply to the court for maintenance. There was no provision for the revocation of the deed in the event of the decree not being made absolute. The decree was made absolute on July 2, 1945. In August, 1956, the wife re-married and in May, 1957, the husband, because of her re-marriage, stopped the payments under the deed.

Held: the deed was a post-nuptial settlement, within s. 25 of the Matrimonial Causes Act, 1950, there being present a sufficient "nuptial element", viz., the deed was made because of marriage when the spouses were still husband and wife and payments began before the decree absolute and would have continued had the decree not been made absolute; moreover the first payments were in favour of the wife in her character as wife and the provision in favour of the children was crucial, notwithstanding that at the date of the application to vary the deed the annuities for them had ended.

Melville v. Melville and Woodward ([1930] All E.R. Rep. 79) applied.

Bosworthwick v. Bosworthwick ([1926] All E.R. Rep. 198) considered.

Appeal allowed.

[As to the meaning of post-nuptial settlement, see 12 HALSBURY'S LAWS (3rd Edn.) 451, para. 1015, note (m); and for cases on the subject, see 27 DIGEST (Repl.) 645-648, 6089-6106.

For the Matrimonial Causes Act, 1950, s. 25, see 29 HALSBURY'S STATUTES (2nd Edn.) 412.

For the Maintenance Agreements Act, 1957, s. 1 (1), s. 1 (2), see 37 HALSBURY'S STATUTES (2nd Edn.) 494, 495.]

Cases referred to:

Bennett v. Bennett, [1952] 1 All E.R. 413; [1952] 1 K.B. 249; 3rd Digest Supp. *Bosworthwick v. Bosworthwick*, [1926] P. 159; *affd.* C.A., [1926] All E.R. Rep. 198; [1927] P. 64; 95 L.J.P. 171; 136 L.T. 211; 27 Digest (Repl.) 645, 6091.

Brown v. Brown, [1936] 2 All E.R. 1616; [1937] P. 7; 105 L.J.P. 103; 155 L.T. 418; 27 Digest (Repl.) 646, 6099.

Brown v. Brown, [1959] 2 All E.R. 266; [1959] P. 86; [1959] 2 W.L.R. 776; 3rd Digest Supp.

Hargreaves v. Hargreaves, [1926] All E.R. Rep. 195; [1926] P. 42; 95 L.J.P. 31; 134 L.T. 543; 27 Digest (Repl.) 646, 6094.

Hindley v. Hindley, [1957] 2 All E.R. 653; [1957] 1 W.L.R. 898; 3rd Digest Supp.

Jacobs v. Jacobs, [1942] 2 All E.R. 471, 473; [1943] P. 7; 111 L.J.P. 98, 99; 167 L.T. 386; 27 Digest (Repl.) 642, 6041.

Joss v. Joss, [1943] 1 All E.R. 102; [1943] P. 18; 112 L.J.P. 19; 167 L.T. 419; 27 Digest (Repl.) 646, 6100.

Jump v. Jump, (1883), 8 P.D. 159; 52 L.J.P. 71; 27 Digest (Repl.) 556, 5068.

Lort-Williams v. Lort-Williams, [1951] 2 All E.R. 241; [1951] P. 395; 27 Digest (Repl.) 647, 6104.

Melvill v. Melvill and Woodward, [1930] P. 99; *revsd.* C.A., [1930] All E.R. Rep. 79; [1930] P. 159; 99 L.J.P. 65; 143 L.T. 206; 27 Digest (Repl.) 646, 6095.

Prescott (orse. Fellowes) v. Fellowes, [1958] 1 All E.R. 824; [1958] P. 260; [1958] 2 W.L.R. 679; *revsd.* C.A., [1958] 3 All E.R. 55; [1958] P. at p. 268; [1958] 3 W.L.R. 288; 3rd Digest Supp.

Prinsep v. Prinsep, [1929] P. 225; 98 L.J.P. 105; 141 L.T. 220; *subsequent proceedings*, [1929] P. 265; *varied* C.A., [1929] All E.R. Rep. 436; [1930] P. 35; 99 L.J.P. 35; 142 L.T. 172; 27 Digest (Repl.) 646, 6098.

Worsley v. Worsley and Wignall, (1869), L.R. 1 P. & D. 648; 38 L.J.P. & M. 43; 20 L.T. 546; 27 Digest (Repl.) 245, 1980.

Summons adjourned into open court.

In this case the husband applied under s. 25 of the Matrimonial Causes Act, 1950, to vary a deed dated May 29, 1945. Mr. Registrar TOWNLEY MILLERS held that the deed was not a post-nuptial settlement and could not, therefore, be varied under this section. The husband appealed to BAKER, J., in chambers who adjourned the matter into open court for judgment.

The facts appear in the judgment.

Edward Grayson for the husband.

P. Goodenday for the wife.

Cur. adv. vult.

June 12. BAKER, J., read the following judgment: The problem is whether an agreement made between husband and wife after decree nisi but before decree absolute, in which the husband covenanted to pay annuities to his wife and children, is a post-nuptial settlement which can be varied by the court under s. 25 of the Matrimonial Causes Act, 1950. The husband appeals from the learned registrar's decision that there is no such settlement.

The parties were married in 1935. On Apr. 12, 1945, the wife obtained a decree nisi against the husband on the ground of adultery. On May 29, 1945, the spouses executed the deed inter partes which is the subject of this dispute. The decree was made absolute on July 2, 1945, leave having been given by BARNARD, J., to expedite. The agreement is expressed to be between

"Michael Young (hereinafter called 'the husband') on the one part, and Ella Young (hereinafter called 'the wife') on the other part."

It recites that the parties were married on Jan. 11, 1935; that there is issue Paul born on Feb. 26, 1939, and Linda born on Sept. 12, 1942, whose custody had been given to the wife on the making of the decree nisi, and that an order for alimony pending suit had been made. It continues:

"... and the wife is now entitled to apply in the registry of the said Division for permanent maintenance And Whereas it has been mutually agreed by and between the parties hereto that in lieu of the wife so applying provisions for the wife and the children shall be made in manner hereinafter appearing and that in consideration thereof the wife shall enter into such covenant and declaration as are on her part hereinafter contained."

Then the deed provides:

"These presents are executed in pursuance of the said agreement and for the consideration herein appearing."

Then follow the covenants by the husband with the wife to pay to the wife during their joint lives annuities, each less income tax, of £416 per annum for herself, and of £130 per annum for each of the children until the age of sixteen or leaving school whichever is the later.

It is to my mind important that each annuity is to begin as from Apr. 1, 1945, and they are to be paid by equal monthly payments, the first to be made on May 1, 1945, that is, before the date of the deed. Three payments would have accrued due by the date of decree absolute. Then follow covenants by the wife thus:

"(6) The wife hereby accepts the provisions hereinbefore made for her and the children (so long as the same are paid) in full satisfaction of all provisions which but for these presents she might have claimed or obtained from the husband by way of permanent maintenance. (7) The wife hereby covenants with the husband that she will not apply to any court for any maintenance or any provision to be made for her and the children by the husband in addition to or in excess of the provision hereinbefore mentioned."

with a provision that no wife's covenant shall be binding on her if payments are in arrear and unpaid for more than one month. There are other immaterial provisions about school fees, clothes, access and tax relief.

In August, 1956, the wife re-married and the husband stopped paying when he discovered this in May, 1957. On July 1, 1957, a writ claiming arrears was issued in the Queen's Bench Division, but that action was discontinued in November, the reason being that the wife's advisers considered she could not succeed because of the decision in *Bennett v. Bennett* (1).

On Aug. 17, 1957, the Maintenance Agreements Act, 1957, came into force, and in January, 1958, a writ was issued claiming the arrears from that date. The county court judge to whom the claim was remitted gave judgment for the plaintiff. The Court of Appeal dismissed an appeal by the husband holding that the agreement fell within the Maintenance Agreements Act, 1957, and that the husband's covenants were valid. Section 1 of that Act is expressed to apply to any written agreement made before or after the Act

"between the parties to a marriage for the purposes of their living separately, being—(a) an agreement containing financial arrangements, whether made during the continuance or after the dissolution or annulment of the marriage; or (b) a separation agreement . . ."

I am not here concerned with a deed of separation. The words "between the parties to a marriage" must in the context mean "between persons who are

(1) [1952] 1 All E.R. 413; [1952] 1 K.B. 249.

or who have been parties to a marriage". Consequently, I do not think that they assist to solve the present problem. Section 1 (3) of the Act of 1957 provides for variation of agreements where the parties are both domiciled or both resident in England. Unfortunately for Mr. Young his ex-wife now lives in Australia, and he is consequently unable to apply to the court under s. 1 (3) (a) to vary the deed. Hence this application under s. 25 of the Act of 1950.

Counsel for the husband says that there is a settlement in that at the date of the decree absolute periodic payments had to be made to the wife. This is not a case of a gift out and out, and he relies on the passage in the judgment of HODSON, L.J., in *Prescott (or se. Fellowes) v. Fellowes* (2):

"If there are periodical payments still to be made (as in *Bosworthwick v. Bosworthwick* (3)) at the time when the court has to inquire into the existence of the settlement, then, provided the nuptial element is present, there can be a settlement, or, to put it more accurately, there remains 'property settled'."

He contends that if the nuptial element is present periodicity of payments is conclusive in favour of a post-nuptial settlement. See also *Hindley v. Hindley* (4) and *Brown v. Brown* (5).

There are certain propositions which are not in dispute. (a) A settlement under s. 25 need not be a conveyancer's settlement; it may be contained, e.g., in a separation agreement. (b) An annuity is property and can be dealt with under the section. This was decided by SIR JAMES HANNEN, P., in *Jump v. Jump* (6). (c) The settlements which the court has power to vary are those in existence at the date of decree absolute: *Jacobs v. Jacobs* (7). (d) For nearly a hundred years the courts have repeatedly said that the section equivalent to s. 25 and in force at the time must be given a wide or liberal interpretation.

The crucial question is whether the nuptial element is present. This requires consideration of what is meant by "nuptial element". It has been expressed in many ways. In *Worsley v. Worsley and Wignall* (8), the Judge Ordinary (LORD PENZANCE) said (9):

"The court would have a great difficulty in saying that any deed which is a settlement of property, made after marriage, and on the parties to the marriage, is not a post-nuptial settlement. It would not be justified in narrowing the reasonable scope of the words used in the section. The substance of the matter is, that the legislature by this section has armed the court with authority to make special arrangements in the case of a woman being found guilty of adultery, in reference to property settled upon her in her character as a wife. The substantial feature to bring the case within the clause of the statute is, that a sum of money is paid to a woman in her character as wife, or is settled upon her in that character and whilst she continues a wife. If a wife commits adultery and the marriage is dissolved, she is no longer a wife, and the court can, within the spirit of the statute, deal with the settlement."

It is, I think, important to remember that LORD PENZANCE was there rejecting the argument that a post-nuptial settlement had in view that the parties were living together and that consequently a deed of separation was not within the section, and, further, that he stresses that a wife remains a wife until dissolution, i.e., decree absolute. As was pointed out by LANGTON, J., in *Brown v. Brown* (10) the headnote in *Worsley v. Worsley* (8) cannot safely be taken as a summary of the decision.

(2) [1958] 3 All E.R. at p. 60; [1958] P. at p. 278.

(3) [1926] All E.R. Rep. 198; [1927] P. 64.

(5) [1959] 2 All E.R. 266; [1959] P. 86.

(7) [1942] 2 All E.R. 471, 473; [1943] P. 7.

(9) (1869), L.R. 1 P. & D. at p. 651.

(10) [1936] 2 All E.R. at p. 1619; [1937] P. at p. 14.

(4) [1957] 2 All E.R. 653.

(6) (1883), 8 P.D. 159.

(8) (1869), L.R. 1 P. & D. 648.

In *Bosworthwick v. Bosworthwick* (11) LORD MERRIVALE, P., dealt with the history of the sections which are now enshrined in s. 25 and on appeal his decision that a bond securing an annuity on a husband for life was a post-nuptial settlement was upheld. ROMER, J., in an oft-quoted judgment, said (12) that the authorities established

"... that where a husband has made a provision for his wife, or a wife for her husband, in the nature of periodical payments, that amounts to a settlement within the meaning of the sections."

To my mind ROMER, J., was there dealing with periodical payments and was not intending to say that provision for a wife simpliciter provides the necessary nuptial element, because in *Melvill v. Melvill and Woodward* (13) ROMER, L.J., expressly refrained from deciding on an argument advanced for the husband appellant that any settlement is a post-nuptial settlement, if it is a settlement during marriage by one of the parties which gives some interest to either of the spouses or their offspring. He said (13) that he was more attracted by the definition given by HILL, J., in *Hargreaves v. Hargreaves* (14) that a post-nuptial settlement is one made "... because of, marriage, and the interests of married people or their children".

In *Prinsep v. Prinsep* (15), HILL, J., put the test of a post-nuptial settlement thus:

"Is it upon the husband in the character of husband or in the wife in the character of wife, or upon both in the character of husband and wife? ...

What does matter is that it should provide for the financial benefit of one or other or both of the spouses as spouses and with reference to their married state."

In *Lort-Williams v. Lort-Williams* (16), DENNING, L.J., defined the word settlement in s. 25 as including

"... any provision made by a husband for the future benefit of his wife, if it proceeds on the footing of the then existing marriage."

Counsel for the wife contends that it is impossible to say that the provisions in this deed satisfy any of these tests, and that the nuptial element is lacking. He submits that three elements are necessary before there is a post-nuptial settlement which can be varied under s. 25. (i) Marriage, (ii) a settlement to uphold or support that marriage whether or not cohabitation continues, and (iii) dissolution of the marriage by decree absolute. The present agreement is for the payment of permanent maintenance on divorce, which is the equivalent of frustration of the marriage. Therefore, he argues, the settlement cannot be one which is to uphold the marriage. He points out that the husband's covenants are expressed to be "in lieu of" the wife applying for permanent maintenance and that she covenants that she will not so apply, although her covenants remain void or unenforceable by s. 1 (2) of the Maintenance Agreements Act, 1957. Thus, he says, the money is paid to or settled on the wife in lieu of her applying for permanent maintenance and not in her character as wife. This is at first sight an attractive argument, but one which I feel bound to reject.

In May, 1945, the parties were still man and wife. The settlement was made because of the marriage, the agreement being expressly between husband and wife. Two payments had to be made before decree absolute, and had it not been expedited, there would have been at least five. There was no provision giving power to revoke if the proceedings did not result in decree absolute as there was in *Bennett v. Bennett* (17) and I think that like the settlement in *Melvill*

(11) [1926] P. at p. 163. (12) [1927] P. at p. 72; [1926] All E.R. Rep. at p. 200.

(13) [1930] All E.R. Rep. at p. 86; [1930] P. at p. 178.

(14) [1926] All E.R. Rep. at p. 197; [1926] P. at p. 45. (15) [1929] P. at p. 232.

(16) [1951] 2 All E.R. at p. 245; [1951] P. at p. 403.

(17) [1952] 1 All E.R. at p. 417; [1952] 1 K.B. at p. 254.

v. Melvill (18) it was binding from the date on which it was made and it would have survived even if for some reason there had been no decree absolute. That the agreement was unenforceable at common law does not, I think, affect its character. But there is a wider basis for the conclusion which I have reached. In *Melvill v. Melvill* (19) a respondent wife, after her husband had filed a petition on the ground of her adultery, executed a settlement of interests on herself for life with remainder to all or any children or child of the settlor, with power to appoint capital and income to any surviving husband. BATESON, J., held (19) that this was not a post-nuptial settlement, but the Court of Appeal (18) reversed his decision, the ratio being, as I understand it, looking at the terms of the settlement itself, that it made a settlement of property, the wife of the existing marriage being the settlor and the issue of the existing marriage, which was recorded, being among the beneficiaries. It was, therefore, a post-nuptial settlement. GREER, L.J., said (20):

"But you cannot have a settlement after a marriage which has not some relation to marriage if it settles a property . . . on one of the parties to the marriage, and still more if it settles a property . . . on . . . the offspring of the marriage . . ."

I think that it is impossible to distinguish the present settlement from that in *Melvill v. Melvill* (18) in that the children of the marriage were beneficiaries. The fact that they are no longer entitled to benefit because they are over sixteen and have left school is immaterial. The important date is that of decree absolute. Further, although I recognise that the expressions may not be altogether apt to cover the circumstances of this case, it seems to me that it can be said that there was payment to or settlement on the wife in her character as wife. She was not a mistress, nor a spinster, nor a single woman; she was a wife, the wife, and she so remained to decree absolute. The first monthly payments cannot have been made to her otherwise than in her character as wife, on the footing of, because of and with reference to the interests of herself and her children. The marriage or the children do not have to be the sole or prime cause of the settlement: *Joss v. Joss* (21). The interests of the children are in any event a crucial element.

In my judgment the agreement of May 29, 1945, is a post-nuptial settlement capable of variation under the provisions of s. 25 of the Matrimonial Causes Act, 1950. The decision of the learned registrar will therefore be rescinded, and the question of variation referred back to him for consideration on the merits.

Order accordingly.

Solicitors: *Ralph Freeman & Co.* (for the husband); *Alec Woolf & Turk* (for the wife).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

(18) [1930] All E.R. Rep. 79; [1930] P. 159.

(19) [1930] P. 99.

(20) [1930] All E.R. Rep. at p. 86; [1930] P. at p. 177.

(21) [1943] 1 All E.R. 102; [1943] P. 18.

BARCLAYS BANK, LTD. v. KILEY AND ANOTHER.

[CHANCERY DIVISION (Pennycuick, J.), May 3, 4, 10, 1961.]

Mortgage—Demand—Service—Death of mortgagor—Letter demanding repayment in accordance with instrument of charge addressed by mortgagee to mortgagor six months after his death—Whether demand validly made—Whether receiver's acts established relationship of landlord and tenant between mortgagee and occupiers—Possession—Parties—Personal representatives of deceased mortgagor not necessary parties if not prejudiced by order.

By an instrument of charge dated Dec. 2, 1948, L. charged certain property with payment to a bank of all moneys from time to time owing by him to the bank as principal or surety. The instrument of charge provided that “(1) A demand for payment or any other demand under this security may be made by any manager or officer of the bank by letter sent by post addressed to me at my address as given in this security or at my last known place of business or abode and every demand so made shall be deemed to have been made on the day such letter was posted. (2) . . . the power of leasing or agreeing to let . . . conferred by s. 99 and s. 100 of [the Law of Property Act, 1925] shall not be exercised without the previous consent in writing of the bank”, and “(12) In this charge where the context so requires or admits references to me shall include my executors or administrators and assigns and successors in title and references to the bank shall include their assigns”. In May, 1951, L. granted a sub-tenancy without the consent of the bank. L. died in August, 1959; no representation to his estate was taken out and it was not known whether he left a will. In November, 1959, a further tenancy of part of the property was granted without the bank's consent. On Feb. 23, 1960, the bank wrote a letter addressed to L. demanding payment forthwith of the full amount of his liability under the instrument of charge. On Mar. 11, 1960, the bank purported to appoint a receiver of the rents of the property comprised in the instrument of charge and the receiver instructed the “tenants” not to pay rent to any one but him; he did not, however, accept rent tendered, intimating that he could not acknowledge the tenancy. Subsequently, the cost of repairs to gutters was agreed by the receiver to be paid for out of “rent” that one of the “tenants” was holding; and the “tenants” paid the rates and taxes. No demand for rent was made by the bank. The bank claimed possession of the property. It was admitted that if the letter of Feb. 23, 1960, were a good demand under the instrument of charge the receiver could not have been the agent of the bank so that acts of his could not have created the relationship of landlord and tenant between the bank and the “tenants”.

Held: (i) the proceedings were properly constituted without personal representatives of the mortgagor having been appointed and made parties, for the order for possession could not prejudice the mortgagor's estate.

Alliance Building Society v. Shave ([1952] 1 All E.R. 1033) followed.

(ii) on the true construction of cl. 1 of the instrument of charge there was nothing to restrict its operation to the lifetime of L. and the demand for payment by letter addressed to him was a valid demand after his death whether or not representatives of his estate had been constituted.

(iii) accordingly there would be an order for possession which would be for possession to be given twenty-eight days after service of the order.

Per CURIAM: if, however, the letter of Feb. 23, 1960, did not constitute a good demand, with the consequence that the receiver had not been validly appointed and that he acted as agent of the bank, the relationship of landlord and tenant had not been constituted on the facts, and in particular such encouragement as had been given to one of the tenants to do repairs to the gutter was insufficient to establish the existence of that relationship.

Doe d. Parry v. Hughes ((1847), 11 Jur. 698) considered.

[As to the exercise of the right to take possession of mortgaged property, see 27 HALSBURY'S LAWS (3rd Edn.) 279, 280, paras. 515-517; and for cases on the subject, see 35 DIGEST 394-398, 1370-1404.]

Cases referred to:

Alliance Building Society v. Shave, [1952] 1 All E.R. 1033; [1952] Ch. 581; 3rd Digest Supp.

Barclays Bank, Ltd. v. Bird, [1954] 1 All E.R. 449; [1954] Ch. 274; [1954] 2 W.L.R. 319; 3rd Digest Supp.

Doe d. Parry v. Hughes, (1847), 9 L.T.O.S. 82; 11 Jur. 698; 35 Digest 338, 810.

Evans v. Elliot, (1838), 9 Ad. & El. 342; 8 L.J.Q.B. 51; 112 E.R. 1242; 18 Digest (Repl.) 272, 185.

Hickman v. Machin, (1859), 4 H. & N. 716; 28 L.J.Ex. 310; 33 L.T.O.S. 206; 157 E.R. 1023; 35 Digest 340, 830.

Hughes v. Waite, [1957] 1 All E.R. 603; [1957] 1 W.L.R. 713; 3rd Digest Supp.

Lever Finance, Ltd. v. Trustee of Property of Needleman, [1956] 2 All E.R. 378; [1956] Ch. 375; [1956] 3 W.L.R. 72; 3rd Digest Supp.

Martins Bank, Ltd. v. Kavanagh, [1948] 2 All E.R. 448; 2nd Digest Supp.

New Zealand Gold Extraction Co. (Newbery-Vautin Process) v. Peacock, [1894] 1 Q.B. 622; 63 L.J.Q.B. 227; 70 L.T. 110; 9 Digest (Repl.) 333, 2133.

Stroud Building Society v. Delamont, [1960] 1 All E.R. 749; [1960] 1 W.L.R. 431.

Taylor v. Ellis, [1960] 1 All E.R. 549; [1960] Ch. 368; [1960] 2 W.L.R. 509.

Adjourned Summons.

This was an application by originating summons dated July 20, 1960, by the plaintiff, Barclays Bank, Ltd., the mortgagee under an instrument of charge dated Dec. 2, 1948, for relief under R.S.C., Ord. 55, r. 5A, viz.: delivery of possession of 70, Colvestone Crescent, Hackney, in the county of London being the property comprised in the instrument of charge under the hand and seal of Maurice Lewis in favour of the plaintiff registered at H.M. Land Registry under title No. 371989 (entries No. 1 and No. 2 on the charges register) on Mar. 25, 1960. The first defendant was Kiley (male) on whom the originating summons was served but who did not enter an appearance in his name as sued or in his proper name of William Henry Farley. An appearance was entered on behalf of Florence Lilian Kiley, sued as Kiley (male), by her solicitors. The second defendant was Henry Frederick Solomons. Both defendants claimed to be in possession of 70, Colvestone Crescent, Hackney. The facts appear in the judgment.

J. L. Arnold, Q.C., and *G. B. H. Dillon* for the plaintiff.

J. G. Strangman, Q.C., and *E. F. Monier-Williams* for the defendants.

Cur. adv. vult.

May 10. PENNYCUICK, J.: This is an originating summons, taken out by Barclays Bank, Ltd., under R.S.C., Ord. 55, r. 5A, whereby the bank asks for delivery of possession of a property known as 70, Colvestone Crescent, Hackney, being the property, comprised in an instrument of charge dated Dec. 2, 1948, under the hand and seal of one Maurice Lewis, registered at the Land Registry under title No. 371989. The defendants are one Mr. Kiley, who was apparently joined in error, if indeed he ever existed; one Mr. Solomons, and one Mrs. Kiley. I will say at once that in my judgment the bank is entitled to the order which it seeks.

The facts are as follows. By the instrument of charge Mr. Lewis charged the previously mentioned property with payment to the bank on demand in writing of all moneys from time to time owing by him to the bank, whether as principal or surety. The instrument of charge contains, so far as now material, the following provisions:

A "I agree as follows: (1) A demand for payment or any other demand under this security may be made by any manager or officer of the bank by letter sent by post addressed to me at my address as given in this security or at my last known place of business or abode and every demand so made shall be deemed to have been made on the day such letter was posted.

B "(2) Section 93 of the Law of Property Act, 1925, dealing with the consolidation of mortgages shall not apply to this security and the power of leasing or agreeing to let and of accepting or agreeing to accept surrenders of leases and *ténancies* conferred by s. 99 and s. 100 of that Act shall not be exercised without the previous consent in writing of the bank.

C "(3) Section 103 of the said Act shall not apply to this security but the statutory power of sale shall as between the bank and a purchaser from the bank be exercisable at any time after the execution of this security provided that the bank shall not exercise the said power of sale until payment of the money hereby secured has been demanded and I have made default for one month in paying the same but this proviso is for my protection only and shall not affect a purchaser or put him upon inquiry whether such default has been made.

D "(4) The statutory power to appoint a receiver may be exercised at any time after payment of the moneys hereby secured has been demanded and I have made default in paying the same . . .

"(12) In this charge where the context so requires or admits references to me shall include my executors or administrators and assigns and successors in title and references to the bank shall include their assigns."

E The instrument of charge was not registered until Mar. 25, 1960, but it is accepted by counsel for the defendants that shortly after the execution of the charge the bank took the interim steps necessary to give them immediate priority.

F In May, 1951, Mr. Lewis, without the consent of the bank, purported to grant a sub-tenancy of the second floor of the house to the defendant Solomons, the rent being 30s. a week, afterwards rising to 32s. 6d. a week. Under the instrument of charge Mr. Lewis was wholly precluded from granting tenancies without the consent of the bank, so that Mr. Solomons took no interest in the property as against the bank. Mr. Solomons paid his rent to Mr. Lewis until June 25, 1959. Mr. Lewis died in August, 1959. No representation to his estate has been taken out and it is not known whether he left a will. Subsequently, at the request of one Sidney Philips, Mr. Solomons paid rent to a company known as Lewis (Import & Export), Ltd. until Mar. 9, 1960. He ceased to do so on receipt of a letter dated Mar. 15, 1960, from Messrs. William Stevens & Sons, to which I will subsequently refer. In November, 1959, the said Sidney Philips, again without the consent of the bank, purported to grant a sub-tenancy of the first floor of the house to the defendant Florence Lilian Kiley, the rent being £3 5s. per week paid monthly. Mrs. Kiley took no interest in the property as against the bank. Mrs. Kiley paid rent to Lewis (Import & Export), Ltd. until April, 1960, when she, too, received a letter from Messrs. William Stevens & Sons. On Feb. 23, 1960, the bank, by one of its managers, on its behalf, wrote a letter addressed to "Maurice Lewis, Esq., 70, Colvestone Crescent, E.8" in the following terms:

I "Dear Sir, we now make demand upon you for payment forthwith of the full amount of your liability to the bank as shown below: Maurice Lewis, debtor, £48 1s. 1d.; interest to date, 6s. 7d. Lewis (Import & Export), Ltd., debtor: £4,324 9s. 4d.; interest to date, £42, 8s. 2d. Failing your immediate compliance the bank will be free to pursue its remedies against the property 70, Colvestone Crescent, E.8, charged as security."

Mr. Lewis had of course been dead for some six months at the date of this letter.

By an instrument under seal dated Mar. 11, 1960, the bank purported, in A
exercise of the power conferred by the Law of Property Act, 1925, and of all
other powers (if any) to appoint Mr. W. P. S. Stevens, a partner in the firm of
William Stevens & Sons, to be the receiver of the rents of the property comprised
in the instrument of charge. On Mar. 15, 1960, Messrs. William Stevens &
Sons wrote to Mr. Solomons a letter in the following terms:

"Dear Sir,

Lewis (Import & Export), Ltd., 70, Colvestone Crescent.

Our Mr. Stevens has been appointed receiver of the above property by deed
of appointment dated Mar. 11, 1960, and made by Barclays Bank, Ltd.
From the date of this letter you must not pay any rent to any persons other
than to Mr. Stevens, or as he directs. If you do so, the receipt may not
be a valid one. Our Mr. Stevens would like to call and inspect the property
and will be calling for this purpose at between 9.30 and 10 a.m. Thursday,
Mar. 17, and will call at this time unless we hear from you to the contrary
in the meanwhile. Please have your rent book available and Mr. Stevens
will show you his deed of appointment at the same time."

Shortly after writing this letter Mr. Stevens called at the house, where he saw
Mrs. Solomons. The latter produced the rent book and tendered rent, but Mr.
Stevens told her that he could not accept rent or acknowledge the tenancy
at that stage.

It appears that in April, 1960, Messrs. William Stevens & Sons wrote a similar
letter to Mrs. Kiley.

In June, 1960, Mrs. Solomons called on Messrs. William Stevens & Sons and
complained about the state of the front guttering of the house. As a result of
this visit, Messrs. William Stevens & Sons wrote to Mrs. Solomons a letter
dated June 20, 1960, in the following terms:

"Dear Madam, referring to your call upon us concerning the front gutter,
although our Mr. Stevens is the receiver of this property, he is not yet in
possession nor are there any funds in hand. The gutter seems likely to be
dangerous and is causing damage to the property and in the circumstances
we think you had better have it attended to by a builder and pay for it out
of the rent you are holding. You should then keep the receipt and later on
tender it as part of your rent payment, but please let us know when you
have had the work done."

The work on the gutter was not done for some months and later Mr. Solomons
called on Messrs. William Stevens & Sons about the same matter. He deposes
that someone in the office of Messrs. William Stevens & Sons told him "that they
had got in touch with the bank and I was to pay for the repairs out of the rent."

At some date in the summer of 1960 a demand for £22 1s. 9d. Sch. A tax,
addressed to "The Occupier, 70, Colvestone Crescent" was delivered at the
house. Mrs. Solomons took the demand to Messrs. William Stevens & Sons.
Two days later Mrs. Solomons saw one of the partners in the firm, who refused
to give her a covering letter as authority to pay the tax, but advised her that
Mr. Solomons and Mrs. Kiley should pay the tax and, in Mrs. Solomons' own
words, "deduct it from the rent which we held in hand". Mrs. Kiley also went
to see Messrs. William Stevens & Sons, who told her that they could not give
authority for the tax to be deducted from the rent, but the tax would have to be
paid. Ultimately Mr. Solomons and Mrs. Kiley paid this tax in equal shares.
Mr. Solomons and Mrs. Kiley have respectively paid rates since they ceased to
pay rent. No demand for rent has been made by the bank or by Mr. Stevens
either on Mr. Solomons or on Mrs. Kiley: nor has any rent been accepted by the
bank or by Mr. Stevens either from Mr. Solomons or from Mrs. Kiley.

Mr. Solomons and Mrs. Kiley claim to be the lawful tenants of the property.
If this claim is well founded, they are entitled to the benefit of the Rent Acts (1).

(1) I.e., the Rent Act, 1957, and prior Acts indicated in s. 25 (1) of that Act.

A The bank contends that Mr. Solomons and Mrs. Kiley are trespassers, and the bank issued this originating summons on July 14, 1960.

The law to be applied has been the subject of many decisions and is not in doubt. If a mortgagor grants a tenancy not authorised by the terms of the mortgage, the mortgagee is not bound by the tenancy and can assert his paramount title and treat the tenant as a trespasser, but the mortgagee and the

B tenant may by mutual agreement create the relationship of landlord and tenant as between themselves. Such relationship may be created by express words or by conduct, and the question whether it has been created is one to be determined on the facts: *Evans v. Elliot* (2), *Hickman v. Machin* (3), *Doe d. Parry v. Hughes* (4), and two recent decisions of CROSS, J., *Stroud Building Society v. Delamont* (5) and *Taylor v. Ellis* (6). In the words of CROSS, J., in *Stroud Building Society v. Delamont* (7) the facts must be looked at as a whole, putting oneself in the position of a jurymen. In the decision of this question of fact, the ordinary rules of estoppel are applicable.

It will be remembered that no representation has been taken out to the estate of the grantor, Mr. Lewis, and counsel for the defendants has taken the preliminary point that the summons is not properly constituted in the absence of a representative of Mr. Lewis. In *Martins Bank, Ltd. v. Kavanagh* (8) it was held that the mortgagor was a necessary party to an application of this kind, but this decision has been distinguished in the subsequent case of *Alliance Building Society v. Shave* (9), in which one of the mortgagors, although joined as a party, had not been served. It was held that an order for possession against the tenants could not possibly prejudice the mortgagors and could properly

E be made in the absence of one of them. This decision was followed in *Hughes v. Waite* (10). It seems to me that the position is the same when, as here, the mortgagor is dead and has no personal representatives who could be made defendants. I propose to follow the more recent cases. Counsel for the defendants has contended that the order sought would prejudice the mortgagor's estate since the bank may now decide to sell without making a proper demand for

F payment: see later, however, as to this point. It seems to me that the only result which can legitimately be treated as flowing from the order will be that the house will be free from statutory tenants and, as this would increase the value of the property, I do not think that the order could be regarded as in any possible circumstances prejudicial to the interest in the equity of redemption. I therefore reject this preliminary contention.

G There remain two questions of substance: (i) Did the letter dated Feb. 23, 1960, constitute a good demand under the instrument of charge? (ii) if not, was the relation of landlord and tenant created as between the bank and the defendants by the acts of Mr. Stevens?

The first question turns by common consent on the construction of the instrument of charge. I will read again cl. 1:

H "A demand for payment or any other demand under this security may be made by any manager or officer of the bank by letter sent by post addressed to me at my address as given in this security or at my last known place of business or abode and every demand so made shall be deemed to have been made on the day such letter was posted."

I It seems to me that, on its natural meaning, this clause provides that a demand under the instrument may be validly made by letter addressed to "Maurice Lewis, 70, Colvestone Crescent, London, E.8", and I see nothing in the clause which could restrict the operation of the provision to the lifetime of Mr. Lewis, that is to say, a demand by letter so addressed would be a valid demand after

(2) (1838), 9 Ad. & El. 342.

(4) (1847), 9 L.T.O.S. 82.

(6) [1960] 1 All E.R. 549; [1960] Ch. 368.

(8) [1948] 2 All E.R. 448.

(3) (1859), 4 H. & N. 716.

(5) [1960] 1 All E.R. 749.

(7) [1960] 1 All E.R. at p. 752.

(9) [1952] 1 All E.R. 1033; [1952] Ch. 581.

(10) [1957] 1 All E.R. 603.

the death of Mr. Lewis, whether or not representatives of his estate had been constituted. Clause 12 says: A

"In this charge where the context so requires or admits references to me shall include my executors or administrators and assigns and successors in title and references to the bank shall include their assigns."

The word "include" is clearly a term of extension and the provision is appropriate in relation to demands, to prescribe that the demand may also be validly made by letter addressed to the personal representatives of Mr. Lewis, but it seems to me that nothing in cl. 12 can cut down the operation of cl. 1 and that a demand made in accordance with cl. 1 alone must still be valid. B

Counsel for the defendants contends that cl. 1 only applies to demands which are capable of being made to the mortgagor personally, and since cl. 12 only applies where representatives have been constituted it follows that, where a mortgagor is dead without representatives, no demand at all can be made. C

For the reasons which I have sought to give, I do not think that this is the natural construction of cl. 1. If this had been the intent, cl. 1 would have been differently worded. For example, it would have started, "A demand for payment or any other demand upon me under this security" and so on. The construction which I have put on cl. 1 appears to me to produce a reasonable result. The other construction would produce deadlock in the case of the death of a mortgagor without representatives, a position which cannot be uncommon. This deadlock could apparently only be resolved by the bank procuring a grant of administration as a creditor and serving a demand on the administrator. I think that if, contrary to my view, the argument on construction were equally balanced, I should be entitled to prefer the construction which leads to a reasonable result. This question turns on the construction of the particular instrument and counsel have been unable to find any case in point, but some little help may perhaps be derived from the judgment of the Court of Appeal in *New Zealand Gold Extraction Co. (Newbery-Vautin Process) v. Peacock* (11) in relation to a deceased member of a company where the articles contain no express provision. D E F

If the first question is answered in the sense indicated, then counsel for the defendants admits that Mr. Stevens cannot have been the agent of the bank so as to be in a position to create the relation of landlord and tenant between the bank and the tenant. This admission makes it unnecessary to trace the precise path by which this conclusion is reached.

On the view which I have taken on the first question, the second question does not arise, but in case I am wrong on the first question I should answer the second question, that is, on the footing that the letter dated Feb. 23, 1960, did not constitute a good demand. On this footing it is clear that the statutory power to appoint a receiver has never been exercisable by the bank: see cl. 3 and cl. 4 of the instrument of charge and s. 109 of the Law of Property Act, 1925. It follows that Mr. Stevens must at all times have been the agent of the bank: cf. *Lever Finance, Ltd. v. Trustee of Property of Needleman* (12). It remains to consider whether Mr. Stevens, on behalf of the bank, entered into the relation of landlord and tenant with the tenant. That, as stated above, is an issue of fact. G H

It will be convenient to consider first the case of Mr. Solomons. There is no doubt that Mr. Solomons himself sought to create the relation of landlord and tenant by tendering rent to Mr. Stevens. There is also no doubt that Mr. Stevens did not seek to create such a relation, but, on the contrary, repudiated it by the refusal of rent. It is, however, said that the bank is estopped from denying the creation of the relation by the conduct of Mr. Stevens, particularly in relation to the repair of the gutter and with regard to the Sch. A demand. In Mr. Stevens' letter dated June 20, 1960, what he did was to advise Mrs. Solomons to I

A repair the gutter and authorise Mr. Solomons to deduct the expense from the rent if and when it should be thereafter payable by him. The letter itself refers to "the rent you are holding" and "later on" "your rent payment". The letter, read in conjunction with Mr. Stevens' refusal to accept rent, is wholly compatible with an intention not to create at once the relation of landlord and tenant, and cannot be reasonably treated as a representation that the relation already existed. Mr. Stevens' advice with regard to the Sch. A demand was merely to pay the tax and deduct it from the rent "in hand". I think that is wholly compatible with an intention not to create the relation of landlord and tenant and cannot be construed as a representation that the relation was already in existence. Indeed the refusal to give a covering notice of itself negatives such a representation. It will be borne in mind that the bank as a mortgagee not in actual occupation was not itself under any liability for this Sch. A tax and could only be concerned with it as a possible deduction from future rent. Therefore I conclude that Mr. Stevens did nothing to create the relation of landlord and tenant between the bank and Mr. Solomons. The same result follows a fortiori in the case of Mrs. Kiley, who can only rely on the Sch. A payment.

Much reliance was placed by counsel for the defendants on the judgment of D PARKE, B., in a case which I have already mentioned, *Doe d. Parry v. Hughes* (13). The judgment runs as follows:

"The dictum of LORD DENMAN, C.J., in *Evans v. Elliot* (14) is only that cases may occur in which there is evidence which ought to be submitted to a jury that a mortgagee has recognised certain parties as his tenants; as for instance if he had encouraged them to expend their money, by saying: 'You had better lay out your money' in such a way. But the evidence in the present case is clearly insufficient for that purpose,—it is nothing more than that the mortgagee took a ride over to see the property."

Obviously evidence of encouragement of this kind might go far* to establish the relationship of landlord and tenant (for example, to take an extreme case, if the mortgagee encouraged the tenant to rebuild the property) but it is merely an element in the issue of fact to be determined in each case, and in the present case the advice to repair the gutter, taken in its context, does not seem to me to possess anything like conclusive weight.

I propose accordingly to make an order for possession against each of the two effective defendants in the terms of the originating summons.

G *J. L. Arnold, Q.C.*: I apprehend your Lordship should make a twenty-eight days' order. It seems to be the rule, according to what HARMAN, J., said in *Barclays Bank, Ltd. v. Bird* (15). The bank will be reasonable about enforcing the order.

PENNYCUICK, J.: I will make an order for possession to be given twenty-eight days after the date of the service of the order.

Order accordingly.

Solicitors: *Forbes & Son* (for the plaintiff); *Simpson, Palmer & Winder* (for the defendants).

[Reported by JENIFER SANDELL, Barrister-at-Law.]

(13) (1847), 11 Jur. at p. 699.

(14) (1838), 9 Ad. & El. 342.

(15) [1954] 1 All E.R. at p. 453; [1954] Ch. at p. 282.

R. v. CAVENDISH.

[COURT OF CRIMINAL APPEAL (Lord Parker, C.J., Winn and Widgery, JJ.),
February 13, 14, 1961.]

Criminal Law—Evidence—Possession—Receiving stolen goods—Goods received by servant in absence of master—Master denied knowledge of receipt of goods—Submission of no case to answer overruled.

For a man to be found to have had possession of goods, something more must be proved than that the goods were found on his premises; it must be shown either, if he were absent, that on his return he became aware of them and exercised some control over them or that the goods had come, albeit in his absence, at his invitation or by arrangement with him (see p. 858, letter E, post).

A lorry driver took six drums of oil, which he should have delivered to a customer, to the appellant's yard where they were unloaded by an employee of the appellant. The appellant, who was away at the time, was questioned by the police on his return and at once denied that he knew anything about the matter. He was charged with receiving the oil knowing it to be stolen. At the end of the prosecution case a submission was made that there was no case to be left to the jury that the appellant had possession or constructive possession of the oil or that he knew that it was stolen. This submission was rejected, the trial proceeded and the appellant was convicted. On appeal,

Held: the submission of no case had been rightly rejected (see p. 858, letter H, post).

Appeal dismissed.

[**Editorial Note.** The receiving of stolen goods imports their possession. The prosecution must, on a charge of receiving stolen goods, adduce evidence which, among other matters, raises a case to answer on the question of the accused's having received the goods into his possession. In *R. v. Fallows* ((1948), 65 T.L.R. 93) the Court of Criminal Appeal, deciding that a plea of guilty by a co-defendant to the charge of receiving was no evidence that the other accused also had possession of the goods, disapproved the decision in *R. v. Merriman* ([1907] V.L.R. 1). In that case there was an arrangement by a receiver with thieves to bring stolen property to his premises; but stolen property being left there subsequently in his absence, the court held that there was no evidence of receiving. The true principle and approach is, it is thought, that stated at letter B above: see also, e.g., as regards knowledge and sanction, *R. v. Savage*, (1906), 70 J.P. 36; *R. v. Higginbottom*, (1912), 8 Cr. App. Rep. 79.

As to possession on charges of receiving stolen goods, see 10 HALSBURY'S LAWS (3rd Edn.) 810, para. 1568; and for cases on the subject, see 15 DIGEST (Repl.) 1146-1149, 11,540-11,571.]

Appeal.

The appellant, Joseph Peter Cavendish, was charged at the County of London Sessions and was tried on Aug. 4 and Aug. 5, 1960, before the deputy chairman and a jury on an indictment that the appellant, on Apr. 25, 1960, received six drums of gas oil, the property of L. G. Hydleman & Co., Ltd., well knowing that property to have been stolen. The appellant was the proprietor of a transport business operating nine lorries and employing nine drivers and a fitter. It was not disputed that the goods were stolen goods nor that one Lisle, a lorry driver employed by the company named, had left the goods at the appellant's premises at a time when the appellant was absent. According to evidence tendered for the prosecution the driver, Lisle, and a fitter employed by the appellant, unloaded six drums of oil from the driver's lorry at the appellant's yard. They then loaded seven empty drums onto the lorry, which Lisle drove away. Apparently the fitter had not had any instructions to accept or knowledge about the oil drums that were unloaded; he was called at the trial as a witness

A for the defence, when he gave evidence that he had no warning that the oil drums would arrive and no instructions to load the empty drums. The lorry had arrived at the appellant's premises at about 3 p.m. on Apr. 25, 1960. At 4.15 p.m. the appellant arrived in a car with his family, when he was approached by the police who told him that they were making inquiries respecting the oil which had been left by the lorry driver; the appellant replied that he had been away most of the day and had just come back, and that the oil was nothing to do with him. B The facts are summarised at p. 858, letters A to C, post.

At the close of the evidence for the prosecution it was submitted on behalf of the appellant that there was no evidence of his having had possession of the property. After argument the deputy chairman ruled that there was a case to go to the jury. Evidence for the defence was then heard. In summing-up the C deputy chairman directed the jury, among other matters, that one essential element of the offence charged, which the prosecution had to prove, was that the goods were in the possession or under the control of the appellant. On the one hand if unordered goods were dumped on a man's premises and he knew nothing about them, he had not received them into his possession. On the other hand, if the jury were satisfied that the appellant, being in communication with the D driver, Lisle, had agreed to take the goods, there was evidence from which the jury could deduce that the appellant was in possession of the goods. Referring to the question of possession the deputy chairman said:

"We have, in law, something which is called constructive possession which, like so many other things, is only a question of common sense. One E can receive something into one's possession constructively without actually physically taking it over. If one were dealing in stolen property, obviously it would not be necessary to receive every piece into one's own hands and to put it down oneself. If one is acting dishonestly in concert with somebody else, it is quite possible to have things left at one's premises, when one is not there; and it would be absurd for the law to say that although F one knew about the whole thing and although it was all arranged, yet because one was not physically present when the goods arrived one was not guilty of the offence . . . The defence is this. The [appellant] says 'I am the victim of the most appalling bad luck; I know nothing about this fuel oil whatsoever; it is agreed that I run a transport business, and a transport business in which fuel oil is used'. If you believe what he said to the police at the G time, he tells you that at that particular time he was short of money, that his overheads were very considerable and that in fact his business was running almost hand to mouth. He is really saying this—' At that particular time, by the most appalling coincidence, a man who is a thief is coming along and is dumping, absolutely unknown to me, at my premises, stolen fuel oil.' It is a matter for you, members of the jury, what inferences you draw from H the evidence which you have heard."

The appellant was convicted and sentenced to eighteen months' imprisonment. He appealed against both conviction and sentence. The court (LORD PARKER, C.J., SALMON and WINN, JJ.), on Jan. 23, 1961, adjourned the case for argument; after leave had been granted by the single judge, ASHWORTH, J., on Aug. 16, 1960, the appellant having been allowed bail. The cases cited below were referred I to in argument*.

B. E. Capstick for the appellant.

H. J. Leonard for the Crown.

* I.e., *R. v. Woodward*, (1862), 9 Cox, C.C. 95; *R. v. Robinson*, (1862), 26 J.P. 183; *R. v. Savage*, (1906), 70 J.P. 36; *R. v. Merriman*, [1907] V.L.R. 1; *R. v. Pearson* (No. 2), (1908), 72 J.P. 451; *R. v. Lewis*, (1910), 4 Cr. App. Rep. 96; *R. v. Fraser*, (1911), 76 J.P. 168; *R. v. Pritchard*, (1913), 9 Cr. App. Rep. 210; *R. v. Power*, (1919), 14 Cr. App. Rep. 17; *R. v. Fallows*, (1948), 65 T.L.R. 93; *Cryans v. Nixon*, 1955 S.C. (J.) 1.

LORD PARKER, C.J., delivered the following judgment of the court: A
The case that was sought to be made against the appellant was that on Apr. 25, 1960, a man called Lisle, who was employed as a driver for a company called Hydleman & Co., gave a short delivery at one of his places of call and took six barrels of oil, which he should have delivered to a customer, to the appellant's premises, a yard, where they were unloaded by one of the appellant's employees. B
Lisle at the same time took away from the yard seven empty barrels, and the case for the prosecution was that that delivery of oil by the thief must have been as a result of some arrangement between the appellant and the thief. The appellant was away at the time. When he came back and was questioned by the police he at once denied that he knew anything about it. At the end of the prosecution case a submission was made that there was no case to be left to the jury that this man had possession or constructive possession of this oil. If he did have possession, it was a clear case of recent possession and called for an explanation. C
Pausing there, if the deputy chairman was right in rejecting that submission, as he did, the court feels that, having regard to the evidence that thereafter was called on behalf of the defence, it was perfectly possible for the jury to come to the conclusion that the offence was made out.

The sole question, as it seems to this court, is whether a case was made out at the end of the prosecution case which called for an answer. Certain propositions are quite clear. It is quite clear, without referring to authority, that for a man to be found to have possession, actual or constructive, of goods, something more must be proved than that the goods have been found on his premises. It must be shown either, if he was absent, that on his return he has become aware of them and exercised some control over them or—and this was the case sought to be made here—that the goods had come, albeit in his absence, at his invitation or by arrangement. E
It is also clear that a man cannot be convicted of receiving goods of which delivery has been taken by his servant unless there is evidence that he, the employer, had given the servant authority or instructions to take the goods.

Counsel for the appellant, to whom the court is indebted for his argument, has contended in effect that there was nothing more here than the fact that the goods were found on the appellant's premises in his absence and that delivery of them had been taken by a servant. The court feel that this is undoubtedly rather a border-line case, but they have come to the clear conclusion that there was evidence in this case, and that the deputy chairman was right in overruling the submission. Perhaps the matter can be put shortly by asking the rhetorical question—why did Lisle deliver these goods to this yard and take away seven empties? He was undoubtedly the thief, and one has only to think of the answer to that question to realise that there was certainly some evidence which made it more probable than not that the delivery was by arrangement with this appellant. On that short ground the court is satisfied that in this case the deputy chairman was right in overruling the submission. F

So far as sentence is concerned, this man has a record. He is now thirty-six years of age and he has certain convictions for larceny between 1937 and 1954. It is true that since then he has had two convictions for assault, but so far as any form of dishonesty is concerned he has kept clear for some eight years. The deputy chairman took that into consideration, as he said, and imposed a sentence of eighteen months. The court is satisfied that that was a perfectly correct sentence when imposed. The trouble is that he has been on bail since Aug. 16, 1960; in other words, he has only been in custody for about twelve days in all. The court is always anxious in such a case to take all the circumstances into consideration. Although the appellant has been on bail he will have had the appeal hanging over him for all this time and, as we have heard, he has had to sell up his business. In all the circumstances the court feels that it would be proper to reduce the sentence of eighteen months so that he will serve in all nine months. Accordingly, G
H
I

A the appeal against conviction is dismissed and that against sentence is allowed to the extent indicated.

[On Mar. 29, 1961, the court (LORD PARKER, C.J., HINCHCLIFFE and SALMON, J.J.), refused an application on behalf of the appellant for leave to appeal to the House of Lords under s. 1 of the Administration of Justice Act, 1960, holding that no point of general public importance was involved so that the question of leave to appeal to the House of Lords did not arise. LORD PARKER, C.J., then stated that apparently in varying the appellant's sentence some question had arisen about when the sentence of nine months' imprisonment should begin. His LORDSHIP had consulted the other members of the court who heard the appeal and it was clear that the twelve days which the appellant had spent in custody before he was given bail should count in the revised sentence, but that (in accordance with s. 38 (1) of the Criminal Justice Act, 1948) the period while the appellant was on bail would not count. In the result, although the sentence was of nine months' imprisonment from the date of conviction, the period of imprisonment which he would now serve was nine months less twelve days to run from Feb. 14, 1961, the date when the sentence was reduced.]

Appeal dismissed. Sentence varied.

Solicitors: *Victor Mishcon & Co.* (for the appellant); *Solicitor, Metropolitan Police* (for the Crown).

[*Reported by N. P. METCALFE, ESQ., Barrister-at-Law.*]

E CENLON FINANCE CO., LTD. v. ELLWOOD (INSPECTOR OF TAXES). ELLWOOD (INSPECTOR OF TAXES) v. CENLON FINANCE CO., LTD.

F TABLEAU HOLDINGS, LTD. v. WILLIAMS (INSPECTOR OF TAXES). WILLIAMS (INSPECTOR OF TAXES) v. TABLEAU HOLDINGS, LTD.

[COURT OF APPEAL (Holroyd Pearce, Upjohn and Donovan, L.J.J.), April 27, 28, May 1, 1961.]

G *Income Tax—Profits—Computation of profits—Dividend received being dividend paid from capital profit—Profit not chargeable to tax in hands of payor company—Recipient a company trading in stocks and shares—Whether recipient company assessable—Income Tax Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 10), Sch. D, Case I, s. 122, s. 123 (1).*

H *Income Tax—Appeal—Finality of determination—Appeal against original assessment determined by agreement—Subsequent additional assessment—Discovery being inspector's change of mind on treatment of dividends—Validity of assessments—Income Tax Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 10), s. 41 (1), s. 50 (2), s. 510 (1).*

I Out of the sale of property a company made a capital profit of £18,000 which was not subject to tax in its hands and it distributed this sum as a dividend without deduction of tax to its sole shareholder, a finance company which traded in stocks and shares. The inspector of taxes came to an agreement with the finance company on an appeal against its assessment, in respect of all but one of the years affected, that the tax free dividend was to be excluded from the computation of the company's profits for income tax purposes. On further consideration of the matter, however, and without any new facts coming to light, he changed his mind and raised additional assessments in respect of the sum, on the ground that he had "discovered" that it had wrongly been omitted.

Held: (i) the capital distribution was a fruit of the stock-in-trade of the finance company, for its trade consisted in dealing in stocks and shares for profit, and therefore, notwithstanding the inapplicability of s. 184* of the Income Tax Act, 1952 (which was a machinery section providing for the deduction of tax from dividends), the capital distribution when received by the finance company must be brought into account as part of the revenue profits of the finance company's trade.

Selection Trust, Ltd. v. Devitt ([1945] 2 All E.R. 499) considered.

(ii) the inspector of taxes was nevertheless precluded from raising, under s. 41 of the Act of 1952, an additional assessment, following his discovery of the undercharge, in respect of the years for which he had made the agreement with the company, since on that agreement he was bound by virtue of s. 510† as if the assessments had been determined finally on an appeal when both sides would be bound by virtue of s. 50 (2)† of the Act.

Decision of CROSS, J. ([1960] 3 All E.R. 390) reversed on (i); affirmed on (ii).

[As to miscellaneous receipts constituting trade receipts within Case I of Sch. D to the Income Tax Act, 1952, see 20 HALSBURY'S LAWS (3rd Edn.) 153, para. 268; and for cases on the subject, see 28 DIGEST (Repl.) 20-38, 78-173.]

As to the effect of agreements determining appeals, see 20 HALSBURY'S LAWS (3rd Edn.) 45 and 680, paras. 64 and 1342; and as to additional assessments following discovery of an undercharge, see *ibid.*, 669, para. 1314.]

Cases referred to:

Anderton and Halstead, Ltd. v. Birrell, [1931] All E.R. Rep. 796; [1932] 1 K.B. 271; 101 L.J.K.B. 219; 146 L.T. 139; 16 Tax Cas. 200; 28 Digest (Repl.) 128, 483.

Bradbury v. English Sewing Cotton Co., Ltd., [1923] All E.R. Rep. 427; [1923] A.C. 744; 92 L.J.K.B. 736; 129 L.T. 546; 8 Tax Cas. 481; 28 Digest (Repl.) 209, 881.

Canadian Eagle Oil Co., Ltd. v. R., [1945] 2 All E.R. 499; [1946] A.C. 119; 114 L.J.K.B. 451; 173 L.T. 234; 27 Tax Cas. 206; 28 Digest (Repl.) 205, 860.

Commercial Structures, Ltd. v. Briggs, [1948] 2 All E.R. 1041; 30 Tax Cas. 487; 28 Digest (Repl.) 387, 1693.

Fry v. Salisbury House Estate, Ltd., *Jones v. City of London Real Property Co., Ltd.*, [1930] All E.R. Rep. 538; [1930] A.C. 432; 99 L.J.K.B. 403; 143 L.T. 77; 15 Tax Cas. 266; 28 Digest (Repl.) 33, 148.

Gilbertson v. Fergusson, (1881), 7 Q.B.D. 562; 46 L.T. 10; 1 Tax Cas. 501; 28 Digest (Repl.) 204, 858.

Gundry v. Dunham, (1915), 85 L.J.K.B. 417; 114 L.T. 106; 7 Tax Cas. 12; 28 Digest (Repl.) 384, 1675.

Hughes v. Bank of New Zealand, [1938] 1 All E.R. 778; [1938] A.C. 366; 107 L.J.K.B. 306; 158 L.T. 463; 21 Tax Cas. 472; 28 Digest (Repl.) 264, 1174.

Inland Revenue Comrs. v. Blott, *Inland Revenue Comrs. v. Greenwood*, [1921] 2 A.C. 171; 90 L.J.K.B. 1028; 125 L.T. 497; 8 Tax Cas. 101; 28 Digest (Repl.) 345, 1525.

Inland Revenue Comrs. v. Reid's Trustees, [1949] 1 All E.R. 354; [1949] A.C. 361; [1949] L.J.R. 701; 30 Tax Cas. 431; 28 Digest (Repl.) 211, 892.

Neumann v. Inland Revenue Comrs., [1934] All E.R. Rep. 398; [1934] A.C. 215; 103 L.J.K.B. 210; 150 L.T. 481; 18 Tax Cas. 332; 28 Digest (Repl.) 338, 1501.

Selection Trust, Ltd. v. Devitt, [1945] 2 All E.R. 499; [1946] A.C. 119; 114 L.J.K.B. 451; 173 L.T. 234; 27 Tax Cas. 206; 28 Digest (Repl.) 205, 861.

* The relevant terms of s. 184 are printed at p. 863, letter I, post.

† The terms of s. 50 (2) and s. 510 are printed at pp. 867, 868, post.

- A *Thompson v. Trust and Loan Co. of Canada*, [1932] All E.R. Rep. 647; [1932] 1 K.B. 517; 101 L.J.K.B. 342; 146 L.T. 369; 16 Tax Cas. 394; 28 Digest (Repl.) 28, 122.

Whimster & Co. v. Inland Revenue Comrs., 1926 S.C. 20; 12 Tax Cas. 813; 28 Digest (Repl.) 424, 944.

B Appeals.

The first taxpayer company, Cenlon Finance Co., Ltd., appealed to the Special Commissioners of Income Tax against assessments made on it under Case I of Sch. D to the Income Tax Act, 1952, for the years 1953-54, 1954-55, 1955-56 and 1956-57 in the sums of £10,452, £22,134, £22,134 and £22,241 respectively. The assessments for 1953-54 to 1955-56 were additional assessments. The questions for determination were: (i) as regards the years 1953-54 to 1955-56, whether there had been a discovery within the meaning of s. 41 (1) of the Act of 1952 (raised only formally in view of the authorities); (ii) as regards the years 1953-54 and 1954-55, (a) whether there had been an agreement on certain matters within the meaning of s. 510 (1) of the Act, and (b) if so, whether additional assessments for those years were competent; (iii) as regards all years whether a dividend received by the first taxpayer company, from which tax had not been deducted, was a receipt of the first taxpayer company's trade which should be included in computing their Case I liability. The company contended: (i) (formally) that as regards the years 1953-54, 1954-55 and 1955-56 that there had been no discovery within the meaning of s. 41 (1) of the Income Tax Act, 1952, and therefore that the additional assessments for those years were not competent; (ii) that as regards the years 1953-54 and 1954-55 the proper officer of the Crown and the first taxpayer company had come to an agreement within the meaning of s. 510 (1) of the Act of 1952 on the specific point that the dividend of £25,000 received from Henry White (Sutherland House), Ltd., should not be included in the computation of the first taxpayer company's Case I profits, the agreement having the like consequences as if an appeal had been determined by the commissioners and therefore being final under s. 50 (2) of the Act, so that an additional assessment could not be raised under s. 41 (1); and (iii) that a dividend paid to a company resident in the United Kingdom was not taxable in the hands of the recipient whether tax had been deducted from it or not and that it could not therefore be included in a computation of Case I profits. The Crown contended: (i) that there had been a discovery within the meaning of s. 41 (1) of the Act of 1952, that the first taxpayer company had been undercharged in respect of the years 1953-54, 1954-55 and 1955-56 and that the additional assessments were therefore validly made; (ii) that the additional assessments for 1953-54 and 1954-55 were not barred by reason of the settling of appeals against the first assessments under s. 510 (1) of the Act, nor by reason of s. 50 (2), nor by reason of the issue having already been determined, since (a) neither s. 510 nor s. 50 (2) had any bearing on the meaning of "discovery" in s. 41 (1), (b) s. 50 (2) applied only to the particular assessment determined on an appeal and not to the additional assessments, and (c) neither s. 50 (2) nor s. 510 (1) operated by way of an estoppel to prevent the raising of an additional assessment under s. 41 (1), the doctrine of *res judicata* having no application to decisions of income tax commissioners; and (iii) that the dividend of £25,000 received by the first taxpayer company was a receipt of its trade and as such had to be taken into account in computing the profits or gains of that trade for the purpose of assessment to income tax under Case I of Sch. D. The commissioners held: (i) that there had been a discovery within s. 41 (1) of the Act of 1952 for the years 1953-54, 1954-55 and 1955-56; (ii) that the specific matter of the taxability of the £25,000 dividend had been raised and considered by the inspector of taxes and that an agreement had been come to within s. 510 (1) that it was not to be included in computing the first taxpayer company's Case I liability with the same effect as the determination of an appeal thereon, and s. 50 (2) therefore operated to prevent the raising of additional

assessments to include the dividend for the two years under s. 41 (1); and (iii) A that the dividend was a receipt of the first taxpayer company's Case I trade and was not itself a receipt chargeable to income tax but should be included in the computation of the company's Case I liability as a receipt of its Case I trade.

The second taxpayer company, Tableau Holdings, Ltd., appealed to the General Commissioners of Income Tax for the City of London against additional assessments to income tax made on it under Case I of Sch. D in respect of its trade as financier in the sums of £4,941, £12,705, £12,705 and £12,705 respectively B for 1952-53, 1953-54, 1954-55 and 1955-56. The questions for determination were whether (i) a sum of £18,000 received by the company on Sept. 18, 1952, was a trading receipt which should be included in its profits for income tax purposes; (ii) having regard to s. 510 (1) and s. 50 (2) of the Income Tax Act, 1952, the additional assessments for 1952-53, 1953-54 and 1954-55 had been validly C made; and (iii) as regards the additional assessments for all four years whether there had been a discovery within the meaning of s. 41 of the Act of 1952 justifying the making of the assessments. The contentions of the parties were substantially the same as in the case of the first taxpayer company. The commissioners held: (i) that the £18,000 was a trading receipt liable to be included in the computation of the company's profits; (ii) that the additional assessments for D 1952-53, 1953-54 and 1954-55 were incompetent and must be discharged because the issues raised therein had already been determined on appeals against first assessments for those years by agreement between the parties under s. 510 (1) of the Act of 1952, the appeals having become final and conclusive by reason of s. 50 (2); and (iii) that for 1955-56 there was a discovery by the inspector of taxes within s. 41 and the additional assessment of £12,705 for that sum must E accordingly be confirmed.

On July 29, 1960, on appeal by way of Case Stated by both taxpayer companies and the Crown, reported [1960] 3 All E.R. 390, Cross, J., gave judgment in favour of the taxpayer companies on the matters in issue (except that of discovery, which owing to the state of the authorities was not argued). The Crown appealed to the Court of Appeal in both cases. F

R. E. Borneman, Q.C., and A. S. Orr for the Crown.

P. Shelbourne and R. B. Holroyd Pearce for the taxpayer companies.

UPJOHN, L.J.: These are two appeals against judgments of Cross, J. Both appeals raise exactly the same points, and the facts are fully set out in the Cases Stated; but, as they are so short and some of the facts are common to G both cases, I propose to re-state them at the beginning of this judgment. In one case, Tableau Holdings, Ltd., the second taxpayer company, was incorporated in November, 1952, as a finance company, i.e., a company which trades in stocks and shares. In the same month, it acquired the whole of the issued capital of a company known as Henry White (Sutherland House), Ltd., which carried on business as ladies' outfitters. That company had sold some of its freehold property at Newcastle-under-Lyme, and thereby realised a profit which H was a capital profit and had not been assessed to tax in its hands. The purchase consideration for the acquisition of its shares was the sum of £87,909; and, on the same day, Henry White, Ltd., distributed by way of dividend to Tableau Holdings, Ltd., as its sole shareholder, a sum of £18,000 out of the capital profit on the sale of its premises. This being a capital profit not subject to tax, no I tax was deducted by Henry White, Ltd., when making the distribution.

Nearly a year later, on Oct. 20, 1953, Tableau Holdings, Ltd. sold the whole of the issued share capital in Henry White, Ltd., to the company concerned in the other appeal, Cenlon Finance Co., Ltd., for the sum of £72,000. The operation was repeated, and, on Nov. 2, 1953, Henry White, Ltd., made another capital distribution by way of dividend out of the profit on the sale of its premises to Cenlon Finance Co., Ltd., the first taxpayer company, of £25,000, again without deduction of tax. On Dec. 4, 1953, Cenlon Finance Co., Ltd., sold its

A entire holding of shares in Henry White for £27,500. Like Tableau Holdings, Ltd., Cenlon Finance Co., Ltd. was incorporated to carry on a business as a finance company, or dealer in stocks and shares.

In these circumstances, it is not in doubt that each company is assessable under Case I of Sch. D to the Income Tax Act, 1952, for the profits that it makes on transactions in investments and securities, and is entitled to deduct losses made in the course of such transactions. Thus it is not in dispute that each of the companies was entitled to bring into the computation of its total profits for the year the loss which it made on the sale of the shareholding in Henry White, Ltd. The sole question is whether the dividends declared by Henry White, Ltd., and paid to the first and second taxpayer companies respectively ought to be brought in as a credit in assessing the profits of the respective companies' trade. That is the first and principal point raised in the appeal.

But there is a subsidiary point which arises in this way. In the case of each company, in respect of some of the relevant years of assessment, it was submitted to the appropriate inspector of taxes that the capital distribution made by Henry White, Ltd., ought not to be brought into account in assessing the profits of the company under Case I of Sch. D. In each case the inspector ultimately accepted the submission and agreed that these dividends should be omitted from the computation of the trading profit. Later, each inspector changed his mind and raised an additional assessment on each of the companies, claiming that these distributions should be brought into account as a profit for the purposes of Case I of Sch. D. It is admitted that in each case no new facts had come to light, and the inspectors respectively raised the additional assessment on each company on a further consideration of the matter, when they respectively came to the conclusion that, in law, each of the companies was liable to bring these sums so distributed into account in the computation of their profits. The question then arises whether the inspectors respectively, having agreed to the original assessment, are entitled to raise an additional assessment under s. 41 of the Income Tax Act, 1952, in respect of those relevant years of assessment in which the agreement had been made.

I turn then to the first and main point, i.e., whether a company incorporated to transact dealings in stocks and shares is bound to bring into the computation of its profits under Case I of Sch. D dividends that it has received from which tax is not deductible by the paying company under s. 184 of the Income Tax Act, 1952. I must, of course, deal with the argument on behalf of the taxpayer companies in some detail, but I may perhaps usefully state the argument in a nutshell at this stage, and it is as follows. Counsel for the taxpayer companies submits that the Income Tax Act, 1952, like its predecessors, contains no provision for taxing dividends except as provided by s. 184. That section, he submits, contains a code for taxing dividends, and if, under its provisions, tax is not deductible from a dividend, then, in the hands of the recipient, that dividend escapes tax altogether and, in truth, dividends from which tax is not deductible under s. 184 are in fact exempt from all tax. Let me state at once that this judgment has reference only to dividends declared by companies resident in the United Kingdom; quite different considerations apply to companies resident abroad. Nor am I concerned with surtax.

Section 184 provides:

"(1) The profits or gains to be charged on any body of persons shall be computed in accordance with the provisions of this Act on the full amount of the same before any dividend thereof is made in respect of any share, right or title thereto, and the body of persons paying the dividend shall be entitled to deduct tax at the standard rate for the year in which the amount payable becomes due.

"(2) Subsection (1) of this section shall, in relation to a dividend paid by any body of persons, be construed as authorising the deduction of tax from

the full amount paid out of profits and gains of the said body which have been charged to tax or which, under the provisions of this Act, would fall to be included in computing the liability of the said body to assessment to tax for any year if the said provisions required the computation to be made by reference to the profits and gains of that year and not by reference to those of any other year or period."

The ancestor of this section was s. 54 of the Income Tax Act, 1842. That section has been the subject of judicial comment, and both counsel for the taxpayer companies and counsel for the Crown rely on the passage contained in the speech of LORD PHILLIMORE in *Bradbury v. English Sewing Cotton Co., Ltd.* (1). LORD PHILLIMORE said this (2):

"This case seems to depend on the following considerations. A joint stock company is, under the Income Tax Act, 1842, treated as a person and is directed to make a return of its profits or gains according to Sch. D on a conventional figure, arrived at by taking an average of the three preceding years, and is liable to be assessed and taxed thereupon. If the principle of its being a distinct person, distinct from its shareholders or the aggregate of its shareholders, had been carried to a logical conclusion, there would have been no reason why each shareholder should not in his turn have to return as part of his profits or gains under Sch. D, the money received by him in dividends. Their taxation would seem to be logical, but it would be destructive of joint stock company enterprise, so the Act of 1842 has, apparently, proceeded on the idea that for revenue purposes a joint stock company should be treated as a large partnership, so that the payment of income tax by a company would discharge the quasi-partners. The reason for their discharge may be the avoidance of double taxation, or to speak accurately, the avoidance of increased taxation. But the law is not founded on the introduction of some equitable principle as modifying the statute; it is founded on the provisions of the statute itself; and the statute carries the analogy of a partnership further for it contemplates a company declaring a dividend on the gross gains, and then on the face of the dividend warrant making a proportionate deduction in respect of the duty, so that the shareholder whose total income is so small that he is exempt from income tax or pays at a lower rate, can get the income tax which has been deducted on the dividend warrant returned to him."

The noble Lord continued (3):

"A company either comes under s. 40 of the Act of 1842, or it does not. If it does not, it is not taxable; but in that event those who receive dividends from it will be taxable in respect of their dividends. If it does come under s. 40, its shareholders are not taxable for their dividends. This is so, not because of any implied rule of law against double taxation, a rule for which it would be difficult to find support in the books, but because dividends on shares in a taxed company do not come under Sch. D."

The reference by LORD PHILLIMORE to "quasi-partners" is readily understood by reading s. 54 and s. 40 of the Income Tax Act, 1842.

Mr. Shelbourne for the taxpayer companies, in an attractive and forceful argument, submits that on the true construction of the Income Tax Acts, and especially having regard to the wide wording of Case VI of Sch. D, it would have been open to the court to hold that dividends in the hands of the recipient shareholders would freshly be liable to tax in their hands under Case VI, but, as he submits, LORD PHILLIMORE is pointing out that had that been done that would have put an end to joint stock company trading overnight. I entirely agree with

(1) [1923] All E.R. Rep. 427; 8 Tax Cas. 481.

(2) [1923] All E.R. Rep. at p. 440; 8 Tax Cas. at p. 518.

(3) [1923] All E.R. Rep. at p. 441; 8 Tax Cas. at p. 520.

A that submission. Therefore, he submits, and rightly, there is no provision in the Income Tax Acts which provides for the taxation of dividends declared by companies save as is provided by s. 184, i.e., that, if a company is paying dividends out of profits which have been brought into charge for tax, they are entitled (though not bound) to deduct tax from the dividend. He further points out that this result is reached, not by any benevolent construction of the law
B against double taxation, but, to use the words of LORD PHILLIMORE, "it is founded on the provisions of the statute itself". Thus, he submits, dividends are taken altogether out of the taxing provisions of the Income Tax Acts; so that, in effect, the recipient of the dividend can be taxed only if the company paying the dividend is entitled to deduct tax from that dividend under s. 184. As a general proposition, with all this I agree; and I do not think that counsel who has argued
C the case on behalf of the Crown finds himself in disagreement, either.

The proposition that dividends are not subject to taxation except by deduction under s. 184 has been repeatedly re-stated in the House of Lords. In *Neumann v. Inland Revenue Comrs.* (4), LORD TOMLIN said (5):

D "... I may say at once that having regard to the view which I have expressed as to the general scheme and operation of the Income Tax Acts in regard to dividends I am unable to accept the view that dividends as such are taxable under Sch. D."

LORD WRIGHT said (6):

E "I reach the conclusion that a shareholder is not separately taxable (I disregard surtax) on a dividend, as a profit individual to himself, under Sch. D, Case VI, as the Court of Appeal held, or at all."

He then went on to cite extracts from earlier cases, including an extract from the passage in LORD PHILLIMORE's speech which I have already read.

In *Canadian Eagle Oil Co., Ltd. v. R.* (7), LORD SIMONDS put it very briefly in this way (8):

F "The shareholder in an English company is not taxed upon his dividend, but he goes untaxed because upon the true construction of the Income Tax Act no tax is imposed upon his dividend. He does not escape tax because some overriding principle says that he shall not be taxed."

There has been much debate before us as to the meaning of the words in LORD TOMLIN's speech, which I have just quoted, "as such". I do not think
G that they occasion any difficulty. In my judgment, what the learned Lords are saying quite clearly is this, that there is no provision in the Income Tax Acts whereby dividends are brought in as a subject-matter of taxation under any of the Schedules. This is in marked contrast (to take but one example) to the recipient of interest from British government securities. The mere receipt of such interest automatically makes the recipient liable to an assessment under Sch. C,
H and he is assessed accordingly; but the receipt of a dividend by a subject does not entitle the Crown to raise an assessment on him in respect of that dividend. Accordingly, as is perfectly well settled, if a taxpayer receives a dividend, as in this case, out of profits not brought into charge to tax, the company is not entitled to deduct tax, and that dividend remains tax free in his hands for the purposes both of income tax and surtax. That is the first step in the argument
I of counsel for the taxpayer companies, and I entirely agree with his submission.

The next step which he takes is this. He submits that in assessing the companies to these capital distributions the Crown is in fact taxing a dividend, and it is not entitled to do so because s. 184 contains a complete and exhaustive code

(4) [1934] All E.R. Rep. 398; 18 Tax Cas. 332.

(5) [1934] All E.R. Rep. at p. 406; 18 Tax Cas. at p. 362.

(6) [1934] All E.R. Rep. at p. 410; 18 Tax Cas. at p. 368.

(7) [1945] 2 All E.R. 499; 27 Tax Cas. 206.

(8) [1945] 2 All E.R. at p. 517; 27 Tax Cas. at p. 262.

for the taxation of dividends, and, if tax is not deductible under that section, then the Crown is not entitled to tax on the dividend in any circumstances. He submits that s. 184 is really a head of taxation comparable to the Schedules contained in the Act. He submits that it is the duty of the Crown to analyse the profit and loss account submitted for the purposes of Case I of Sch. D to see whether something has been brought in which is not subject to tax.

He points out truly that if, e.g., rent received from land is found in a trading company's accounts, it must be taken out of Case I Sch. D assessment, and taxed under Sch. A. No doubt that is perfectly true, and is due to the construction which has been put on the Income Tax Acts in the well-known case of *Fry v. Salisbury House Estate, Ltd.* (9). The law was there laid down that each Schedule contained a definite code applying exclusively to its defined subject-matters (see per LORD ATKIN (10)). Equally, no doubt, if interest from government securities is found in the trading account it must be taken out and taxed under Sch. C. So he says, if the dividend declared by a company is found, it must be taken out to see whether it is taxable under s. 184, and, if not so taxable, it escapes the net altogether.

He relies, naturally, on *Hughes v. Bank of New Zealand* (11). In that case, during the first world war the British government issued securities which were to be tax free in the hands of non-residents for the reason that they wanted to attract funds from overseas non-residents with which to fight the war. It was held that not only was the interest exempt as such under Sch. C, but that in the case of a non-resident trading company it was not permissible to bring in the interest under Case I of Sch. D, and thereby tax the interest indirectly as a profit of the trade carried on by the respondent bank. The same result was reached in the case of interest where there was an exemption not by statute but by virtue of the rules made under the Schedules. This result was reached by application of the *Salisbury House* (12) principle; i.e., that, if a source of income is taxed under one Schedule but is exempt by virtue of rules under that Schedule, it is altogether exempt and cannot be taxed under another Schedule. For another example of the exclusiveness of the Schedules relied on by counsel for the taxpayer companies, see *Thompson v. Trust and Loan Co. of Canada* (13). He also pointed out that in *Inland Revenue Comrs. v. Reid's Trustees* (14), LORD SIMONDS pointed out that, though a dividend paid out of capital profits is necessarily income in the hands of the recipient, it will escape taxation unless tax can be deducted under s. 184.

These are the main authorities from which he asked us to deduce that s. 184 constitutes a complete and exhaustive code, really a charging Schedule, which charged dividends to tax, so that they cannot be charged in any circumstances under any other Schedule; they are exempt. This was indeed accepted by the learned judge, who decided this point in his favour when he said (15):

"In my judgment, the exemption of dividends from income tax which is implied in the deduction provisions of the Income Tax Act is a general exemption analogous to the express exemption of war loan interest in the beneficial ownership of a non-resident."

I am quite unable to accept this argument. Section 184 is not a charging section, and has no analogy with the charging Schedules contained in the Income Tax Acts. It is to be found in Part 7 of the Act and is a machinery or administrative provision, and it is directed solely to the case where a company is paying a dividend out of profits charged to tax, and is authorised (though not compellable) to deduct the tax from the dividend. I cannot for one moment accept the

(9) [1930] All E.R. Rep. 538; 15 Tax Cas. 266.

(10) [1930] All E.R. Rep. at p. 552; 15 Tax Cas. at p. 320.

(11) [1938] 1 All E.R. 778; 21 Tax Cas. 472.

(12) *Fry v. Salisbury House Estate, Ltd.*, [1930] All E.R. Rep. 538; 15 Tax Cas. 266.

(13) [1932] All E.R. Rep. 647; 16 Tax Cas. 394.

(14) [1949] 1 All E.R. 354; 30 Tax Cas. 431.

(15) [1960] 3 All E.R. at p. 395.

A submission that s. 184 forms a complete and exhaustive code for the taxation of dividends. I see nothing in s. 184 corresponding to the legislation in *Hughes v. Bank of New Zealand* (16) which exempts dividends from taxation. The matter must be regarded as one of general principle.

B In the ordinary case, a company pays dividends out of profits brought into charge for tax, and deducts the tax. No difficulty arises. If a company (as in this case) such as Henry White, Ltd., makes a capital profit, then it is not entitled to deduct the tax under s. 184, and there is no provision in the Income Tax Acts whereby the recipient can automatically be assessed to tax on the dividend. Those are the ordinary cases; but this is a case where the company assessed is a trader in stocks and shares. I can see nothing myself to prevent the application of the ordinary rules; i.e., the company is assessed under Case I of Sch. D on the profit made from dealing in stocks and shares, and it has to bring in profits that it makes on dealings which, in the hands of a non-trader, would be capital profits: for example, the profit made on the sale of a share over the purchase price; a cash repayment on a reduction of capital; dividends received in a liquidation—all these would be capital profits in the hands of the non-trader. But the trader has chosen to regard his stocks and shares as his stock-in-trade, and he deals with them as such; and the fruit which is yielded by such dealings is the fruit of his trade, and is assessable to tax under Case I of Sch. D.

C I can see no distinction between the cases which I have mentioned and the case of a capital distribution by way of dividend by a company as a going concern. It is all part of the fruit of his stock-in-trade; and, on general income tax principles, it must be brought into his computation as part of the revenue profits of his trade. Short of some express exemption exempting dividends from taxation altogether, I cannot see how it is possible to exclude dividends, although tax may not be deducted under s. 184, from computation when ascertaining the trader's profits. There most certainly is no express exemption in s. 184, and I cannot see how any exemption is to be implied from the words of the section.

E It seems to me clear that the learned Lords in the cases that I have mentioned were stating a general proposition in relation to the receipt by a shareholder of a dividend, and that they did not have under consideration the special case of the recipient shareholder being a trader in stocks and shares. Indeed the use, by LORD TOMLIN, of the phrase "as such" (to which I have adverted earlier) makes that very plain. It is perfectly true that in *Selection Trust, Ltd. v. Devitt* (17), reported with *Canadian Eagle Oil Co., Ltd. v. R.* (17), the Selection Trust Co. was a dealer in stocks and shares. It is possible that the case might have been argued on a rather broader basis, and have raised the point that is now before us, but in fact the contentions of the Crown were directed to the overthrow of *Gilbertson v. Fergusson* (18), which had stood for fifty years; and I cannot myself draw any assistance from that case for present purposes.

F For these reasons, I find myself unable to agree with the judgment of the learned judge. In my judgment, the commissioners in each case came to a correct conclusion, and these tax-free dividends ought to be included in the computation of the company's profits for the purposes of Case I, Sch. D, in the year in which they arose.

H That makes it necessary to consider the second point, and it is necessary to refer first of all to the relevant sections of the Income Tax Act, 1952. Section 50 (2) provides:

"An appeal, once determined by the commissioners, shall be final, and neither the determination of the commissioners, nor the assessment made thereon, shall be altered, except by order of the court when a case has been required as provided by this Act."

(16) [1938] 1 All E.R. 778; 21 Tax Cas. 472.

(17) [1945] 2 All E.R. 499; 27 Tax Cas. 206.

(18) (1881), 7 Q.B.D. 562; 1 Tax Cas. 501.

Section 510, which was originally introduced as s. 51 of the Finance Act, 1949, A provides:

"(1) Subject to the provisions of this section, where a person gives notice of appeal to the General Commissioners, the Special Commissioners or the Board of Referees against an assessment to, or a decision of any kind with respect to, income tax other than surtax or surtax, and, before the appeal is determined by the commissioners or board, the surveyor or other proper officer of the Crown and the appellant come to an agreement, whether in writing or otherwise, that the assessment or decision should be treated as upheld without variation, or as varied in a particular manner or as discharged or cancelled, the like consequences shall ensue for all purposes as would have ensued if, at the time when the agreement was come to, the commissioners or board had determined the appeal and had upheld the assessment or decision without variation, had varied it in that manner or had discharged or cancelled it, as the case may be.

"(2) Subsection (1) of this section shall not apply where, within twenty-one days from the date when the agreement was come to, the appellant gives notice in writing to the surveyor or other proper officer of the Crown that he desires to repudiate or resile from the agreement."

It is not in doubt that the effect of s. 510 is that, if the inspector comes to an agreement with the taxpayer, the effect of such an agreement is the same as if the point at issue between the inspector and the taxpayer had been determined on appeal by the commissioners. It is conceded by the Crown that in each case the inspectors did come to such an agreement with the company concerned to the effect that for certain years of assessment these tax-free dividends were to be excluded from the assessments in question. The question, therefore, may be posed very shortly: Is the Crown entitled to raise an additional assessment under the provisions of s. 41, notwithstanding either an agreement or an appeal which has been determined by the commissioners?

Section 41 (1) is in these terms:

"If the surveyor discovers—that any properties or profits chargeable to tax have been omitted from the first assessments; or that a person chargeable has not delivered any statement, or has not delivered a full and proper statement, or has not been assessed to tax, or has been undercharged in the first assessments; or that a person chargeable has been allowed, or has obtained from and in the first assessments, any allowance, deduction, exemption, abatement or relief not authorised by this Act, then and in every such case . . . (ii) Where the tax is chargeable under Sch. D, the Additional Commissioners shall make an assessment on the person chargeable, in an additional first assessment, in such a sum as, according to their judgment, ought to be charged, and any such assessment shall be subject to appeal."

Before us, counsel for the taxpayer companies has properly conceded that we are bound by *Commercial Structures, Ltd. v. Briggs* (19), so that, subject always to the point on s. 50 (2), the inspector is entitled to raise an additional assessment on the taxpayer companies merely because he has a change of mind as to the law applicable to the circumstances of the case, although no new fact or other event has subsequently emerged which would cause him to change his mind. Counsel reserves the right to challenge that case if the matter should go higher.

The commissioners in each case, and the learned judge, came to the conclusion that the inspector was not entitled to raise an additional assessment on the taxpayer. I agree with them, and propose, therefore, to state my conclusions very shortly. The argument of counsel for the Crown on this matter may be briefly stated. He submitted that no agreement which an inspector may make

A under s. 510, and no determination on an appeal before the commissioners, can prevent the operation of the assessing machinery provided by the Income Tax Acts, and preclude an inspector from raising by a first or additional assessment the imposition of the correct liability on the taxpayer. The logical consequence of that submission, subject to the general limitation of six years, is that no agreement by the inspector and no determination of an appeal by the
B commissioners after a hearing is binding on the Crown.

Counsel for the Crown relied on certain dicta of WARRINGTON, L.J., in *Gundry v. Dunham* (20), but such dicta are quite inconclusive for the purpose now under consideration. He also relied on certain observations of ROWLATT, J., in *Anderton and Halstead, Ltd. v. Birrell* (21). It is perfectly true that the learned judge did there express the view that the section in the Income Tax Act, 1918, corresponding to s. 50 did not preclude the inspector from raising an additional assessment, but it is quite clear that he did so on the ground that in his view a mere change of mind as to the applicable law would not give rise to a case for an additional assessment under the section corresponding to s. 41. Whether ROWLATT, J., would have come to that conclusion on the footing that the law is as stated in *Commercial Structures, Ltd. v. Briggs* (22), is a matter
D of speculation. It follows, therefore, that his observations are not of assistance in this case.

In my judgment, if we were to give effect to the submissions made on behalf of the Crown, we should be rendering s. 50 (2) completely nugatory; and, what is equally important, it was quite futile and unnecessary to pass s. 510 as s. 51 of the Finance Act, 1949: for in essence the Crown would not be bound until
E the passing of six years, and it could always re-open any assessment on a change of mind as to the law applicable. It seems to me that s. 50 (2) is directed to the case where a particular point has been determined, and when that point is determined it cannot be relitigated; both sides are bound. So with s. 510, when a particular point has been agreed, the parties are bound subject only to a locus poenitentiae given to the subject but not to the Crown under sub-s. (2).
F If they are bound, both sides must be bound, and it cannot be open to the Crown, under the guise of an additional assessment under s. 41, to relitigate the very point, and in this case the only point, that has been agreed between the parties. On that short ground I would agree with the decision of the judge and of the commissioners.

G For these reasons, I am of opinion that in each case the commissioners came to a correct conclusion. I would therefore allow the appeal in each case, and restore the decisions of the commissioners.

H **DONOVAN, L.J.:** In each of these cases the respondent is a company whose trade consists in dealing in investments for profit. In the course of such trade, each company received a dividend on shares which it held, as part of its stock-in-trade, in a company which at the time was a subsidiary. The dividend was a distribution of profit which the subsidiary had made by selling certain premises which were part of its fixed capital. Accordingly, in the subsidiary's hands the profit was not liable to income tax. For the same reason, the subsidiary could not deduct income tax at source when paying a dividend out of this capital profit, for s. 184 of the Income Tax Act, 1952, does not allow such a deduction in the case of such a dividend. Nevertheless, the dividend was income
I in the hands of each of the recipient companies, and income of its trade. So much is admitted. The profits of each such company are assessable under Case I of Sch. D, and the computation for income tax purposes is to be made "on the full amount of the profits or gains . . ." (s. 127 (1) of the same Act).

It is well settled that, for the purposes of Case I of Sch. D, trading profits are to be computed on the principles of commercial accountancy, subject to any

(20) 7 Tax Cas. at p. 24.

(21) [1931] All E.R. Rep. 796; 16 Tax Cas. 200.

(22) [1948] 2 All E.R. 1041; 30 Tax Cas. 487.

express provisions of the Income Tax Acts by which they are excluded or modified (see *Whimster & Co. v. Inland Revenue Comrs.* (23)). No such exclusions or modifications are in point here. In consonance with those principles, each of the taxpayer companies included the dividends here in question in its profit and loss account; but, in the special computation of its profits liable to income tax, each company excluded it. The Special Commissioners who decided the appeal of the Cenlon company and the General Commissioners for the City of London who decided the appeal of the Tableau company both held that the dividend should be included in the computation of taxable trading profits. CROSS, J., reversed that decision.

Dividends paid by a company resident in the United Kingdom are not liable to tax as though they were a new income in the hands of the recipient shareholder: I speak throughout, of course, of income tax as distinct from surtax. But under s. 184 of the Income Tax Act, 1952, the paying company, if it chooses and provided the dividend is paid out of profits charged or chargeable to tax, may deduct from the dividend on payment income tax at the current standard rate. If the company does not exercise its option to deduct tax in this way, or if it has no such option because the dividend is paid out of "capital" profits, then the dividend suffers no income tax, albeit that, whether paid out of "income" profits or "capital" profits, it is income in the hands of the recipient shareholder.

So far as they go, these propositions are common ground. They rest on a number of decisions of the House of Lords beginning with *Bradbury v. English Sewing Cotton Co., Ltd.* (24) and continuing to *Canadian Eagle Oil Co., Ltd. v. R.* (25), and *Selection Trust, Ltd. v. Devitt* (25). But the Crown contends that they do not by themselves solve the problem posed by the present appeals; for what is being taxed here, says the Crown, is the full profit of a trade; and, while a dividend per se is not a taxable subject-matter (save under s. 184), nevertheless, when it is a trading receipt as well, the Act requires that it shall be brought in as such when computing the trading profits liable to tax. The taxpayer companies reply that this is to tax the dividend indirectly, which is contrary to law. So, although the matter is susceptible of much argument, and many authorities have been canvassed in the course of it, the question in the end is the very narrow one posed by these rival contentions.

I think that these two dividends ought to be brought into the computation of trading profits for these reasons: first, the language of the Act itself, which requires the tax to be levied on the full amount of the trading profits, of which these dividends admittedly form part. Secondly, because, in my view, the provisions of Case I of Sch. D to the foregoing effect are not overridden by the provisions of s. 184, or by any inference to be drawn from that section. The reason why dividends as such are not liable to be assessed to income tax is not because of anything in s. 184, but because the law recognises that, while a company is one person and its shareholder is another, nevertheless no new fund of profit is created merely by dividing that fund. But where the dividend comes to a person who is not merely a shareholder but a trader, and the dividend is income of the trade which he carries on, why should the Act not be obeyed, and the dividend be included in the computation of those profits to be taxed as profits of the trade? It begs the question, if I may say so, simply to say that s. 184 is the sole provision for the taxation of dividends.

Thirdly, I think that the decision in *Hughes v. Bank of New Zealand* (26) is not applicable here. In that case, the special exemption granted by the combined effect of the statute and the Treasury condition was exemption from *all* taxation if the other terms of the condition were complied with (see the observations of

(23) 12 Tax Cas. 813.

(24) [1923] All E.R. Rep. 427; 8 Tax Cas. 481.

(25) [1945] 2 All E.R. 499; 27 Tax Cas. 206.

(26) [1938] 1 All E.R. 778; 21 Tax Cas. 472.

A LORD WRIGHT, M.R. (27)). There is no such special exemption in the case of these dividends; nor, indeed, any exemption properly so called at all. For the term connotes a liability from which someone is excused. The conception does not fit these dividends. Regarded purely as dividends, they were never liable to tax. In this respect, I part company with the learned judge, who considered that the dividends should not lose their "exemption" by being included in a fund of taxable profits.

B These appeals do not raise the problem of the proper treatment of dividends taxed at source received by a company dealing in stocks and shares by way of trade, but in the course of the argument the question has naturally been looked at. These also, in my view, would fall to be included in a computation of profits taxable under Case I of Sch. D, with an adjustment of the tax bill which allows for that suffered at source. There may be no specific provision for such an adjustment, and naturally play was made of that fact by the taxpayer companies. But such an adjustment must obviously be made to do justice, and to give effect to the oft-recognised prohibition in the Income Tax Acts against such a double levy of tax, even though it may not be double taxation in the strictly theoretical sense. In this context, of course, I am not considering income of a finance company which is taxed at source under Sch. C, and which cannot otherwise be taxed because of the rule that income taxable under one Schedule may not be taxed instead under another. I do not think that the existence of that rule really helps the taxpayer companies.

D An argument of some subtlety was addressed to us, based on the decision of the House of Lords in *Canadian Eagle Oil Co., Ltd. v. R.* (28) and *Selection Trust, Ltd. v. Devitt* (28). It was said that, if dividends could be included in a computation of trading profits under Case I of Sch. D, then that provided in the *Selection Trust* case (28) a short and complete answer to the taxpayer there, and one hardly likely to be overlooked by the House of Lords if it were right. Yet quite a different answer was in fact given. But it must be remembered that no argument inviting consideration of the short answer was developed in the House of Lords, although it was mentioned; and, while I take notice of what the taxpayer companies in these cases now say, I am nevertheless not relieved from the duty of considering the Crown's present arguments on their merits.

E As to the contention raised by the taxpayer companies on s. 510 of the Income Tax Act, 1952, which affords them an alternative defence against certain of the additional assessments, I agree with the views expressed by both bodies of commissioners and by the learned judge. I add nothing to these, except to say that counsel for the Crown admitted that his contention involved that the protection which Parliament obviously intended to confer on the taxpayer by s. 510 was wholly illusory.

G The point is kept open by the taxpayer companies that there has been no "discovery" within the meaning of s. 41 of the Act of 1952 so as to justify additional assessments, but merely a change of mind on the same facts for the same year. But this point is concluded by this court's decision in *Commercial Structures, Ltd. v. Briggs* (29). Like UPJOHN, L.J., I also think that the Crown succeeds in these appeals to the extent that the commissioners' decision in each case should be restored, but that the Crown fails in its contention regarding s. 510.

I **HOLROYD PEARCE, L.J.:** I concur. On the question whether the Crown is precluded by the agreement in writing from raising afresh under s. 41 of the Income Tax Act, 1952, the matter concluded by the agreement, I agree with what the learned judge and my Lords have said. By s. 50 (2), an appeal, once determined, is final. There are no words saving the effect of s. 41

(27) [1936] 3 All E.R. at pp. 983, 984; 21 Tax Cas. at pp. 491, 492.

(28) [1945] 2 All E.R. 499; 27 Tax Cas. 206.

(29) [1948] 2 All E.R. 1041; 30 Tax Cas. 487.

as to that finality. By s. 510, the agreement in writing shares that finality. The finality therefore extends to the particular matter which was the subject of the agreement, viz., in this case, whether the £25,000 and £18,000 dividends could properly be computed in the receipts under Case I of Sch. D. Such a conclusion does not prevent s. 41 having a reasonable, though limited, application. Any other conclusion would conflict with the express words in s. 50 (2) and (particularly in view of what s. 41 must be taken to mean following *Commercial Structures, Ltd. v. Briggs* (30)), would rob s. 50 (2) (and, incidentally, s. 510) of its clear intention.

On the other questions also, I agree with what my Lords have said. With all respect to the learned judge's judgment and to Mr. Shelbourne's able and ingenious argument, I am unable to find any principle that justifies the exclusion of these capital dividends from a computation to which they are otherwise clearly relevant under Case I of Sch. D.

In *Inland Revenue Comrs. v. Blott* (31), VISCOUNT CAVE said:

"It [the company] pays as a taxpayer, and if no dividend is declared the shareholders have no direct concern in the payment. If a dividend is declared, the company is entitled to deduct from such dividend a proportionate part of the amount of the tax previously paid by the company; and, in that case, the payment by the company operates in relief of the shareholder."

In *Bradbury v. English Sewing Cotton Co., Ltd.* (32), following on that case, LORD WRENBURY said (33):

"The corporator bore his share of the tax by the deduction of the appropriate share of the collective tax paid by the corporation from his dividend."

LORD PHILLIMORE thus expresses it (34):

"... the shareholder is taken to have paid the tax on his dividends through the company and is not assessed or taxed on them."

That is a perfectly reasonable concept. The company has paid the tax, and the dividend is therefore not brought into receipt under Sch. D to be further taxed. But the concept becomes unreasonable if it is extended to capital dividends which are part of the receipts of a trader. They have not contributed tax at source as dividends on income have done, whether or not that tax is deducted from the dividend. Such capital dividends have not come within s. 184 at all, since the section expressly confines itself to "the profits or gains to be charged on any body of persons" and to "any dividend thereof... made in respect of any share, right or title thereto," i.e., to profits or gains to be charged. There is therefore no reason why the capital dividend, with which, qua dividend, the Act does not concern itself, should not be taxable if any person receives it as part of the revenue of a taxable trade.

To equate such a capital dividend to the income dividend from which tax has been deducted or might have been deducted is misleading. The income dividend is a distribution from, and a part of, a source that has suffered tax. The capital dividend is a distribution from, and a part of, a source which has never been concerned with income tax at all. It becomes for the first time the subject of income tax if it becomes part of a trader's receipts. It has at no time received any exemption or exclusion from deduction of tax, as had the war loan in *Hughes v. Bank of New Zealand* (35). It is not comparable to the dividends paid in *Thompson v. Trust and Loan Co. of Canada* (36), which, having suffered

(30) [1948] 2 All E.R. 1041; 30 Tax Cas. 487.

(31) 8 Tax Cas. at p. 136.

(32) [1923] All E.R. Rep. 427; 8 Tax Cas. 481.

(33) [1923] All E.R. Rep. at p. 438; 8 Tax Cas. at p. 516.

(34) [1923] All E.R. Rep. at p. 440; 8 Tax Cas. at p. 519.

(35) [1938] 1 All E.R. 778; 21 Tax Cas. 472.

(36) [1932] All E.R. Rep. 647; 16 Tax Cas. 394.

A tax by deduction under Sch. C, could not properly be included under Sch. D.

It had no tax character whatever. It had never previously been income, or come within the ambit of income taxation. When first it became income by virtue of a trader receiving it, it could not rely on any exemption or exclusion or any allocation to any other Schedule under the Income Tax Acts. One may compare it, for instance, to the proceeds of the sale of a house. Such proceeds have nothing to do with the Income Tax Acts unless and until they are received by a trader who has on the expenses side of his balance sheet the price at which he bought the house. But in such an event they become part of the revenue of his trade. The appeals will therefore be to that extent allowed, and the decisions of the commissioners restored.

Appeals allowed to extent indicated.

Solicitors: *Solicitor of Inland Revenue; Manches & Co.* (for the taxpayer companies).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

PAYNE v. HARRISON AND ANOTHER.

[COURT OF APPEAL (Holroyd Pearce, Willmer and Pearson, L.JJ.), June 7, 8, 9, 1961.]

“No Case”—*Submission—Appeal against rejection of submission—Election by defendant to adduce evidence—Appeal decided on whole evidence.*

When in a civil action tried by a judge and jury (or by a judge alone*) the judge has ruled against a submission by the defendant that there is no case for him to answer and, the defendant having elected to call evidence, his evidence completes the proof of the plaintiff's case, an appeal will be decided on the whole of the evidence (including the defendant's); and, even if the judge wrongly rejected the defendant's submission of no case, the appeal will not be allowed on a hypothetical basis, as if the defendant's evidence should not have been given.

Great Western Ry. Co. v. Rimell ((1856), 18 C.B. 575) and *R. v. Abbott* ([1955] 2 All E.R. 899) distinguished.

Groves v. Cheltenham and East Gloucestershire Building Society ([1913] 2 K.B. 100) applied.

Per HOLROYD PEARCE, L.J.: assuming without deciding that a judge in a jury case has a discretion to rule without putting the defendant to his election whether he will call evidence, the judge is certainly not bound to give a ruling until the evidence is concluded (see p. 877, letter I, post).

Appeal dismissed.

Cases referred to:

Alexander v. Rayson, [1935] All E.R. Rep. 185; [1936] 1 K.B. 169; 105 L.J.K.B. 148; 154 L.T. 205; 30 Digest (Repl.) 434, 772.

Great Western Ry. Co. v. Rimell, (1856), 18 C.B. 575; 27 L.J.C.P. 201; 27 L.T.O.S. 262; 139 E.R. 1495; sub nom. *Great Northern Ry. Co. v. Rimell*, 20 J.P. 679; 13 Digest (Repl.) 473, 968.

* See p. 876, letter C, post.

- Groves v. Cheltenham and East Gloucestershire Building Society*, [1913] 2 K.B. 100; 82 L.J.K.B. 664; 108 L.T. 846; 13 Digest (Repl.) 473, 969.
- Marbe v. George Edwardes (Daly's Theatre), Ltd.*, [1927] All E.R. Rep. 253; [1928] 1 K.B. 269; 96 L.J.K.B. 980; 138 L.T. 51; 42 Digest 911, 71.
- Parry v. Aluminium Corpn., Ltd.*, (1940), 162 L.T. 236; 2nd Digest Supp.
- R. v. Abbott*, [1955] 2 All E.R. 899; [1955] 2 Q.B. 497; 119 J.P. 526; 39 Cr. App. Rep. 141; [1955] 3 W.L.R. 369; 14 Digest (Repl.) 253, 2199.
- R. v. Fraser*, (1911), 76 J.P. 168; 7 Cr. App. Rep. 99; 14 Digest (Repl.) 318, 3059.
- R. v. George*, (1908), 73 J.P. 11; 1 Cr. App. Rep. 168; 14 Digest (Repl.) 318, 3052.
- R. v. Jackson*, (1910), 74 J.P. 352; 5 Cr. App. Rep. 22; 14 Digest (Repl.) 318, 3053.
- R. v. Joiner*, (1910), 74 J.P. 200; 4 Cr. App. Rep. 64; 14 Digest (Repl.) 318, 3056.
- R. v. Pearson (No. 1)*, (1908), 72 J.P. 449; 1 Cr. App. Rep. 77; 14 Digest (Repl.) 318, 3058.
- R. v. Power*, [1919] 1 K.B. 572; 88 L.J.K.B. 593; 120 L.T. 577; 83 J.P. 124; 14 Cr. App. Rep. 17; 14 Digest (Repl.) 318, 3060.
- Young v. Rank*, [1950] 2 All E.R. 166; [1950] 2 K.B. 510; 2nd Digest Supp.

Appeal.

This was an appeal by the defendants from a judgment dated June 16, 1960, whereby the plaintiff was awarded £2,500 damages in an action brought by June Payne, widow and sole executrix of Terrance Albert Payne, deceased, on behalf of herself and their infant daughter for damages for negligent driving causing a traffic accident by collision between two motor vehicles in consequence of which the deceased lost his life. The first defendant was the owner and the second defendant was his servant, the driver of a motor lorry, one of the two vehicles in collision. The case was tried before HAVERS, J., with a jury. At the close of the plaintiff's case the defendants submitted that there was no case to answer, and the judge ruled against the submission. They elected to adduce evidence. On appeal they contended that the judge should, on their submission of no case, have withdrawn the case from the jury.

D. J. Brabin, Q.C., and *W. D. T. Hodgson, Q.C.*, for the defendants.

N. R. Fox-Andrews, Q.C., and *P. Chadd* for the plaintiff.

June 9. The following judgments were read.

HOLROYD PEARCE, L.J.: The defendants appeal from a judgment of HAVERS, J., sitting with a jury, for £2,500 in favour of the plaintiff on a claim by her as widow under the Fatal Accidents Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1. Her late husband was killed while driving an articulated vehicle which collided with a lorry, owned by the first defendant and driven by the second defendant who was his servant. It is conceded that the jury could properly find negligence proved on the whole of the evidence, including that of the defendant driver. The case has been argued on the basis that the existence of the first defendant, who was merely vicariously liable, can be disregarded.

At the end of the plaintiff's case the defendants submitted that there was no evidence to go to the jury and asked the judge so to rule. The judge rejected that submission. The defendants then chose to give evidence, and in so doing provided evidence of negligence. The jury returned a verdict for the plaintiff, and the judge entered judgment accordingly.

It is argued that at the close of the plaintiff's case the judge should have ruled that there was no case to go to the jury, and should have entered judgment for the defendants. In spite of the fact that after the judge's rejection of his submission the second defendant chose to go into the witness-box, it is argued

that this court should disregard his evidence, allow him to revert to the position before he gave evidence, and dismiss the plaintiff's case on the ground that it did not establish negligence against the defendants.

The argument is not, as counsel for the defendants frankly acknowledges, attractive, and even he cannot make it so. Such a situation as this only arises when a defendant is in truth liable, but the paucity of the plaintiff's evidence makes the liability hard to prove. In such a case the defendant has the advantage that he can ask the judge to rule that there is no evidence to go to the jury and thus avoid the necessity of revealing by his own evidence that he is in truth liable. If the judge rules otherwise and the defendant considers that such ruling is wrong, he can always maintain his advantageous position by declining to give evidence. If the judge then wrongly gives judgment against him the defendant can come to this court. If, however, he deliberately abandons the advantage of not having to give evidence and seeks to make his escape from liability more certain by calling evidence, is it fair that he should be entitled to revert to the position which he voluntarily abandoned?

There is no authority which directly covers this case. In *Great Western Ry. Co. v. Rimell* (1) the defendant at the end of the plaintiffs' case submitted that there was no evidence to go to the jury. The judge held that there was, and the defendant then called evidence. It was held that the defendant did not, by calling witnesses, preclude himself from appealing on the ground that the judge had ruled erroneously. JERVIS, C.J., said (2):

"I think the judge was wrong in leaving the first question to the jury, because there was in my opinion no evidence whatever for them that any felony had been committed by any one of the company's servants. In truth, unless the courts in cases of this sort take upon themselves the duty of deciding, the statute which was intended for the protection of the carrier will become a dead letter: for, juries always will find felony as against a company. I think it is the duty of the presiding judge to withdraw the question altogether from the jury, and not to allow them an opportunity of finding in favour of the plaintiff in defiance of all evidence. I therefore think the judge of the county court in this case was wrong in leaving it to the jury at all, and that he ought at once to have directed a non-suit."

But that case was different from the present in that at the end of all the evidence on both sides there was not a "scintilla of evidence" to go to the jury (per CRESSWELL, J. (3)). The defendant's evidence left the situation unaltered and the judge was wrong when in his summing-up he told the jury that they could find in the plaintiffs' favour. The defendant's submission that there was no evidence to go to the jury was well founded not only when it was made, but also when all the evidence had been called on both sides.

In *Groves v. Cheltenham and East Gloucestershire Building Society* (4) the defendants in a county court before a judge alone at the close of the plaintiff's case submitted that there was no case to answer. That submission was rejected and the defendants called evidence. The court said clearly that if on the whole of the evidence called the judge was entitled to find for the plaintiff, even if he was wrong in not nonsuiting at the conclusion of the plaintiff's case, the court ought not to overrule his decision. It did, however, come to the conclusion that on the whole of the evidence the plaintiff could not succeed. LUSH, J., said (5):

"It is said that in *Great Western Ry. Co. v. Rimell* (1) it was held that, if on an appeal from a county court it appeared that the county court judge was wrong in not nonsuiting the plaintiff on an objection taken at the close of his case that there was no evidence, the court would allow the appeal

(1) (1856), 18 C.B. 575.

(2) (1856), 18 C.B. at p. 585.

(3) (1856), 18 C.B. at p. 586.

(4) [1913] 2 K.B. 100.

(5) [1913] 2 K.B. at p. 101.

although the defendant had called witnesses whose evidence would justify his judgment. I do not think that the court did so decide in that case although the headnote seems to suggest it, but if that was the law a change has come over the procedure, and in my judgment the law is now different. The practice is now well recognised that if a defendant, when the judge at the trial refuses to nonsuit, calls evidence, the case is not then confined to the plaintiff's evidence but also depends on that given by the defendant, and if on the whole of the evidence the county court judge was justified in coming to the conclusion he did, this court ought not to overrule him merely because it thinks he was wrong in not nonsuiting."

ROWLATT, J., concurred, and the report adds that the court, on considering the whole of the evidence given in the county court, reversed the judgment of the county court judge on the ground that on all the evidence there was nothing to justify him in giving judgment for the plaintiff. Counsel for the defendants submits that that case can be distinguished on the ground that it was an appeal from a judge alone. In my judgment, however, the principle which underlies the decision is equally applicable to a jury case and it is founded on justice and common sense. Certainly the learned judges in that case said nothing to suggest that there was any difference in principle between considerations in a jury case and those in a non-jury case.

Counsel for the defendants, in a very fair and careful argument, has referred us to certain criminal cases. From 1908 onwards the Court of Criminal Appeal took the view that when the prosecution's evidence was insufficient but the defendant had given evidence, whether he had failed to make a submission that there was no case to answer or had made an unsuccessful submission to that effect, the court should or could look at the defendant's evidence as well as that of the prosecution: see *R. v. George* (6); *R. v. Pearson* (No. 1) (7); *R. v. Jackson* (8); *R. v. Fraser* (9); but contra *R. v. Joiner* (10). In *R. v. Power* (11), where such a submission was rejected and a co-defendant thereafter was called for the defence and gave evidence which incriminated the appellant, it was held that the Court of Criminal Appeal was entitled to take into consideration that adverse evidence, following the majority of the earlier decisions in preference to *R. v. Joiner* (10).

In *R. v. Abbott* (12), however, there was a somewhat different approach, and *R. v. Power* (11) was explained. Counsel for the defendants relies strongly on *R. v. Abbott* (12), but I do not find it helpful to the present problem. In that case the trial judge wrongly refused a submission made at the close of the prosecution's case that there was no evidence to go to the jury. LORD GODDARD, C.J., emphasised the fact that the defendant did not supply any direct evidence against himself and that it was his co-defendant who supplied the damaging evidence. He considered that the appellant had an absolute right to have his appeal allowed, if there had been a "wrong decision of any question of law", unless it could be brought within the proviso that the court considered that there had been no substantial miscarriage of justice. With regard to *R. v. Power* (11), he said (13):

"What the court said in that case was that if the case did go to the jury, then the evidence given by the prisoners respectively was part of the sum of the evidence in the case, and that this court when asked to quash a conviction might take the whole of the evidence into account. They did not say that the court must, but they said that this court might, take the whole of the evidence into account. They certainly did not say that, if there was no evidence given against one of two or more prisoners, the learned judge could simply leave the case to the jury to see whether when the case

(6) (1908), 1 Cr. App. Rep. 168.

(8) (1910), 5 Cr. App. Rep. 22.

(10) (1910), 4 Cr. App. Rep. 64.

(12) [1955] 2 All E.R. 899; [1955] 2 Q.B. 497.

(13) [1955] 2 All E.R. at p. 902; [1955] 2 Q.B. at p. 505.

(7) (1908), 1 Cr. App. Rep. 77.

(9) (1911), 7 Cr. App. Rep. 99.

(11) [1919] 1 K.B. 572.

for the defence was opened one or other of the prisoners would support the case set up by the prosecution."

In my view that case is different from the present case and is of no assistance, for the following reasons. It is clear that considerable weight was given to the fact that it was not the evidence given by or called by the defendant which provided the damaging evidence. The court there was considering that the prisoner had an absolute right (apart from the proviso) to have his appeal allowed if there was a "wrong decision of any question of law" and was not applying the proviso, whereas in our case the question of applying justice as between the parties is always an essential part of the problem. Moreover, in certain respects the criminal courts may be prepared to extend to a defendant a latitude at the expense of the prosecution which the civil courts should not extend to a defendant at the expense of the plaintiff.

As to the exact rights of a defendant in a jury case in respect of submissions, there is some divergence of view which is irrelevant for the purposes of this case. In *Alexander v. Rayson* (14) ROMER, L.J., said:

"Where an action is being heard by a jury it is, of course, quite usual and often very convenient at the end of the case of the plaintiff, or of the party having onus of proof, as the [defendant] had here, for the opposing party to ask for the ruling of the judge whether there is any case to go to the jury who are the only judges of fact."

That observation is obiter. He then goes on to say that such a procedure is highly inconvenient in actions tried by a judge alone and that it is not right that he should be asked to express any opinion on the evidence until the evidence is completed. The defendant in a non-jury case must therefore elect not to call evidence when he makes his submission that there is no case. In *Parry v. Aluminium Corpn., Ltd.* (15) GODDARD, L.J., made cogent obiter observations to the effect that the judge should not rule on submissions of no case in jury actions (exception in certain classes of case of which this is not one) unless the defendant elects to call no evidence. In *Young v. Rank* (16), however, DEVLIN, J., concluded that he had a discretion in a jury case to rule without making the defendant elect. In *Marbe v. George Edwardes (Daly's Theatre), Ltd.* (17) BANKES, L.J., said:

"[Counsel] for the defendants contended that... it was for the judge to rule at that stage whether there was evidence to go to the jury, and that if he had done that the plaintiff must have failed. That argument has been addressed to the court on several occasions and it has been held, and I repeat now, that according to the present practice the judge has a discretion whether he will rule on the matter at the close of the plaintiff's case or whether he will defer ruling until the whole of the evidence has been called. In the latter event the defendant's counsel must then elect whether he will rely on his objection that there is no evidence of malice, or call evidence for the defendant at the risk of supplying evidence for the plaintiff which the jury may accept as proving malice."

Thus there is authority for the view that the defendant has no right until all the evidence is concluded to have a ruling on a submission that there is no case to answer. Assuming without deciding that a judge in a jury case has a discretion to rule without putting the defendant to his election whether he will call evidence, the judge is certainly not bound to give a ruling until the evidence is concluded. When the evidence is concluded the defendant, of course, has a right to a ruling whether there is any evidence to go to the jury, and if there is no such evidence he has a right to judgment.

(14) [1936] 1 K.B. at p. 178; [1935] All E.R. Rep. at p. 189.

(15) (1940), 162 L.T. at p. 237. (16) [1950] 2 All E.R. 166; [1950] 2 K.B. 510.

(17) [1928] 1 K.B. at p. 277; [1927] All E.R. Rep. at p. 255.

In this case, therefore, the judge certainly need not have ruled on the defendants' submission at that stage. He could have deferred his ruling and thereby made the defendants elect. Even assuming that the judge ruled incorrectly, the defendants were thereby left in the position in which at the least the judge had every right to place them, viz., they were compelled to elect. Either they could call no evidence and stand on their submission before the judge, and if necessary before this court, or they could call evidence. They took the latter course. They cannot now, when it has proved disadvantageous, revert to the former course. Events have moved on since they made their choice. Truth has superseded hypothesis. It has been shown by evidence that the second defendant was negligent, and the process of the law has given the plaintiff a judgment to which she thus became entitled. There is nothing here which suffices to "lure it back to cancel half a line" (18). It would be a denial of justice now to deprive the plaintiff of that judgment by assessing the case artificially on a fragment of evidence when the whole has, by the defendants' choice, become available.

The question whether the judge was right in his ruling does not, therefore, arise. Now that the second defendant has himself provided evidence of his own negligence, an interlocutory assessment of the evidence as it stood at the time when the plaintiff closed her case has become academic and irrelevant. If it were relevant I would hold on the facts (which it is unnecessary to recapitulate) that there was just sufficient evidence on the plaintiff's case to justify the judge in leaving it to the jury. I would therefore dismiss the appeal.

WILLMER, L.J.: I have come to the same conclusion. In order to succeed on this appeal the defendants must show: first, that the learned judge was in error when he ruled at the conclusion of the plaintiff's case that there was no evidence to go to the jury, and secondly, that, on this assumption, they are entitled now to be put back in the same position as they would have been in had the judge ruled that there was no case to answer. In my judgment, the defendants fail on both points.

As to the first point, the evidence before the court at the conclusion of the plaintiff's case included the agreed plan, a number of agreed photographs, the evidence of the police officer as to the positions of the vehicles, and the measurements which he took shortly after the accident, and the answers to certain interrogatories administered on behalf of the plaintiff. I leave out of consideration the evidence of two witnesses called on behalf of the plaintiff, who could only speak as to how the deceased was driving his vehicle some time before the accident. But even without this I am satisfied that enough was proved on behalf of the plaintiff to call for an answer by the defendants. It was admitted that in the course of what can only have been seconds before the collision the defendant driver was engaged in overtaking a cyclist. This he did at a point where there was a sufficient curve in the road to obscure the vision ahead, and in a place where the road narrowed appreciably after a stretch of dual carriage-way. The measurements given in evidence were such as to prompt a well-high inevitable inference that in the course of overtaking the cyclist the defendant driver must have pulled out so that part of his vehicle was materially beyond the centre of the road. The points of contact between the defendants' lorry and the trailer of the deceased's vehicle were such as to make it at least highly probable that at the moment of that contact the offside of the defendants' lorry was on its wrong side of the road. This must be taken in conjunction with the admission that the defendant driver never from first to last applied his brakes. It may be said that the material available did not make a particularly strong case, and that it was one that could readily be rebutted. But having regard to the admitted

(18) "The moving finger writes; and, having writ, moves on: nor all thy piety nor wit shall lure it back to cancel half a line, nor all thy tears wash out a word of it."—from the *Rubáiyát* of Omar Khayyám by E. FitzGerald.

A facts and the inferences that could properly be drawn therefrom, I find it impossible to say that the learned judge came to a wrong conclusion when he ruled that there was a case to answer.

B That is sufficient to dispose of this appeal. I am, however, equally satisfied that, even if the learned judge's ruling were shown to be wrong, it would now be impossible for this court to put the parties back in the position they would have been in had the ruling been the other way. Evidence has now been given on behalf of the defendants, and the jury have found, on the whole of the evidence, that the collision was actually caused by the negligence of the defendant driver. Counsel for the defendants has frankly admitted that he cannot properly attack this finding if the whole of the evidence is to be taken into consideration. His argument is nothing if not audacious. He concedes that on the facts as they are now known the defendant driver was to blame; yet he contends that, if he can show that the learned judge was wrong in ruling that there was a case to answer, the defendant is in law entitled to escape liability for the consequences of his negligence. Counsel frankly admitted that his argument would be the same even if the defendant, when giving his evidence, had admitted on oath in terms that he was entirely to blame for the collision.

D I should be sorry indeed to think that the law could produce any such result as that; but in my judgment it does not. The defendants in this case themselves invited the judge's ruling. He gave his ruling without putting counsel for the defendants to his election whether he would call evidence or not. In so doing he followed the course set by DEVLIN, J., in *Young v. Rank* (19). On receiving the judge's ruling the defendants were left perfectly free to call their evidence or not as they thought fit. They could, if they wished, have stood on their submission, and if judgment went against them they could appeal to this court against the learned judge's ruling. Or they could take the course they did take, call their evidence, and take the jury's verdict on the evidence as a whole. What they could not do was—to use counsel for the plaintiff's picturesque expression—“to have their cake and eat it”. Though not put to his election before the learned judge ruled, counsel for the defendants was in the position, after the judge had ruled that there was a case to answer, in which he had to elect what course he would take. Having made his election he must, in my judgment, stand by it. He elected to call his evidence and take the verdict of the jury on the whole of the case. No doubt he hoped that the witnesses he called would make it clear that the defendants' lorry was in no way at fault. But having made his election he cannot, when the verdict goes against him, return to the position he was in before the evidence was called, and invite this court to shut its eyes to the effect of the evidence which he freely elected to adduce. It would in my judgment be contrary to all principle for this court so to ignore all the realities of the case and to pronounce judgment on a hypothetical basis, as if the defendants' evidence had never been given.

I have reached this conclusion on the basis of what I conceive to be the principle involved. There is a strange paucity of authority directly in point. But I am happy to find that my conclusion is substantially in accord with the decision of the Divisional Court in *Groves v. Cheltenham and East Gloucestershire Building Society* (20), to which HOLROYD PEARCE, L.J., has already referred. That was, it is true, a county court case, in which the learned county court judge had refused to nonsuit the plaintiff. But I do not think the principle can be any different where a judge of the High Court rules against a submission that there is no case to answer. HOLROYD PEARCE, L.J., has already read what was said by LUSH, J., in that case and I need not repeat it. In my judgment it was a correct statement of the principle involved, and *mutatis mutandis* covers the circumstances of this case.

It only remains for me to add that I do not think that any argument can properly be founded on the practice of the Court of Criminal Appeal in dealing with appeals in criminal matters. The fact that in such cases the liberty of the subject is at stake is enough, to my mind, to distinguish them from cases in which the question at issue is merely one of civil liability. Moreover, the conduct of criminal appeals is governed by the Criminal Appeal Act, 1907, s. 4 of which specifically requires, subject to the proviso, that the court

“... shall allow the appeal if they think ... that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law ...”

In these circumstances, I prefer to express no opinion on the question how far the decision in *R. v. Power* (21) has been affected by the later decision in *R. v. Abbott* (22).

For the reasons I have given, as well as those given by HOLROYD PEARCE, L.J., with which I wholly agree, I have come to the conclusion that this appeal should be dismissed.

PEARSON, L.J.: I agree, and base my judgment on two grounds. First, at the end of the plaintiff's case the defendants' counsel submitted that there was no evidence to go to the jury. The learned judge did not require the defendants' counsel to elect at that stage whether or not he would call evidence but, after hearing argument, rejected the submission. The defendants then called evidence. Now, on appeal, the defendants' counsel contends that this court should disregard the evidence called by the defendants and decide whether or not the submission was well founded at the time when it was made. In my view, for the reasons which have been given by my Lords, the defendants, having elected, after the rejection of the submission, to call their own evidence, must take the consequences, whether favourable or unfavourable to their case. This court should decide on the whole of the evidence as it stands.

In view of doubts arising on the authorities as to the principles involved, I prefer to express no opinion on the questions: (a) whether it was right to give a ruling without first requiring the defendants to elect whether or not they would call evidence, and (b) whether, when the defendants' counsel makes a submission of this kind at the end of the plaintiff's case, the defendant is entitled to have a decision on his submission at that stage, or whether the court may defer its ruling until after all the evidence has been concluded.

Secondly, on the question of fact, I agree with the learned judge that at the conclusion of the plaintiff's case there was some evidence on which the jury could decide, if they thought fit, that there was negligence on the part of the defendants causing or contributing to the causation of the accident.

I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Hewitt, Woollacott & Chown*, agents for *Shaw, Smith & Co.*, Manchester (for the defendants); *Pattinson & Brewer*, agents for *Lawrence Williams & Co.*, Bristol (for the plaintiff).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

TODD v. TODD.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Wrangham, J.), June 8, 9, 1961.]

Divorce—Evidence—Foreign marriage—Marriage in Republic of Ireland—Proof of marriage—Ireland Act, 1949 (12, 13 & 14 Geo. 6 c. 41), s. 2.

In proceedings for divorce in England it is proper for the proof of a marriage celebrated in the Republic of Ireland to be by evidence of an expert witness that the marriage certificate would be accepted in the republic as evidence of the marriage, that is to say, by evidence similar to that which proves a marriage in a foreign country.

[**Editorial Note.** Expert evidence in proof of a foreign marriage, which is not disputed, may be adduced by affidavit, unless otherwise directed, without prior leave; see *Practice Direction*, [1958] 1 All E.R. 364.

As to proof of a foreign marriage, see 12 HALSBURY'S LAWS (3rd Edn.) 376, para. 821, note (g), and as to proof of a marriage in Ireland, see 15 HALSBURY'S LAWS (3rd Edn.) 389, para. 691, note (e); and for cases on the subject, see 22 DIGEST (Repl.) 332, 3512, 3516.

For the Ireland Act, 1949, s. 2, see 28 HALSBURY'S STATUTES (2nd Edn.) 446.]

Petition.

In this case the wife petitioned for divorce on the ground of the husband's adultery. The suit was undefended.

The parties were married on June 27, 1931, in Dublin. At the hearing of the petition the question arose as to the proper procedure for proving the marriage. Counsel for the wife referred to the statutes and authority enumerated below*.

Eric Stockdale for the wife.

WRANGHAM, J.: In this case the question arose how the marriage between the parties celebrated on June 27, 1931, should be strictly proved in proceedings by the wife for dissolution of the marriage on the ground of the husband's adultery. The parties are domiciled in England. After some consideration of the relevant statutes, counsel for the wife has called an expert witness to prove that the marriage certificate would be accepted in the courts of the Republic of Ireland as *prima facie* evidence that the marriage was valid—in other words the normal evidence has been called to prove a marriage celebrated in a foreign country. ~~In my judgment that was the right course.~~ Whatever may have been the rule as to the evidence by which the validity of such a marriage might be proved in these courts at an earlier period in the history of Ireland, it seems to me that, for the present purpose and at the present time, the validity of a marriage celebrated in the Republic of Ireland must be proved strictly in the same way as a marriage in any foreign country. For this purpose I do not think that the statutory provision in s. 2 of the Ireland Act, 1949, that the Republic of Ireland is not to be regarded as a foreign country, makes any difference. I refer to an article in 108 L.Jo. 470 and agree with the reasoning and the opinion expressed therein.

Accordingly, I accept the evidence offered and I find the adultery proved and grant the wife a decree nisi.

Solicitors: *Stocken, May, Sykes & Dearman* (for the wife).

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

* Evidence Act, 1851, s. 10, s. 14; Marriages (Ireland) Act, 1844, s. 52, s. 71, Sch. 9; Ireland Act, 1949, s. 2; Irish Free State Constitution Act, 1922, Sch. 1, art. 73; *Bury v. Bury*, (1919), 35 T.L.R. 220.

PAYNE AND OTHERS *v.* BRADLEY.

[HOUSE OF LORDS (Lord Denning, Lord Goddard, Lord Morton of Henryton, Lord Morris of Borth-y-Gest and Lord Guest), May 4, June 23, 1961.]

Gaming—Lottery—Exemption—Purposes other than “private gain”—Tombola played at club and profits paid into general funds to meet general expenses of club—Whether profits were applied for purposes other than purposes of “private gain”—Betting and Lotteries Act, 1934 (24 & 25 Geo. 5 c. 58), s. 21, s. 22—Small Lotteries and Gaming Act, 1956 (4 & 5 Eliz. 2 c. 45), s. 4 (1) (c).

The appellants were the trustees of a friendly and trade societies' club, which was a members' club, and was not registered under s. 2 of the Small Lotteries and Gaming Act, 1956, nor was it a charity. Sessions of tombola, which was a game of pure chance and a lottery, were promoted by and on behalf of members of the club as a body and were held on the club premises. Sets of tickets were sold at 2s. 6d. a set. The sessions were not confined to members of the club. After payment of prizes the proceeds of the playing of tombola were paid into the general funds of the club. The general expenses of the club and amenities were provided out of this fund. In 1959 the proceeds of tombola amounted to £900. The annual membership subscription was 1s. There were fifteen thousand members. The proceeds of the tombola were needed to avoid a deficit, or something near one, on the year's accounts. At the trial of informations preferred against the appellants for permitting the premises to be used in connexion with the conduct of a lottery, contrary to s. 22 (1) (f) of the Betting and Lotteries Act, 1934, the appellants claimed exemption under s. 4 and s. 5 (1) of the Small Lotteries and Gaming Act, 1956, contending that the proceeds were applied “for purposes other than the purposes of private gain” within s. 4 (1) (c).

Held (LORD DENNING and LORD MORRIS OF BORTH-Y-GEST dissenting): the receipt of the proceeds of the tombola by the club was “a private gain” to the club and the members of the club within s. 4 (1) (c) of the Act of 1956.

Decision of the QUEEN'S BENCH DIVISIONAL COURT (ante, p. 36) affirmed.

[**Editorial Note.** Section 4 (3) of the Small Lotteries and Gaming Act, 1956, which provided the exception on which the appellants relied in the present case, was repealed as from Jan. 1, 1961, by the Betting and Gaming Act, 1960, s. 15 and Sch. 6, Part 1. The words “purposes other than private gain” have, however, application at the present time as they are used in the saving for entertainments provided by s. 20 of the Act of 1960.

As to lawful and unlawful lotteries, see 18 HALSBURY'S LAWS (3rd Edn.) 238-248, paras. 460-474; and for cases on the subject, see 25 DIGEST 452-456, 429-449.

For the Betting and Lotteries Act, 1934, s. 21, s. 22, see 10 HALSBURY'S STATUTES (2nd Edn.) 801.

For the Small Lotteries and Gaming Act, 1956, s. 4, see 36 HALSBURY'S STATUTES (2nd Edn.) 367.]

Cases referred to:

Maynard v. Williams, [1955] 1 All E.R. 81; 119 J.P. 137; [1955] 1 W.L.R. 54; 3rd Digest Supp.

Ormond Investment Co., Ltd. v. Betts, [1928] All E.R. Rep. 709; [1928] A.C. 143; 97 L.J.K.B. 342; 138 L.T. 600; 13 Tax Cas. 400; 28 Digest (Repl.) 213, 906.

Pearse v. Hart, [1955] 1 All E.R. 91 n.; 119 J.P. 140 n.; [1955] 1 W.L.R. 67 n.; 3rd Digest Supp.

Appeal.

Appeal by Harry Vincent Payne and nineteen other persons from an order of the Queen's Bench Divisional Court (LORD PARKER, C.J., WINN and

A WIDGERY, JJ.), dated Feb. 16, 1961, and reported ante, p. 36, dismissing the appellants' appeal by way of Case Stated against their conviction by the stipendiary magistrate and two justices of the peace for the county borough of Huddersfield on Sept. 13, 1960, of offences against s. 22 (1) of the Betting and Lotteries Act, 1934. The facts are set out in the opinion of LORD DENNING.

B *P. M. O'Connor, Q.C., and A. E. Hutchinson* for the appellants.
J. M. G. Griffith-Jones for the respondent.

Their Lordships took time for consideration.

June 23. The following opinions were read.

C LORD DENNING: My Lords, this case concerns a working-men's club in Huddersfield, which has over fifteen thousand members. It has premises at No. 9, Northumberland Street, Huddersfield, where it carries on its social activities. One of these activities is the holding of entertainments where members and their guests play a game called "tombola". It also goes by other names, "housie-housie" or "bingo". I expect that some of your Lordships are familiar with it. Each player is handed a ticket with several numbers printed on it. The person in charge of the game draws out numbers from a bag and calls out the numbers he draws. As each number is called, any player who holds a ticket with that number on it crosses it out. The first player to cross out all the numbers on his ticket wins a prize. The club holds regular sessions of tombola in the main hall of the club. The game is not confined to members. Guests are also admitted. Sets of tickets are sold at 2s. 6d. a set. No one is entitled to more than one set for one session. The proceeds are used to provide prizes for the winners and the balance is paid into the general funds of the club. The prizes distributed on any one day never exceed £20 all told. These tombola sessions have helped the club to pay its way. The profits from tombola for the year 1959 were in the region of £900; whilst the membership fees were £1,059; and the profits on refreshments were £4,364; and the total income of the club was over £7,000. But, even so, the expenses of running the club were very great. The wages of staff and artists came to over £3,000; repairs and renewals to £1,746; heat and light £644; rates, and so forth £753. The total expenditure was round about £7,000. At the end of the year there was only a small surplus of £170. So the tombola sessions made all the difference between solvency and insolvency. Not only did they provide harmless recreation, but they helped the club to keep going. No individual member got anything out of it except, of course, the prize winners who got the prizes.

G My Lords, this game of tombola is played so widely that I do not suppose many people realise that it is a lottery. Yet it is so. And, being a lottery, it is unlawful—and the promoters are guilty of an offence—unless they can bring themselves within one of the exceptions permitted by statute: see s. 21 and s. 22 of the Betting and Lotteries Act, 1934. The promoters here are the directors and trustees of the club. They claim exemption by virtue of s. 4 (1) and (3) of the Small Lotteries and Gaming Act, 1956. Under that section, the playing of tombola is lawful—it is not to be deemed to be an unlawful lottery—if it is played as an "entertainment promoted in Great Britain for raising money to be applied for purposes other than purposes of private gain". In order to claim exemption under this section, the game must be played in accordance with certain specified conditions. In particular, no player must pay more than 5s. I The prizes must not exceed £20 in all. The whole of the proceeds (after deducting expenses and prizes) must be "applied for purposes other than purposes of private gain". All the conditions were admittedly satisfied in this case save for this disputed issue: Was the money raised by the tombola sessions applied "for purposes other than purposes of private gain"? If the money was applied for "purposes of private gain", the game was unlawful. But, if it was applied for other purposes, it was lawful.

The matter came first before the stipendiary magistrate for Huddersfield (Mr. LESLIE PUGH) and two justices of the peace. They held that the profits from tombola were applied for the purposes of private gain, and they convicted the appellants of offences under s. 22 (1) of the Act of 1934. But they granted them an absolute discharge and stated a Case for the opinion of the court. The Divisional Court affirmed the conviction, but gave leave to appeal to your Lordships. A

My Lords, I do not think that the profits from the playing of tombola were applied for the purposes of "private gain"—as those words are ordinarily understood. None of the proceeds went into the pockets of individual members of the club. They all went, and went only, to help the club to pay its way. They went to pay the wages of the staff, the repairs to the premises, the renewals of the furnishings, the heat and light, and so forth. I cannot see how that can be said to be the "private gain" of any individual. Collectively, no doubt, the whole fifteen thousand members benefit. But surely a benefit which is shared between fifteen thousand people is not a "private gain", when no money goes into the pocket of any individual member and no money's worth is had by him? B C

It is said that the club is a members' club and that its property belongs to the members, so that, in this way, they all make a private gain. But I venture to point out that this is a misconception. This working-men's club is not a members' club like the well-known London social clubs. It is a friendly society duly registered under the Friendly Societies Act, 1896, with all the attributes that that Act gives to it. It is concerned, not with the private interests of the members, but with the advancement of social welfare. "The objects of the society" as defined in r. 2 D E

"are to afford the members the means of social intercourse, mutual helpfulness, mental and moral improvement, and rational recreation."

Those words are taken ipsissima verba from s. 8 (4) of the Act. And, by r. 3, all moneys are to be applied according to the rules of the society, "no surplus being divisible among the members individually". This, too, is in accordance with the Act which, by s. 15, does not permit a working-men's club to divide its funds among its members. It is apparent from the Act that a working-men's club has its own personality. It is not a group of persons without any legal personality. It is a society which has much the same characteristics as a trade union. It can own property, it can employ servants, it can enter into contracts, it can commit wrongs, and it can be sued as a legal entity, distinct altogether from its individual members. The members have no legal interest in any of its property. That is held by the society for carrying out its objects; and its objects, as I have said, are concerned with the advancement of social welfare, just as a charitable foundation is concerned with the advancement of religion or education. It is altogether different from a social club founded by a group of persons for their own enjoyment or recreation. I can understand that, if a social group should hold tombola sessions so as to raise money for a champagne party for the members, it would be promoted for purposes of private gain. Each one of them would be getting money's worth out of it. But here the only body which gets anything out of these tombola sessions is the society itself which is concerned with the good of all its members and the private gain of none. F G H I

So much is sufficient for the decision of this case; but I would like to draw attention to the other places in these Acts where the words "private gain" are used; for they bear out the construction I have put on them. Take s. 23 of the Act of 1934. Suppose that the people of a village hold a fête so as to raise money for heating the church or the parish rooms. They can lawfully hold a raffle so long as the proceeds are not applied for "private gain". It is true that, collectively, all the village folk benefit from a warmer church or a warmer parish

A room, as the case may be, but no one surely would say that it is for private gain, seeing that no one of them gets any money or money's worth of it. The purposes of the fête, when it is held to raise money for heating the church, is a "charitable" purpose, strictly so called; and, when it is for the parish room, it is for the advancement of social welfare. But in either case it is devoted to "purposes other than private gain" and lawful accordingly. So, here, this working-men's club is clearly established for the advancement of social welfare; and, when the proceeds are applied for the purposes of the club, they are applied for purposes other than private gain.

Take next s. 1 of the Act of 1956. Suppose that a working-men's club desires to promote games of tombola under that section. It has to ask itself these questions: First: Can the club be registered under the Act? Answer: Yes, it can be registered, so long as it is not established or conducted for "purposes of private gain" (see s. 1 (1) (c)). Second: Can the club lawfully promote a small lottery under s. 1? Answer: Yes, it can, so long as the proceeds are not applied to "purposes of private gain" (see s. 1 (2) (d), incorporating s. 1 (1) (c)). Third: Does the club apply the proceeds for "private gain" if it applies them so as to provide accommodation and amenities for its members? Answer: No, for it is the very be-all and end-all of a working-men's club to provide accommodation and amenities for its members. If these were held to be "purposes of private gain" so as to offend against s. 1, it would mean that the club could not be registered at all; nor could it lawfully hold a lottery under that section so as to raise money for the purposes of the club. Whereas Parliament clearly intended that it should be able to do so.

E Take next s. 17 of the Betting and Gaming Act, 1960, which permits the use of gaming machines. True, it is later in date than the Act of 1956, but it is permissible to look at a later statute, not, perhaps, to construe the earlier statute, but to see the meaning which Parliament puts on the self-same phrase in a similar context, in case it throws any light on the matter: see *Ormond Investment Co., Ltd. v. Betts* (1) by LORD ATKINSON. Suppose that, in reliance on s. 17, a working-men's club installs one or two gaming machines, such as a fruit machine, at which people can play at sixpence a time. It is only lawful if

"all stakes hazarded are applied either in the payment of winnings to a player of the game or for purposes other than private gain."

G Surely under this section the profits from the machine (after payment of winnings) can be applied for providing or improving the accommodation and amenities of the club? No one would seriously suggest that, by so doing, the stakes were applied for purposes of "private gain" so as to render it all illegal. These references to other sections seem to me to show that the legislature has throughout used the words "purposes of private gain" quite consistently so as to denote the direct benefit which accrues to an individual when money goes into his pocket or money's worth gets into his hands, as distinct from the indirect benefit which accrues to him as a member of a society or club by reason of the improvement of its accommodation or amenities which he shares with the other members.

H Let me now come back to s. 4 (1) of the Act of 1956. Under that section, an entertainment can be held for raising money "to be applied for purposes other than... private gain". In my judgment, the purposes of a working-men's club in providing accommodation and amenities for members generally are not purposes of private gain, even though each individual member is indirectly benefited thereby.

I I ought, perhaps, to mention two other matters; the magistrates found that the profits from the tombola sessions were used to avoid a loss which would fall on the individual members of the club. I cannot see this. The individual members of the club were not liable for losses. And, in point of fact, there were no losses.

If the money had not come in from the tombola sessions, the club might have got it in other ways. Good friends might have given donations. Or the club might have cut down its activities and its staff. I do not see how the avoidance of a hypothetical loss which never happened can be considered to be a private gain. It is true that the subscription was small. It was only 1s. It was said that, if it were not for the tombola profits, the subscription would have to be increased to 3s.; and the avoidance of an increase was a private gain. This, too, is a fallacy. The question is whether the money was applied for private gain. You have to look at what is done with the money. The subscriptions are like the profits from tombola. They are applied for running the club and not for private gain. By keeping the subscription low, the members are relieved of some expense, but the money is not applied for private gain.

It was suggested that a working-men's club could lawfully hold tombola sessions under s. 24 of the Act of 1934 if it confined the tickets to members of the club and excluded guests. This seems to me very doubtful. The benefits apparently conferred on societies and clubs by s. 24 were greatly restricted by the cases on supporters' clubs, *Pearse v. Hart* (2) and *Maynard v. Williams* (3). In view of those decisions, if a working-men's club should hold regular weekly lotteries to raise money for the club, it might be held to be conducted for purposes connected with lotteries, even though it was only incidental and ancillary to its main objects. It was one of the objects of Parliament in the Act of 1956 to get rid of the effect of those decisions. I would give an interpretation of s. 1 and s. 4 of the Act so as to carry out this intention.

In conclusion, I would say that it seems to me very reasonable that a working-men's club should provide "rational recreation" in the shape of games of tombola and help the finances of the club thereby; and I do not think Parliament intended to prohibit it from so doing.

I would allow this appeal.

LORD GODDARD: My Lords, in my opinion, the judgment of the Divisional Court was right. I need not recapitulate the facts. The information charged the appellants who form the committee of a working-men's club with conducting an illegal lottery, and the appellants contended that they were protected by s. 4 of the Small Lotteries and Gaming Act, 1956. The whole question depends on whether the money raised was applied for purposes other than purposes of private gain, and it was in fact applied to the general funds of the club. The expression "purposes of private gain" is found both in s. 1 and s. 4 of the Act. Under s. 1, a society which is not established for private gain or purposes of any commercial undertaking may, subject to the conditions laid down in the section and if registered by the local authority, promote a lottery for raising money to be applied for purposes of the society. The club in question is a members' club and would, therefore, be entitled to promote a lottery for raising money for the purposes of the club had it been registered, which it was not. Registration involves the club in certain obligations and payments set out in s. 2 and s. 3 of the Act, which it may well be that a society does not desire to undertake. Accordingly, s. 1 has no application to this case.

Section 4 deals with an entirely different matter. It permits small gaming parties which may be promoted by anyone, whether an individual or a club, and tickets for the gaming can be bought by anyone at a price of 5s. or less. There is no restriction as to advertising or of sending tickets through the post, and the conditions generally that have to be observed are quite different from those that apply to the holding of lotteries by registered societies. But the money raised by the gaming, after the permitted deduction for expenses and for prizes, which must not in the aggregate exceed £20, must be applied for purposes other than private gain. There is no permission given in s. 4 for the application of the

A proceeds to the purposes of a club, and while to bring the case within s. 1 the promoters must be acting on behalf of a registered society, which will include a club, as I have already said, the gaming party can be promoted by anyone. An unregistered club, whether a members' or a proprietary club, can promote a gaming party provided it observes the conditions of s. 4, but there is no provision in that section permitting it to raise money to be applied for the purposes of the

B society. If the proceeds of the gaming can be paid into the general funds of the club, it appears to me to be clear that the club, and that means the individuals forming the club, do obtain a private gain. No doubt rules may govern the objects on which the funds of the club may be expended, and rules can be altered and added to at any time. In the present case, it is clear from the accounts that the club needed the proceeds of the game to enable it to avoid a deficit or something near one. Be that as it may, the proceeds of the game were a gain to the club and its members; that is a private gain to them. Moreover, if the appellants' contention be right, the necessity for registration with a local authority disappears, and a lottery which is also a game as many are could be held by any club for the benefit of its funds.

I would dismiss the appeal.

D **LORD MORTON OF HENRYTON:** My Lords, I agree with the speech which has just been delivered by my noble and learned friend, LORD GODDARD, but, as your Lordships are divided in opinion, I shall add a few words.

The only question arising on this appeal is whether the net proceeds resulting from the payments made by players of the game of tombola at the Huddersfield Friendly and Trade Societies' Club on the relevant dates were or were not

E "applied for purposes other than purposes of private gain" within the meaning of s. 4 (1) (c) of the Small Lotteries and Gaming Act, 1956. The game was promoted by or on behalf of the members of the club, and the justices have found as a fact that

F "After payment of prizes the proceeds of the playing of tombola were paid into the general funds of the club and appear in the profit and loss account, out of which the general expenses of the club are met."

This finding has not been challenged. Thus, the whole of the net proceeds arising from this game, which was promoted by or on behalf of the members of the club as a body, were paid into funds belonging to that body and were applied for the benefit of that body. It has not been contended that this was a charitable

G purpose (4). No member of the general public, and no charitable cause, obtained the smallest "gain" from these proceeds. Moreover, as it seems to me, each individual member of the club derived a personal gain from these proceeds. The subscription paid by each member was the remarkably small sum of 1s. a year, and it seems clear, from the accounts laid before your Lordships, that this subscription must have been raised if the club had not acquired about £900 in the

H year 1959 by organising tombola games which were attended by non-members as well as members.

For these reasons, my Lords, I am of opinion that the receipt of the proceeds by the club was a "private gain", if these words are to be given their ordinary meaning, and I have not been able to find any sufficient reason, in s. 4 of the Act or in any other section, for giving some other meaning to the words.

I It was suggested in the course of the argument that the decision of the justices and the Divisional Court involves serious hardship to the members of this workingmen's club, and it is unlikely that Parliament can have intended this result. I am not greatly impressed by the suggestion. Your Lordships were informed that the club has over fifteen thousand members so, if the subscriptions were to be increased from 1s. to 3s. a year, the funds would benefit by £1,500—far more than the proceeds of the tombolas. Three shillings a year does not seem an

excessive sum to pay for all the amenities of the club, and Parliament might well think it quite appropriate that the gap between income and expenditure should be filled by the members themselves rather than by the expedient of inviting non-members to help in filling the gap by indulging in a mild gamble. I would dismiss the appeal.

LORD MORRIS OF BORTH-Y-GEST: My Lords, the appellants are the trustees of a working-men's club with premises at 9, Northumberland Street, Huddersfield. It is registered under the Friendly Societies Act, 1896. Its objects as declared by the rules are

"to afford the members the means of social intercourse, mutual helpfulness, mental and moral improvement, and rational recreation."

The rules further provide that, in that purpose, the society may provide a reading room, magazines, newspapers and other periodicals, maps, books of reference, and a library for circulation among its members. It may also provide a large hall and lodge and committee rooms to be let to any friendly or trade society established within the borough of Huddersfield; other lettings as laid down in the rules may be made. In the year 1959, the number of societies meeting at the club was as follows:—eighteen friendly societies (with a membership of 1,963) and seventy-two trade societies (with a membership of 13,230). All the property of the society is vested in the trustees representing and acting for the whole of the members of the society. All moneys received on account of contributions and donations, admission fees, fines or otherwise are to be applied according to the rules of the society, and no surplus is divisible among the members individually. In the year 1959, the expenses of running the club were nearly £7,000. This amount was found in various ways. The profit of the refreshment account yielded £4,300. Membership fees yielded £1,059. There was in that year a balance of £990 from "Members' Efforts". This represented the proceeds of the playing of tombola on various dates. That game (which the magistrates held to be one of pure chance) was played on the premises on the dates in 1960 set out in the informations. The proceeds of the playing (after payment of the prizes) were paid into the general funds of the club, out of which the general expenses of the club are met. On each of those dates, the appellants undoubtedly used their premises in connexion with a lottery. They would be guilty of an offence under s. 22 (1) of the Betting and Lotteries Act, 1934, unless some statutory exemption applied to them.

Though some other statutory provisions fall to be considered, it is not in dispute that, on the facts as found by the magistrates, the exemption given by s. 4 of the Small Lotteries and Gaming Act, 1956, applies in this case if the proceeds of the various lotteries (the games of tombola) were to be applied "for purposes other than purposes of private gain". The magistrates rejected a contention that a purpose which is not for "public gain" is necessarily for "private gain". They held, however, that, in this case, the proceeds "were not applied for purposes other than purposes of private gain". This they held for the four following reasons—(i) That the proceeds were paid into the general funds of the club; (ii) That such proceeds were used to meet the general expenses of the club; (iii) That such proceeds were used to finance the amenities and social activities of the club enjoyed by the members to whom, therefore, there accrued a private gain; (iv) That such proceeds were used to avoid a loss which would fall on the individual members of the club and that the avoidance of such a loss was a private gain. I doubt whether the last reason is in any event a valid one. Apart from the fact that the informations related to the year 1960 and that there are no findings as to the accounts for the year 1960, if the figures for the previous year are to be taken as a guide, it might well be that the loss of some item of revenue would only have resulted in the curtailment of some items of expenditure, and that no question of any financial loss would arise. Thus, in

- A the accounts for 1959, it is seen that a sum of £629 was expended for "concert artists, pianists, etc." Such an item of expenditure might have been omitted had there been no resources to meet it. Effectively, therefore, the finding of the magistrates was that, as the proceeds were used to meet the general expenses of the club and to finance the amenities and social activities of the club, there was a private gain for each one of the members.
- B The phrase "purposes other than private gain" appears in s. 23 of the Betting and Lotteries Act, 1934. That section relates to small lotteries which are promoted as an incident of bazaars, sales of work, fêtes and other entertainments of a similar character. Subject to certain conditions, such lotteries are deemed not to be unlawful. One condition is that the whole proceeds of the entertainment (including the proceeds of the lottery), after certain permitted deductions, are to be devoted to purposes other than private gain. This suggests, to my mind, a requirement that the net amount of the money which is raised is to go to the cause which the bazaar or sale of work or fête is promoting. None of the money that is raised is to go into the private pocket of an organiser or promoter. The club in the present case could not claim to be within that section for there was no bazaar or other similar entertainment.
- C The same phrase "purposes of private gain" appears in s. 1 and s. 4 of the Small Lotteries and Gaming Act, 1956. In each of these sections, as well as in s. 23 of the Act of 1934, the phrase must, I think, have the same meaning. This seems to me to be a reasonable conclusion having regard to s. 5 (1) of the Act of 1956. By that subsection, it is provided that the Act of 1934 is to have effect as if s. 1 and s. 4 of the Act of 1956 were included in Part 2 of the Act of 1934 and were so included after s. 22. That section (s. 22) provides a defence (see sub-s. (2)) in proceedings under s. 22 in respect of lotteries regulated by any subsequent section of Part 2. A lottery is, therefore, declared not to be unlawful if it is covered by s. 1 of the Act of 1956 or by s. 4 of the Act of 1956 or by s. 23 of the Act of 1934 or by s. 24 of the Act of 1934.
- D Section 1 of the Act of 1956 applies to certain small lotteries which are promoted in Great Britain on behalf of certain societies, if registered under the Act, if such lotteries are promoted for raising money to be applied for purposes of the particular society. In this connexion, "society" includes a club, institution, organisation or association of persons (by whatever name called). To be covered by the section, a society must be established and conducted wholly or mainly for one or more of these purposes: (a) charitable purposes; (b) participation in or support of athletic sports or games or cultural activities; (c) purposes not described under (a) or (b), and not being purposes of private gain or purposes of any commercial undertaking. The appellants did not purport to promote the lotteries in question in such a way as to bring themselves within s. 1. It is, nevertheless, relevant to consider whether the club, which undoubtedly is a "society" for the purposes of s. 1, was established and conducted wholly or mainly for purposes of private gain or purposes of any commercial undertaking. My Lords, I cannot think that it could be suggested that the club was not bona fide established and conducted as a working-men's club and with the objects which are recorded in the rules. I can see no trace of any of the "purposes of any commercial undertaking". Nor can I discern any "purposes of private gain". In a section which is dealing with the promoting of lotteries for raising "money" and is dealing with the purposes for which such money is to be applied, it seems to me that the phrase "purposes of private gain" denotes as an objective the personal acquisition of money (or money's worth) by individuals. I cannot accept (as was submitted on behalf of the respondent) that the Huddersfield Friendly and Trade Societies' Club could fairly or rationally be said to be a club established and conducted wholly or mainly for private gain.
- E
- F
- G
- H
- I

Section 4 of the Act of 1956 gives exemption in the case of small gaming parties. The section applies to any entertainment promoted in Great Britain for raising "money to be applied for purposes other than purposes of private

gain" if certain conditions are satisfied. It is common ground that, on its facts, the present case comes within s. 4, and that all the conditions of the section were satisfied if it can be said that all the net proceeds of the entertainment (i.e., the proceeds after deducting certain permitted deductions) were "applied for purposes other than purposes of private gain". The proceeds were applied for the purposes of the club. In such purposes I see no trace of the element of private gain. A

I would, therefore, allow the appeal. B

LORD GUEST: My Lords, the appellants, who are the trustees of the Huddersfield Friendly and Trade Societies' Club, Huddersfield, were charged and convicted under s. 22 of the Betting and Lotteries Act, 1934, with using the premises occupied by them for purposes connected with the conduct of a lottery. C
Under s. 21 of that Act, all lotteries are unlawful, but certain exemptions are provided in that Act and in the Small Lotteries and Gaming Act, 1956. The appellants claimed exemption under s. 4 of the latter Act. Before exemption can be claimed under s. 4, certain conditions require to be complied with. It is admitted that they complied with all the conditions except one. This condition, which is to be found in s. 4 (1) (c), is in the following terms: D

"the whole of the proceeds of such payments as are mentioned in para. (a) of this subsection, after deducting sums lawfully appropriated on account of expenses or for the provision of prizes or awards in respect of the games, are applied for purposes other than purposes of private gain;"

The only question in the appeal is whether the magistrates and the Divisional Court were right in holding that the appellants failed to comply with this condition, and whether the lottery was, accordingly, illegal under s. 21 of the Act of 1934. E

The club is a members' club. The game which the appellants promoted was "tombola", details of which have already been described. It would not normally be described as a lottery, but, if all the conditions of s. 4 were complied with, the game would be exempt under s. 4. There is a finding of fact that the whole of the proceeds, after deducting all expenses and prize moneys, were paid into the general funds of the club. The short question is whether such application of the proceeds is for purposes other than purposes of private gain. The appellants argued that "private gain" meant the private gain of some particular individual person, and did not comprehend the gain of a members' club. It was admitted that it would comprehend a proprietary club, presumably whether conducted by an individual or a company or a partnership. For my part, I find it impossible to read the words "private gain" as not applying to a members' club. Private gain is, I think, opposed to public gain, in the sense that public gain would benefit large numbers of the public and could, therefore, be regarded as of a semi-charitable nature. I am quite unable to understand how it would be for the private gain of an individual if that individual received the proceeds of a lottery, but it would not be for the private gain of a number of individuals associated together in the form of some society, club, partnership or other organisation if the proceeds were paid to this association. It is in all cases the private gain of the individual members of the society or club as the case may be. F
G

The findings of fact in the Case demonstrate quite clearly how the individual members benefited from the proceeds of the tombolas. The total profits from the playing of tombola, which were paid into the general funds of the club, amounted in 1959 to £900. The membership fees, which were 1s., amounted to £1,059. The surplus for the year amounted to only £170. It will thus be apparent that, apart from the profits from tombola, there would have been a loss which eventually would have had to be met by increased subscriptions. In any event, as the findings show, the profits from tombola are used to finance the amenities and social activities of the club in which all the members share. In my view, H
I

A the magistrates were right in holding that the receipts for tombola were not applied for purposes other than purposes of private gain. I would dismiss the appeal.

I should prefer to reserve my opinion on the question whether the appellants could have obtained exemption under s. 1 of the Act of 1956.

Appeal dismissed.

B

Solicitors: *Biddle, Thorne, Welsford & Barnes*, agents for *G. E. Hutchinson & Co.*, Huddersfield (for the appellants); *Sharpe, Pritchard & Co.*, agents for *Town clerk*, Huddersfield (for the respondent).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

C

MORRISON ROSE & PARTNERS (a firm) v. HILLMAN.

[COURT OF APPEAL (Holroyd Pearce, Willmer and Pearson, L.JJ.), June 6, 7, 1961.]

D

Res Judicata—Estoppel arising after the issue of the writ—Plaintiffs seeking to rely on estoppel—Amendment of reply—Architects' actions for fees for work on project subsequently abandoned—Defence that remuneration for abandoned projects excluded by agreement rejected—Second action in respect of another abandoned project—Same defence—Writ in second action issued before decision in first action—Whether defendant estopped in second action from raising at the trial the same defence as in the first action.

E

The plaintiffs, a firm of architects, were employed under an oral agreement with the defendant, a property developer, to do architectural work for his development schemes. In an action by the plaintiffs claiming fees for work done on schemes for a particular site, which schemes had been subsequently abandoned, the defendant pleaded, among other defences, that it was agreed that the plaintiffs should not be paid for work done on any scheme which was subsequently abandoned. While this action was pending the plaintiffs issued a writ in a second action claiming fees in respect of another abandoned scheme, and the defendant entered a defence similar to that in the first action. Both actions were heard before the same official referee. In the first action the official referee found that the plaintiffs were entitled to charge fees in respect of abandoned schemes and gave judgment for the plaintiffs. Thereupon, the plaintiffs amended their reply (with leave) in the second action by adding a plea of *res judicata*, viz., that the defendant was estopped by reason of the decision in the first action from raising the issue whether the plaintiffs were entitled by agreement to charge fees. On appeal from a decision upholding the estoppel,

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Held: the estoppel would be upheld because—

H

(i) a judgment in an action could constitute an estoppel *per rem judicatam* in a subsequent action, although the judgment in the first action was given after the issue of the writ in the second action.

Re Defries, Norton (or Nordon) v. Levy ((1883), 48 L.T. 703) and *Bell v. Holmes* ([1956] 3 All E.R. 449) approved.

I

The Delta ((1876), 1 P.D. 393) distinguished.

(ii) although a party might be taken to have waived an estoppel if he had not pleaded it, there was no waiver unless he had opportunity to plead it; R.S.C., Ord. 24, did not by implication prevent the plaintiffs from pleading an estoppel that arose after the issue of their writ, and the plaintiffs had been entitled to plead the estoppel by amending their reply.

Dictum of HOLT, C.J., in *Trevivian v. Lawrence* ((1704), 2 Ld. Raym. at p. 1051) applied.

Appeal dismissed.

[As to judgments as estoppels, see 15 HALSBURY'S LAWS (3rd Edn.) 396, 397, para. 708, and as to the necessity to plead an estoppel, see *ibid.*, 202, 203, para. 381; and for cases on these subjects, see 21 DIGEST 143-158, 65-209; 287, 1011-1018.]

Cases referred to:

Bell v. Holmes, [1956] 3 All E.R. 449; [1956] 1 W.L.R. 1359; 13 Digest (Repl.) 441, 664.

Catterina Chiazzare, The, (1876), 1 P.D. 368; 45 L.J.P. 105; 34 L.T. 588; 3 Asp. M.L.C. 170; 11 Digest (Repl.) 551, 1585.

Defries, Re, Norton (or Nordon) v. Levy, (1883), 48 L.T. 703; 21 Digest 190, 379.

Delta, The, The Erminia Foscolo, (1876), 1 P.D. 393; 45 L.J.P. 111; 35 L.T. 376; 3 Asp. M.L.C. 256; 11 Digest (Repl.) 550, 1579.

Eshelby v. Federated European Bank, Ltd., [1932] 1 K.B. 254; *affd.* C.A., [1932] 1 K.B. 423; 17 Digest (Repl.) 302, 1090.

Houstoun v. Sligo (Marquis), (1885), 29 Ch.D. 448; 52 L.T. 96; *on appeal*, C.A., 29 Ch.D. 457; 21 Digest 182, 325.

Kingston's (Duchess), Case, (1776), 1 East, P.C. 468; 1 Leach, 146 (168 E.R. 175); 20 State Tr. 355; 21 Digest 159, 213.

Lockyer v. Ferryman, (1877), 2 App. Cas. 519; 21 Digest 199, 435.

Mali Ivo, The, (1869), L.R. 2 A. & E. 356; 38 L.J. Adm. 34; 20 L.T. 681; 11 Digest (Repl.) 550, 1578.

Ord v. Ord, [1923] All E.R. Rep. 206; [1923] 2 K.B. 432; 92 L.J.K.B. 859; 129 L.T. 605; 21 Digest 152, 140.

Randolph v. Tuck, [1961] 1 All E.R. 814; [1961] 2 W.L.R. 855.

Trevinian v. Laurence, (1704), Holt, K.B. 282; 2 Ld. Raym. 1036, 1048; 6 Mod. Rep. 256; 87 E.R. 1003; 21 Digest 185, 332.

Appeal.

This was an appeal by the defendant from the judgment of His Honour Sir BRETT CLOUTMAN, V.C., Q.C., official referee, on June 16, 1960, giving judgment for the plaintiffs. The action was one of five actions brought by the plaintiffs, a firm of architects, against the defendant, a property developer, in respect of work done by the plaintiffs at sites of the defendant, all the actions being by agreement assigned for trial to the same official referee. The plaintiffs by specially indorsed writ dated Dec. 11, 1958, claimed £5,970 13s. 3d. for work done for the defendant by the plaintiffs as architects in connexion with a site at Kirby Street in the City of London between January, 1955, and July, 1958. The defendant pleaded, among other defences, that it had been orally agreed between the parties that in relation not only to the Kirby Street site but to other sites of the defendant also that the plaintiffs would be paid for their work if and when the buildings were erected, and that the plaintiffs would not be paid for work on any scheme which was subsequently abandoned or which otherwise proved abortive; that no building had been erected on or begun on the site and that the work had proved abortive. By their reply, delivered on June 18, 1959, the plaintiffs alleged that by an oral agreement, subsequently confirmed in writing, in April, 1954, the defendant agreed to employ the plaintiffs on certain sites and to pay fees according to the R.I.B.A. scale, subject only to one proviso, namely, that the plaintiffs should allow an extended method of payment of such fees as should become due as a result of the commencement of the erection of the buildings; that the plaintiffs were first instructed in relation to the site in December, 1954, and that the agreement applied. The plaintiffs further alleged that the defendant had sold his interest in the Kirby Street site. On Mar. 22, 1960, judgment was given in another action (begun by writ issued on June 30, 1958) between the same parties, as were parties to the present action. In this earlier action the plaintiffs claimed fees for work as architects in connexion with another site and the same defence as to the terms of payment

A was raised, the defendant relying on the same oral agreement as he set up in the present action, and the plaintiffs relying by their reply on the same agreement as they set up by their reply in the present action. In this former action the official referee found, on Mar. 22, 1960, that the terms of agreement were as alleged by the plaintiffs, that accordingly they were entitled to charge scale fees in respect of their work on schemes that were subsequently abandoned, B and judgment was entered for the plaintiffs. The plaintiffs on May 17, 1960, obtained leave to amend their reply in the present action, and amended it accordingly so as to plead in effect that the defendant was estopped from raising the issue as to the terms of agreement for the plaintiffs' remuneration for work on abandoned schemes as that matter was *res judicata* by reason of the decision in the earlier action. At the trial of the present action, it was conceded C that there was no evidence on this issue that had not been given in the other action, and the official referee, without hearing any evidence as to the terms of agreement, held that the defendant was estopped by reason of the decision in the earlier action, and judgment was entered for the plaintiffs in the sum of £5,044 7s. 8d.

D *E. S. Fay, Q.C.*, and *A. C. Bulger* for the defendant, the appellant.
Leonard Caplan, Q.C., and *P. M. J. Slot* for the plaintiffs, the respondents.

HOLROYD PEARCE, L.J., having stated the facts and the issue, continued: Counsel for the defendant relies on two arguments. First, he argues that following the judgment of PHILLMORE, J., in *The Delta, The Erminia Foscolo* (1) there is a rule that no estoppel can arise from a judgment in another E case given after the issue of the writ. There is no authority in this court on the point. Secondly, he argues that estoppel by *res judicata* must be pleaded in order to be effective, and that the rules of pleading do not enable the plaintiffs to plead an estoppel that arises after action brought. In *The Delta* (1) the owners of the ship Delta sued abroad in respect of a collision between two ships and obtained judgment against the owners of the other ship. Before that judgment F a writ had been issued against the owners of the Delta in England. The owners of the Delta sought to say that a foreign judgment delivered while the English suit was pending created an estoppel in their favour, but the court refused to accept the estoppel. The learned judge said this (2):

G "... I am of opinion this defence must fail, for two reasons: the first is that at the time when the suit against the Delta was begun there was confessedly no *res judicata*; there was only a *lis alibi pendens*; and if the owners of the Delta had wished to escape from having two suits against them for the same matter brought to a hearing, they should have put the owners of the *Erminia Foscolo* to their election, compelling them to abandon one or the other of the suits, according to the rule laid down by me in *The Mali Ivo* (3), and quite recently applied in *The Catterina Chiazzare* (4). As regards the suit H against the *Erminia Foscolo*, that was brought by the owners of the Delta while the foreign *lis* was pending; they cannot be heard, therefore, to object that this *lis* is a bar to a decision on the merits in this suit. The second reason is that the foreign judgments not having been given on the merits of the case, but on matters of form only, cannot be set up as a bar to a decision on the merits."

I I understand the learned judge to be saying that the owners of the Delta had an opportunity when both actions were pending of pleading a *lis alibi pendens* and putting their opponents to an election. Instead of doing so, they chose to lie by until they had secured a victory and then tried to rest on that and avoid a second trial. They must be taken to waive their right to fight one action

(1) (1876), 1 P.D. 393; 3 Asp. M.L.C. 256.

(2) (1876), 1 P.D. at p. 404; 3 Asp. M.L.C. at p. 259.

(3) (1869), L.R. 2 A. & E. 356.

(4) (1876), 1 P.D. 368; 3 Asp. M.L.C. 170.

only, and they ought not to be heard to rely on estoppel. As LORD COKE A said (5)—“estoppel against estoppel doeth put the matter at large”.

I cannot accept that case as authority for the general proposition that a judgment in another case could not act as an estoppel merely because it was given after the issue of the writ in the second case.

In *Houstoun v. Marquis of Sligo* (6) the headnote reads, inter alia:

“Whether a judgment obtained in one action before the trial of another can operate by way of estoppel as *res judicata*, unless the judgment was obtained before the issue of the writ in the second action, *Quaere*.” B

The passage in the judgment of PEARSON, J., from which that part of the headnote derives, is (7):

“The first point which strikes me is that which was suggested by [counsel for the plaintiff] viz., that, inasmuch as a plea of *res judicata* is a plea in bar to the institution of an action, that plea cannot succeed in the present case inasmuch as the judgment in the Irish action did not exist at the time when the writ in the English action was issued. I am rather inclined to think that that view is right, and that I cannot stop the proceedings in this action upon the ground that in the interval between the issue of the writ and the hearing of the present application, judgment has been pronounced in the Irish action. But I am unwilling to decide this case entirely upon that ground, because, however right the decision in *The Delta* (8) may have been under the old practice, I am not satisfied, without a closer examination of the existing Rules of Court, that a defendant is not now at liberty to set up as *res judicata*, a decision of the point at issue by a court of competent jurisdiction during the progress of the action.” C D E

The judge was therefore considering the matter rather as one of technical difficulty and pleading than as a principle of law, and the case gives little help.

In *Re Defries, Norton (or Nordon) v. Levy* (9) POLLOCK, B., said:

“No doubt it has long been settled, as was laid down by DE GREY, C.J., in an old case (10), that if the defendant has had an opportunity of pleading a judgment and has not done so, he may be considered to have waived the estoppel. But the defendants cannot be said to have waived the estoppel by not pleading this judgment, for it was not in existence when the pleadings closed. I think it will be found that there is an old decision that it is sufficient to plead pendency of another action in order to enable the party pleading to put the judgment in such action in evidence by way of estoppel. But I do not base my decision upon that. It is sufficient to rest upon the broad principle that, unless the court is driven, by the party's not pleading the judgment, to the conclusion that he has waived the estoppel, the estoppel will not fail.” F G

He went on to hold that the defendant could raise a judgment in a previous case as an estoppel though it was given after the writ. Counsel for the defendant seeks to say that the judgment was ill-considered because the plaintiff was unrepresented and the court did not have a proper argument; but I cannot agree. H

Finally, in *Bell v. Holmes* (11) McNAIR, J., held that a judgment in an earlier case given after a later action had been started, created an estoppel. The plaintiff sued the defendant in the High Court in respect of a collision between the plaintiff's and the defendant's motor cars. While that action was pending both parties were successfully sued by a third party in the county court, and the I

(5) COKE UPON LITTLETON at p. 352, b.

(6) (1885), 29 Ch.D. 448.

(7) (1885), 29 Ch.D. at p. 454.

(8) (1876), 1 P.D. 393; 3 Asp. M.L.C. 256.

(9) (1883), 48 L.T. at p. 704.

(10) *Duchess of Kingston's Case*, (1776), 1 East, P.C. 468.

(11) [1956] 3 All E.R. 449.

A county court judge apportioned the blame between them both. The plaintiff was held to be estopped in the High Court from contending that he was not negligent in the proportion decided by the apportionment of the county court judge. After considering the well-known judgment of LUSH, J., on the nature of *res judicata* in *Ord v. Ord* (12), McNAIR, J., said (13):

B "There are other passages in the same judgment which support the view, which I suggested in the course of the argument, that it is a matter of evidence. If it is a matter of evidence, it is a question what evidence can properly be given in this court today, and if it is a matter of evidence I can see no reason at all why I should be limited in considering evidence consisting of a judgment to a case where that judgment has been given before the issue of the writ..."

C Counsel for the defendant contends that that case was wrongly decided, but I find myself unable to agree so far as concerns the point in the present argument. There are other points in that judgment on which we have not heard argument, and express no opinion—see *Randolph v. Tuck* (14).

D In support of his second point counsel for the defendant relies on *Eshelby v. Federated European Bank, Ltd.* (15) which establishes that a plaintiff cannot add a cause of action that has arisen since the issue of the writ. Estoppel is not a cause of action; but he argues that no matter that arose since the writ can be relied on by a plaintiff. R.S.C., Ord. 24, expressly allows the defendant to raise a ground of defence that has arisen since the issue of the writ, but no such privilege is given to a plaintiff to plead, either in his statement of claim or reply, anything that has arisen since the writ. Counsel for the defendant seeks to deduce a general principle from the fact that it was necessary to grant an express privilege to the defendant by R.S.C., Ord. 24. But in my judgment such a deduction is unwarranted.

E The object of estoppel *per rem judicatam* is succinctly expressed by LORD BLACKBURN in *Lockyer v. Ferryman* (16) where he says:

F "The object of the rule of *res judicata* is always put upon two grounds—the one public policy, that it is in the interest of the state that there should be an end of litigation, and the other, the hardship on the individual, that he should be vexed twice for the same cause."

G The argument which counsel for the defendant puts forward can claim no ground of principle on which to exclude judgments given after writ issued from the general principle which LORD BLACKBURN there put forward. *Finis litium* is no less desirable when the suits are almost contemporaneous.

In SMITH'S LEADING CASES (13th Edn.), Vol. 2, at p. 657, estoppels are referred to as

H "a head of law once tortured into a variety of absurd refinements, but now almost reduced to consonancy with the rules of common sense and justice."

I should be loath to resurrect any earlier refinement that has no present justification.

The industry and learning of counsel have taken us concisely through the old intricacies of pleading. Counsel for the plaintiffs argues that the early cases were much concerned with the question of waiver of estoppel by technicalities of pleading; and he rightly contends that the answer to this problem should not now be found in any technicality of pleading. The argument that the defendant can evade an estoppel (even though a plaintiff cannot do so) from a judgment given after the issue of the writ, merely because the plaintiff has no means of pleading it under the Rules of the Supreme Court, does not accord with justice or common sense, and in my judgment it is not maintainable.

(12) [1923] All E.R. Rep. 206; [1923] 2 K.B. 432.

(13) [1956] 3 All E.R. at p. 454.

(15) [1932] 1 K.B. 254.

(14) [1961] 1 All E.R. 814.

(16) (1877), 2 App. Cas. at p. 530.

ROSCOE'S EVIDENCE IN CIVIL ACTIONS (20th Edn.), Vol. 1, at p. 192, referring A
to the *Duchess of Kingston's Case* (17), says this:

"The language of the judges on the first proposition enunciated above has
been thus explained, viz., that the judgment is conclusive (i.e., an estoppel)
if pleaded, where there is an opportunity of pleading it; but that where there
is no such opportunity, then it is conclusive as evidence; but if the party
forbear to rely upon an estoppel when he may plead it, he is taken to waive B
the estoppel, and to leave the prior judgments as evidence only for the
jury."

That passage is good sense, and it is confirmed by cases which are there cited.
In *Trevivian v. Lawrence* (18) HOLT, C.J., makes observations that support the
view that estoppel only has to be pleaded if there is an opportunity of pleading C
it. I accept that view.

In the present case there was no opportunity of pleading the estoppel in the
original pleadings since it had not arisen when they were delivered. The
validity of the estoppel is therefore unaffected by its absence from the original
pleading. Nevertheless, the plaintiff must plead it if he can by amendment.
If the amendment is refused, he can still rely on it; but to refuse such an amend- D
ment would be purposeless. Therefore, in my judgment the plaintiff is entitled
to plead this estoppel in his reply by amendment. I can find no ground for
creating an artificial exception from the general rule of estoppel per rem judica-
tam, by distinguishing res judicatae that follow the issue of a writ from those
which precede it. The principles which make the latter desirable have no less
application to the former, and should be applied to both alike.

I would dismiss the appeal. E

WILLMER, L.J.: I agree; and HOLROYD PEARCE, L.J., has dealt with the
matter so fully that I can usefully add nothing.

PEARSON, L.J.: I agree; and the only point which I should like to add
is that, in the opinion of the judges in the *Duchess of Kingston's Case*, as
set out in 2 SMITH'S LEADING CASES (13th Edn.), at p. 645, there is this passage: F

"From the variety of cases relative to judgments being given in evidence
in civil suits, these two deductions seem to follow as generally true: first,
that the judgment of a court of concurrent jurisdiction, directly upon the
point, is as a plea, a bar, or as evidence, conclusive, between the same
parties, upon the same matter, directly in question in another court..." G

To my mind, the easiest line of approach to this question is to regard the previous
decision as conclusive evidence. The theory then becomes easier. If the parties
have submitted to the decision of a court an issue between them, and that issue
has been fully considered and decided on the evidence which they have called,
it is reasonable that the decision given should be conclusive evidence as between
those parties for the purpose of another suit between them. If the same issue is H
raised to be decided it would be unreasonable that the same controversy should
be re-agitated over and over again.

I fully agree with the decision that has been given, and that the appeal should
be dismissed.

Appeal dismissed.

Solicitors: *Howard, Kennedy & Co.* (for the appellant); *Hewitt, Woollacott
& Chown* (for the respondents).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

Re LINOLEUM MANUFACTURERS' ASSOCIATION'S AGREEMENT.

[RESTRICTIVE PRACTICES COURT (Russell, J., Mr. W. L. Heywood, Mr. W. G. Campbell, and Mr. C. C. W. Havell), April 17, 18, 19, 20, 21, 24, 25, 26, 27, 28, May 1, 2, 3, 4, 5, 8, 9, June 22, 1961.]

Restrictive Trade Practices—Reference—Linoleum manufacturers—Minimum price and discount scheme—Whether removal of restrictions would deny public substantial benefit—Whether removal of restrictions would be likely to cause substantial reduction in volume or earnings of linoleum export business in relation to whole business of linoleum industry—Restrictive Trade Practices Act, 1956 (4 & 5 Eliz. 2 c. 68), s. 21 (1) (b), (f).

Of the nine companies who made linoleum in Great Britain, seven were parties to the Linoleum Manufacturers' Agreement, and, during the period 1954 to 1960, these Association members together produced over eighty-three per cent. in value of the home trade, and eighty-six per cent. of the export trade from the United Kingdom. Within the Association, four of the members, in the period 1956 to 1960, together accounted for from eighty-six per cent. to eighty-nine per cent. of the Association's total sales, their aggregate proportion tending to increase and that of the three small members to decrease. The average annual figure for exports by members in the years 1954 to 1960 was about one-third of their total sales, about sixty-nine per cent. by value of their exports going to Eire and the Commonwealth countries and twenty-six per cent. to the Continent of Europe. Linoleum of the various types (plain, cork carpet, printed and inlaid) was made in standard gauges or thicknesses which, under the Association's agreement, had to be adhered to. The substance of the restrictions under the agreement was that a system of common minimum prices and common discounts was observed by the members. There were discounts for prompt payment. A list was kept of approved wholesalers to whom alone certain discounts were permitted, and a wholesale rebate was also allowed to a list of builders' merchants in respect of tiles later sold by them to retailers. Special cutting service was permitted only to mail order houses on an approved list, and a discount was allowed to a short list of those houses in lieu of retail aggregated turnover bonus. Certain concerns received a discount and did not participate in the turnover bonus. Special discounts were allowed to the Ministry of Works (including supplies to regional hospital boards), the Admiralty, the Northern Ireland Government, the London County Council and the Metropolitan Police. There were other restrictions relating mostly to terms of service without which concealed price competition would be possible. In practice, the minimum prices could be treated as constituting also maximum prices. The members of the Association were also members of an international association of linoleum manufacturers known as the convention, which comprised all European manufacturers of substance. The members were the parties to the Linoleum Manufacturers' Export Group Agreement whose objects were to encourage the export of British linoleum, to collaborate in matters relating to the export field and to act on behalf of the linoleum industry generally and on behalf of the members of the export group collectively in all matters relating to export trade. The function of the convention was basically to fix prices and trade terms for all markets outside the United Kingdom other than in the U.S.A. and Germany. There were four convention price lists—(i) the Commonwealth price list (basic prices being the same as the United Kingdom home list but differing in the field of discounts); (ii) the general export list, covering non-European markets outside the Commonwealth list (prices tending to be below and to depart increasingly from the home list); (iii) the continental sterling list, covering

all European countries for which prices were not separately fixed (prices normally being somewhat below the home list prices); and (iv) the special list, covering various important European markets. The court found that the effect of the operation by the Association of its price-fixing agreement had not been to produce unreasonable profits, nor was there evidence to show that the members were inefficient in their operations, or that, for that reason, prices were unduly high. The court also found that the Association had adapted its activities and machinery to meet criticisms and recommendations made by the working party on the industry and by the Monopolies Commission, wherever it thought them to be practicable.

On a reference to the court by the Registrar of Restrictive Trading Agreements under s. 20 (1) and s. 20 (2) (a) of the Restrictive Trade Practices Act, 1956*, the Association sought to establish a *prima facie* case for its price restrictions under s. 21 (1) (b) and (f) of that Act†. Under s. 21 (1) (b), they contended that, by virtue of the restrictions or operations or arrangements resulting therefrom, the public as purchasers or users of linoleum enjoyed or were likely to enjoy the following specific and substantial benefits or advantages:—(a) the quality of linoleum supplied by each member was of a high standard and such standard was likely to be maintained or enhanced; (b) the public could purchase the linoleum of any member with the assurance that it would give satisfaction in use and would conform to known standard gauges; (c) the public were protected against risks in the purchase of linoleum which their knowledge and judgment would not enable them to appreciate or avoid; (d) the fullest freedom of choice in the purchase of linoleum and the widest range of choice of patterns and colours was secured to the public; (e) prices of linoleum were reasonably stable and, accordingly, adequate stocks were maintained by wholesalers and retailers; (f) in periods of high demand, the prices of linoleum were lower than they would otherwise have been. They contended in support of the above that (i) the consequence of the removal of the price restrictions would

*Section 20, so far as relevant, provides: “(1) The court shall have jurisdiction, on application made in accordance with this section in respect of any agreement of which particulars are for the time being registered under this Part of this Act, to declare whether or not any restrictions by virtue of which this Part of this Act applies to the agreement (other than restrictions in respect of matters described in paras. (b) to (d) of s. 8 (8) of this Act) are contrary to the public interest.

“(2) An application to the court under the foregoing subsection may be made—(a) in any case, by the Registrar . . .

“(3) Where any such restrictions are found by the court to be contrary to the public interest, the agreement shall be void in respect of those restrictions; and . . . the court may . . . make such order as appears to the court to be proper for restraining all or any of the persons party to the agreement . . . (a) from giving effect to . . . the agreement in respect of those restrictions; . . .”

†Section 21 (1), so far as relevant, provides: “For the purposes of any proceedings before the court under the last foregoing section, a restriction accepted in pursuance of any agreement shall be deemed to be contrary to the public interest unless the court is satisfied of any one or more of the following circumstances, that is to say— . . .

“(b) that the removal of the restriction would deny to the public as purchasers, consumers or users of any goods other specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them as such, whether by virtue of the restriction itself or of any arrangements or operations resulting therefrom; . . .

“(f) that, having regard to the conditions actually obtaining or reasonably foreseen at the time of the application, the removal of the restriction would be likely to cause a reduction in the volume or earnings of the export business which is substantial either in relation to the whole export business of the United Kingdom or in relation to the whole business (including export business) of the said trade or industry; . . . and is further satisfied (in any such case) that the restriction is not unreasonable having regard to the balance between those circumstances and any detriment to the public or to persons not parties to the agreement (being purchasers, consumers or users of goods produced or sold by such parties, or persons engaged or seeking to become engaged in the trade or business of selling such goods or of producing or selling similar goods) resulting or likely to result from the operation of the restriction.”

A be to create instability in the home market, and would sooner or later lead to
 debasement of quality; (ii) the agreement of common minimum prices had
 operated in times of high demand to restrain the increase of prices and was
 likely so to operate in the future, and it enabled prices to be stabilised
 for considerable periods despite fluctuations in the prices of raw materials and
 this stability of prices encouraged wholesalers and retailers to hold adequate
 B stocks; (iii) the effect of the common minimum prices was to concentrate
 competition of members on quality and service and thus to improve both;
 (iv) if there were no agreed minimum prices, in times of high demand linoleum
 prices would rise to a higher level than they would under the present system,
 prices would fluctuate and wholesalers and retailers would be discouraged
 from holding adequate stocks and competition in price would assume a
 C greater importance than competition in quality; (v) retail customers would
 not have the same full freedom of choice as they did now, with the result
 that customers' range of choice of patterns would then become restricted.
 Under s. 21 (1) (f), the Association contended that the immediate conse-
 quence of the removal of the price restrictions to the home market would
 be the termination of the convention arrangements. The willingness of
 D continental manufacturers to enter into such arrangements depended on their
 confidence that the agreed selling prices would in fact be observed. Even if
 they accepted that members would endeavour to comply with their obli-
 gations, they would envisage the possibility that United Kingdom prices
 would fall to a level when linoleum might profitably be bought by third
 parties there and exported to the Continent for sale there below the agreed
 E selling price. In these circumstances, the continental manufacturers would
 immediately on the removal of the restrictions withdraw from the convention
 and take steps to secure themselves against competition on price from the
 United Kingdom. With reference to the Commonwealth list, the Association
 contended that lowering of prices in the United Kingdom market would lead
 to development of sales resistance if f.o.b. prices were not lowered commensurately
 F and, therefore, in order to avoid a reduction in earnings, members
 of the Association would be compelled to lower their f.o.b. prices. Further,
 in certain countries, notably Australia and Canada, applications would be
 likely to be made for tariff protection which would lead to a further reduction
 in the yield on members' exports to these countries.

G **Held:** the restrictions were deemed by s. 21 (1) of the Act of 1956 to be,
 and were declared to be, contrary to the public interest, the Association
 having failed to satisfy the court of the circumstances stated in para. (b)
 and para. (f) of s. 21 (1) for the following reasons—

I (i) (as regards s. 21 (1) (b)) the abrogation of the Association's price
 arrangements would not in fact result in a denial to the public of such
 benefits and advantages as were specified in (a)-(d) supra (see p. 907,
 letter B, post), price movements consequent on such abrogation would not
 so alter stockholding habits as to amount to a denial to the public of any
 substantial benefit or advantage as alleged in (e) supra (see p. 907, letter
 E, post), and, as no period of high demand seemed likely to return in the
 foreseeable future, the abrogation would not result in the denial of any such
 benefit as that alleged in (f) supra (see p. 907, letter G, post).

[(ii) (as regards s. 21 (1) (f)) it was not established that the condemnation
 of the home price restrictions would lead to the disruption of the export
 group or the convention (see p. 911, letter G, post), nor that any decline
 in home prices would probably be reflected in reduction of prices to the
 Commonwealth list countries and thus lead to a substantial fall in export
 earnings (see p. 913, letter B, post).

Case referred to:

Yarn Spinners' Agreement, Re, [1959] 1 All E.R. 299; L.R. 1 R.P. 118; [1959] 1 W.L.R. 154; 3rd Digest Supp.

Reference.

Pursuant to the Restrictive Trade Practices Act, 1956, s. 20 (2) (a), the Registrar of Restrictive Trading Agreements referred to the Restrictive Practices Court an agreement made between the members of the Linoleum Manufacturers' Association and contained in the constitution of the Association adopted in writing by the members on Feb. 19, 1957, the documents entitled the Association's "Trade Practices" and the variations thereof, together with the list of customers therein referred to, the resolution of the Association dated Feb. 19, 1957, adopting the list of approved wholesale stockists and the Association's price schedules and the list and price schedules. The Association was formed in 1934, and, by its constitution, its objects were (a) to promote the welfare of the British linoleum industry, to take such action as might tend to produce regularity in the relationship between the various interests concerned in the home market and to promote efficiency in the manufacture and distribution of linoleum and other materials used for like purposes; (b) to create funds which should be available for furthering the objects of the Association under the direction and control of its members; (c) to act on behalf of the industry generally or on behalf of the members of the Association collectively and individually in matters having to be dealt with officially with other organisations and government departments; (d) to set up and regulate and maintain such standards and specifications as were calculated to assure the quality and reputation of British-made linoleum and to adopt, cause to be registered, use and protect trade marks and designs, and to lay down specifications in connexion with such trade marks; (e) to encourage the production of linoleum of high quality; and (f) to do all such acts and things as might be incidental or conducive to the carrying into effect of any of the above objects. The Association was to be concerned solely with the home market and was not to impose on or recommend to its members any restriction or obligation which related otherwise than to the home market. The Association recognised, however, that its members had a substantial export trade and that the objects of the Association which included encouragement of the production of linoleum of high quality had their effect also on the export trade of members.

The facts and the nature of the restrictions are set out in the judgment of the court.

Sir Lionel Heald, Q.C., R. I. Threlfall and P. Ford for the Linoleum Manufacturers' Association.

B. J. M. MacKenna, Q.C., and Arthur Bagnall, Q.C., for the Registrar.

Cur. adv. vult.

June 22. **RUSSELL, J.**, read the following judgment of the court: Linoleum is made in Great Britain by nine companies. Seven are members of the Association, which was formed in 1934, and, therefore, parties to the agreement before the court. These are: Barry Ostlere & Shepherd, Ltd., Linoleum Manufacturing Co., Ltd. (both the above are one hundred per cent. subsidiaries of Barry & Staines Linoleum, Ltd.), Dundee Linoleum Co., Ltd., Michael Nairn & Co., Ltd., North British Linoleum Co., Ltd., the Scottish Co-operative Wholesale Society, Ltd., and Jas. Williamson & Son, Ltd. Those outside the Association are the Tayside Floorcloth Co., Ltd. and Thomas Witter & Co., Ltd.

Linoleum is a smooth, hard-surfaced and pliable material made by pressing or calendering on to a backing of hessian or bituminised paper felt a plastic mass consisting of oxidised linseed oil compounded with resins, pigments, and powdered cork or wood flour. It is principally used as a floor covering. As such, it is in competition with a number of alternative forms of floor covering, including printed felt base (that is, bituminised paper felt printed with a flexible glossy

- A paint in multi-coloured patterns), plastic and rubber flooring, plastic and asphalt floor tiles, and the cheaper kinds of carpet. There are various types of linoleum. Plain linoleum results if the mix is all of one colour—plain brown if ochre is added to the mixture, plain coloured if other pigments are used. Cork carpet contains granulated cork instead of the powdered cork used in ordinary linoleum. Printed linoleum is made by passing seasoned, thin-gauge, plain linoleum through flat or rotary printing machines which apply a pattern in paint; the linoleum is then further seasoned until the paint is dry. Since the pattern is on the surface only, it wears off with use; in all other linoleum, the colour or the pattern goes through to the base. Inlaid linoleum includes (a) jaspe, moire, granite and sheet marble, which are streaked, mottled or veined effects obtained by mixing granules of different colours and sizes before calendering; and (b) patterned inlaid linoleum, which is more complicated to make. There are two main methods of making patterned inlaid. In one, pre-cut shapes of unbacked linoleum are assembled in the form of a pattern on the hessian backing; in the other, granules of different colours or effects are brushed through stencils on to the hessian until a pattern is built up. In both methods the pattern is then fixed to the backing by a hydraulic press or by passing through a calender. Linoleum is made in both sheet and tile form.

Linoleum of the various kinds is made in standard gauges or thicknesses, and, under the agreement, these gauges must be adhered to. Clause 7 of the Trade Practices of the Association, to which the agreement binds the members, is in the following terms:

- E “Gauges. The gauges of goods in the various categories which may be made by members for the British home market are:

Categories of goods which may be made in each gauge
(all for goods on a canvas backing except where goods
on felt base are specifically referred to)

Gauge mm.

F	8.00	(special)	Cork carpet only.
	6.70	(special)	Plain, jaspe, sheet marble, cork carpet, but not patterned inlaid.
	6.00	(special)	Plain only.
	4.50		Plain, sheet marble, jaspe, inlaid, cork carpet.
G	3.20		Plain, inlaid, jaspe, sheet marble, cork carpet on canvas or on felt base.
	2.50	(special)	Plain, jaspe only on canvas. Any category of linoleum or cork carpet on felt base.
	2.00		Plain, jaspe, sheet marble, inlaid on canvas. This category also includes 2 mm. goods on cotton backing.
H	1.80		Printed linoleum only.
	1.60	(special)	Jaspe, moire and patterned inlaid only.
	1.40		Printed linoleum only.

(The jaspe category includes moire and granite except in 1.60 mm. gauge where granite is excluded.) ‘Special’ implies gauge retained for the time being.”

- I The substance of the restrictions under the agreement is that a system of common minimum prices and common discounts is imposed on the members. Discounts for prompt payment are $4\frac{1}{4}$ per cent. to $3\frac{3}{4}$ per cent. A list is kept of approved wholesalers, to whom alone a discount of fifteen per cent. is permitted for goods despatched to the wholesaler's own warehouse, and of ten per cent. for goods delivered direct. The wholesale rebate of fifteen per cent. is also allowed to a list of builders' merchants in respect of tiles later sold by them to retailers. Special cutting service is permitted only to mail order houses on an approved list, and a discount of ten per cent. is allowed to a short list of these houses in

lieu of retail aggregated turnover bonus. The retail aggregated turnover bonus operates between $2\frac{1}{2}$ per cent. at £15,000 and $12\frac{1}{2}$ per cent. at £160,000. Some concerns, like Great Universal Stores, Ltd. and United Drapery Stores, Ltd., receive a ten per cent. discount and do not participate in the turnover bonus. Special discounts are allowed to the Ministry of Works (including supplies to regional hospital boards), the Admiralty, the Northern Ireland Government, the London County Council, and the Metropolitan Police. In fact, the restriction on the price of plain linoleum to the Ministry of Works is always abandoned, in the face of strong competition in this line from the Tayside Co. The restrictions not so far mentioned are supported by the Association as reasonably required for the operation of the price restrictions; they relate mostly to terms of service without which concealed price competition would be possible. The minimum prices in practice may be treated as constituting also maximum prices; according to the evidence, the rare exceptions were special or luxury lines.

The following sales figures give some indication of the size of the industry and the proportion of the reference goods produced by members of the Association. The figures are in £M.

	Home assoc- iation	Home industry	Export assoc- iation	Export industry	Total assoc- iation	Total industry	
1954	8.66	10.70	5.47	5.88	14.13	16.58	
1955	9.23	11.17	6.34	7.06	15.57	18.23	
1956	9.95	12.18	5.30	6.05	15.25	18.22	
1957	10.80	12.79	5.17	6.08	15.97	18.87	E
1958	11.57	13.57	4.51	5.54	16.08	19.11	
1959	12.26	14.79	4.81	5.88	17.06	20.67	
1960	12.41	14.62	5.46	6.55	17.87	21.16	

Thus, during this period the Association members have together produced over eighty-three per cent. in value of the home trade, and eighty-six per cent. of the export trade from the United Kingdom. Within the Association, three of the members (counting Barry Ostlere & Shepherd, Ltd. and Linoleum Manufacturing Co., Ltd. as one) have, in the period 1956 to 1960, together accounted for from eighty-six per cent. to eighty-nine per cent. of the Association's total sales, their aggregate proportion tending to increase and that of the three small members to decrease. We have no breakdown of sales by non-members, but we understand that Witter is mainly interested in felt base, the reference goods constituting only ten per cent. of its total output. It would seem probable that Tayside in output ranks somewhere between the lowest of the three large members and the highest of the three small members.

The average annual figure for exports by members in the above years has been £M5.29, about one-third of their total sales. Of their exports, about sixty-nine per cent. by value have been to Eire and Commonwealth countries (including therein South Africa) and twenty-six per cent. to countries on the Continent of Europe. The non-members' proportion of the value of export sales from the United Kingdom increased steadily from 7.1 per cent. in 1954 to 18.7 per cent. in 1958, but declined to 16.6 per cent. in 1960. Figures were given to the court of sales in terms also of square yards. The proportion attributable to non-members in terms of square yards is consistently higher than the proportion last mentioned.

The effect of the operation by the Association of its price-fixing agreement has not been to produce unreasonable profits; nor is there evidence to show that the members are inefficient in their operations, or that, for that reason, prices are unduly high. They are, as they put it, keenly competitive other than in price. We feel that we can state this aspect of the case thus shortly, without setting out details of figures. If a restrictive agreement is such that it could be

A shown to have produced unduly high profits, or high prices consequent on inefficiency, it is, perhaps, unlikely at this stage in the history of the statute and of this court that it would reach a full hearing.

The Association seeks to establish a prima facie case for its price restrictions under both para. (b) and para. (f) of s. 21 (1) of the Restrictive Trade Practices Act, 1956. In respect of ancillary restrictions, it turns to para. (g). It asserts
B also that any detriments arising from the restrictions are outweighed by the benefits conferred. We will consider the case first under para. (b), and secondly under para. (f).

The case under para. (b) falls under three main heads. The first predicts such a fall in prices as will lead to debasement of quality. The second predicts that there will be such instability in prices that wholesalers and retailers will
C stock less. The third predicts that, in times of high demand, prices will be higher than they would have been had the price ring continued to operate. In expansion of that case we refer to paras. 5, 8A, 8B, 8C, 8D and 28A of the statement of case, which are in the following terms:

“ 5. The consequence of the removal of the restrictions as to prices would
D be to create instability in the home market. As linoleum is an article in which the cost of production depends to a large extent upon the quantity produced, and as the capital invested in plant and buildings is very high, a fall in demand greatly increases the incidence per yard of standing overheads, and each manufacturer would be tempted in the uncertainty produced by unrestricted price competition, to lower his prices in an effort to maintain
E and, if possible, increase his share of the market. Once price cutting began it would spread throughout the industry and would assume cut-throat proportions. The members will rely in support of the above statement on the experience of the industry in the years immediately preceding the formation of the Association in 1934. The lowering of prices would sooner or later lead to debasement of quality, since it would become uneconomic to maintain the
F existing high quality at the lower prices.

“ 8A. Further or alternatively, the removal of the restrictions in the agreement relating to common minimum prices would deny to the public as purchasers or users of linoleum specific and substantial benefits or
G advantages enjoyed or likely to be enjoyed by them as such. In the first place, the agreement of common minimum prices, which in practice tend to be maximum prices also, has operated in times of high demand to restrain the increase of prices and is likely so to operate in future periods of high demand. Secondly, the agreement of common minimum prices enables prices to be
H stabilised for considerable periods despite fluctuations in the prices of raw materials, which fluctuations are at times considerable. This stability of prices encourages wholesalers and retailers to hold adequate stocks of linoleum. The holding of such stocks is an advantage both to the retail customers and to those retailers who buy from wholesalers, since it enables their requirements to be more promptly met, and it is a further advantage to retail customers that they can buy, as they prefer, by reference to goods in stock rather than by reference to patterns.

“ 8B. Further, the effect of the agreement of common minimum prices
I is to concentrate the competition of members upon quality and service and thus to improve both. The maintenance of quality is of the greatest importance in the public interest. Retail customers are incapable of forming any accurate judgment with regard to the quality of linoleum, and the same may be said of trade buyers. Only the most expert trade buyer can detect differences in quality, other than in finish, and then only to a limited extent and not in respect of such important qualities as wearability and colour-fastness. Under present conditions traders and retail customers can rely upon the quality of the linoleum of all the members being such as to give

satisfaction in use, and they can rely also upon adherence by all members to known standard gauges. Retailers, moreover, are able to assure their customers that, gauge for gauge, it is immaterial from the point of view of wear, resilience and other qualities such as colour-fastness, which of the members' linoleum is bought. The retail customers, with assurance as to quality, can concentrate their choice, as they would wish to be able to do, upon pattern and colour, and the widest possible freedom of choice in these matters is secured to them.

"8C. If there were no agreed minimum prices, in times of high demand the prices of linoleum would rise to higher levels than they would under the present system. Prices would fluctuate and wholesalers and retailers would be discouraged from holding adequate stocks. Competition in price would assume a greater importance than competition in quality and the quality of linoleum would suffer. As soon as price cutting occurred on any scale, as would inevitably happen in a period of recession, some manufacturers at least would be tempted or compelled to lower the quality of their linoleum in order to accept lower prices. They would do so in matters other than appearance and in respect of which the public would be unable to judge. Even if all manufacturers did not lower their quality, the public would become confused. They would not have the same assurance of quality as they do now. Retailers and wholesalers would be unable to advise their customers whether the goods of one manufacturer, at a few pence per square yard cheaper, represented as good value as the goods of another manufacturer at the slightly higher price. The confusion of customers would be enhanced, if, as would be likely, some manufacturers ceased to adhere to the present agreed gauges and introduced intermediate gauges of their own. Again, retailers and wholesalers for a period of years at least would be unable to advise their customers which of varying gauges at differential prices represented the best value. Retail customers would be tempted to buy on price alone and would run the risk of finding in course of time that they had purchased a much inferior, and thus in effect substantially dearer article.

"8D. Retail customers, moreover, would not have the same full freedom of choice as they do now. They could not be assured that it was immaterial, from the point of view of quality, which member's linoleum they purchased. They might well, therefore, be compelled to choose between having the colours and effects which pleased them, offered by a manufacturer of whose quality standards they were uncertain, or of having the linoleum of another manufacturer in whose quality standards they had more confidence, but whose patterns and colours did not attract them. Further, a prolonged period of price cutting or a short period of price cutting of cut-throat proportions would eliminate from the industry those firms with more limited resources, though they might not be the least efficient. The customers' range of choice of patterns would then become restricted in an absolute sense. At the same time, the larger manufacturers would be likely to be compelled to discontinue those patterns and colourings which were more expensive to produce, thus again reducing the range of choice available to the customer.

"28A. Alternatively the Association will rely, in respect of the restrictions as to common minimum prices, upon the circumstance set out in s. 21 (1) (b) of the Act. The Association will submit that by virtue of the said restrictions or operations or arrangements resulting therefrom the public as purchasers or users of linoleum enjoy or are likely to enjoy the following specific and substantial benefits or advantages:—(a) that the quality of linoleum supplied by each member of the Association is of a high standard and that such standard is likely to be maintained or enhanced; (b) that the public can purchase the linoleum of any member with the assurance that it will give satisfaction in use and will conform to known standard gauges; (c) that the public are protected against risks in the purchase of

A linoleum which their knowledge and judgment would not enable them to appreciate or avoid; (d) that the fullest freedom of choice in the purchase of linoleum and the widest range of choice of patterns and colours is secured to the public; (e) that prices of linoleum are reasonably stable and that, accordingly, adequate stocks of linoleum are maintained by wholesalers and retailers; and (f) that in periods of high demand, the prices of linoleum are lower than they would otherwise be. The Association will contend that the removal of the said restrictions would deny to the public as aforesaid the said benefits or advantages. In support of the above submission the Association will rely upon the facts and matters set out in para. 8A to para. 8D hereof."

C At the root of the first head is the forecast of such a fall in prices as will lead to substantial debasement of invisible quality (affecting wear and colour fastness) by at least some members of the Association. (At one stage in the argument it seemed to be suggested that, if the court was not satisfied that there would be debasement, though there was a possibility that there might be, the avoidance of the risk was a sufficient benefit or advantage; if this suggestion was made, we unhesitatingly reject it.) We consider that the fears expressed to us as to price falls in a free market, though, no doubt, genuinely held by those who have D for so many years been sheltered from price competition in linoleum, are exaggerated. Witnesses predicted a kind of snowball effect. First, the big retailers will demand and receive larger discounts; there are at present fifty-nine retailers who qualify for the turnover bonus, with an aggregate trade of some £M3, of whom twelve together account for about £M1.8; next, there would be larger E discounts for the medium-sized retailers; these discounts will come up to the present wholesale level of fifteen per cent.; such retailers would then undercut other retailers (there is no fixed retail price) who would then demand better terms from wholesalers, who, in their turn, would demand more than fifteen per cent., and so on. Words such as "cut-throat competition" and "chaos" were used, and falls in the basic prices were predicted.

F This is a well-established industry with only nine manufacturers, three of whom are very substantial in size. The demand for linoleum is steady. Though the question of surplus capacity was ventilated in the course of the evidence, it soon became reasonably plain that this possible incentive to price cutting could be virtually ignored. A price war reducing profits to below an economic level is not to be expected as the result of the introduction of ordinary price competition G in present times in such an industry. There seems to us to be no special feature in the present case to justify the expectation. The history of linoleum in the U.S.A. (a free market) which was put forward in evidence is one on which it would be very unwise to place any reliance; it would be equally unwise to rely in the other sense on the history in the German market, which is also free. It may well be that there will be some widening in the allowance of discounts, but we are H not satisfied that free price competition will extend beyond that into the field where manufacturers will be forced against their expressed wishes to debase quality. We were told of conditions in the early 1930's, when in those difficult times there was sharp price competition, in particular in printed and plain brown. There was no debasement of quality. One company introduced a thinner No. 3 printed at a lower price; but that was not debasement of quality; it was only I the introduction of a thinner and, therefore, cheaper floor cover, the other gauges remaining available to the public. If manufacturers introduce an additional thinner gauge, it is not a debasement of quality of linoleum detrimental to the public; it is the production of a new line which will succeed or not, according to whether the public want it. The Association itself introduced a fourth gauge (1.6 mm. in jaspes and moires) in this country and partially succeeded in introducing it on the Continent; and, plainly, this was not regarded as a debasement in quality. The only evidence we heard was of a slight debasement in felt base (not linoleum) in which there is a free market, by one member, who slightly

thinned the paper backing and used rather more waste paper in its preparation in order to save production costs. We do not think that the witness considered the customer to be substantially worse off as a result. A

In connexion with debasement of quality, stress was laid on the invisible qualities of linoleum such as affected life and colour fastness. We need not detail them; we accept that it is possible for linoleum to be made with poor invisible qualities which are not discernible except by experienced interpretation of laboratory tests, and which would not otherwise be revealed for some years in the course of use. This fact undoubtedly would tend to lower a hard-pressed manufacturer's resistance to the temptation to reduce his costs by debasing quality. But there are particular reasons (apart from our view already expressed as to the extent of falls in earnings) why we do not expect any significant or substantial debasement in quality. We were told that a manufacturer cannot produce linoleum in different qualities; his quality must be either high or moderate or low through all his ranges and, therefore, for all his customers; among the purchasers of linoleum, there are customers who would, if necessary, subject linoleum to appropriate laboratory tests for invisible quality, and interpret those tests; no manufacturer could afford to lose the goodwill of such customers by being caught—and quickly caught—debasement quality to a material extent. Moreover, there is the question of standard. There is a British Standard for linoleum; this is at present such as will not produce a quality as high as that produced by the manufacturers. There is in draft form a proposed International Standard which, if complied with, will produce a linoleum of substantially the quality now produced; this has been in the course of drafting by the convention (hereafter mentioned) for some years and is ripe for acceptance by the convention. Some doubt was expressed whether it would be finally accepted if the home price agreement went—in view of the fears of a price war and its possible impact on quality. But those manufacturers are plainly extremely proud of linoleum as a product, and of their reputation here and abroad for the high quality of their products. If a manufacturer were to market his goods as complying with the International Standard, his quality will be sufficiently maintained. It seems to us that, if anything, the manufacturers will be the more willing to adopt the International Standard and so to market his goods, as a stop against debasement. As will later appear, we do not envisage the disruption of the convention, which, remaining in being, will be able to complete its work of adopting this standard. We would observe that the British Standard could be brought up to the draft International Standard level; if it were so raised, the statute does not prevent the members of the Association from agreeing with each other to comply with it: see s. 7 (3), (1). The constitution of the Association, we note, includes among its objects that of setting up and regulating and maintaining such standards and specifications as are calculated to assure the quality and reputation of British made linoleum and of encouraging the production of linoleum of high quality. So far as actual gauges are concerned, we have already indicated that the mere introduction of additional gauges cannot be regarded as a debasement of quality or as a detriment to the public. We do not, in fact, envisage the proliferation of gauges in a free price market, nor a process by which the thicker gauges cease to be available for those who want them. It is to be observed that the British Standard and the draft International Standard both include details of the gauges in which different lines are to be produced. Moreover, the following feature of the trade will tend to put a brake on departures from current practice in gauges; it is quite common for the products of different manufacturers to be combined in B
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(1) Section 7 (3) provides: "In determining whether an agreement is an agreement to which this Part of this Act applies, no account shall be taken of any term by which the parties or any of them agree to comply with or apply, in respect of the production of any goods or the application to goods of any process of manufacture, standards of dimensions, design or quality for the time being approved by the British Standards Institution".

A the same floor scheme, and a manufacturer who abandoned the standard gauge in a relevant line for a thinner gauge could not expect to participate in such combinations. The submission that the conditions of price competition will lead to a narrowing of choice in patterns and types such as to amount to the denial of a substantial benefit or advantage to the public we do not accept.

To summarise thus far: our estimate of the effect of abrogation of the price arrangements of the Association on prices and on quality is such that we do not consider that the Association have made out their case under the statement of case, para. 28A (a), (b), (c) or (d) [for these sub-paras. see pp. 904, 905, ante].

There remain the second and third heads already mentioned, which are referred to in sub-paras. (e) and (f) of para. 28A of the statement of case. It is a universal feature of price rings that they tend to produce greater stability of prices than obtains in a free market; and this must equally be so in all trades which involve stockholding by wholesalers and retailers. We bear in mind what was said on this subject by this court in *Re Yarn Spinners' Agreement* (2) on stability of price as a benefit. Under the price agreement, there have been eleven changes in ten years in the price list; there have, of course, also been variations in discounts to particular purchasers. The purchase tax has varied, being thirty per cent. in December, 1955, fifteen per cent. in April, 1957, and twelve per cent. in April, 1959—though this affects retailers' stock only. We accept that, in the case of linoleum, it is advantageous to the purchaser that there should be a wide range "in the piece" from which he may select out of stock, whether he is buying from a retailer or is a retailer buying from a wholesaler. We agree that the tendency is for greater stockholding by a person who has confidence that the price will not be frequently reduced. But the evidence as a whole does not persuade us that such price movements as will result from price competition in this trade will result in inadequate stockholding by trade outlets, or alter stockholding habits to an extent sufficient to amount to a denial to the public of a substantial benefit or advantage.

The final specific and substantial benefit or advantage suggested is that, in periods of high demand, the prices of linoleum are lower than they would be in free price conditions. We incline to think that this submission should be regarded much as stability of prices was regarded in the passage in *Re Yarn Spinners' Agreement* (2) already mentioned; that is to say, that the submission cannot be considered in isolation and without regard to the other side of the medal, that, in periods of low demand, prices are higher than they would otherwise be. But, as a matter of history, the evidence of such holding down of prices is not strong; prices were subject to government control until April, 1953, and the records of sales show that any period of high demand ended by the beginning of 1956. Moreover, there is nothing to suggest that there is now a period of high demand or that such a period is likely in the foreseeable future. The submission involved in para. 28A (f), in our judgment, is consequently not established. Accordingly, the attempt by the Association to justify its minimum price arrangements under para. (b) of s. 21 (1) of the statute in our judgment fails.

We turn to the claim made under para. (f) of that section, that, having regard to the conditions actually obtaining or reasonably foreseen, the removal of the price restrictions would be likely to cause a reduction in the volume or earnings of the export business which is substantial in relation to the whole business (including export business) of the linoleum trade or industry. Before developing this aspect of the case, we mention one point on the word "earnings" which was suggested, but we think only faintly. A substantial proportion of the cost of manufacturing linoleum lies in imported raw materials—linseed oil, jute, and pigments. It was suggested that this was somehow relevant under para. (f), in that a small fall in export price could represent a substantial proportion of the net export content of the sale. We do not consider that the

section is in any way concerned with that matter, and we reject the suggestion. A

It is desirable to give some explanation of the workings of the international price arrangements in linoleum known as the convention. The members of the Association are also members of an international association of linoleum manufacturers known as the convention, which comprises all European manufacturers of substance—though not the two United Kingdom non-members. The members of the Association are the parties to the Linoleum Manufacturers' Export Group Agreement; the objects of the export group are expressed to be to encourage the export of British linoleum, to collaborate in matters relating to the export field, and to act on behalf of the linoleum industry generally and on behalf of the members of the export group collectively in all matters relating to export trade; the export group in effect is the collective voice of the British members of the convention. The function of the convention is basically to fix prices and trade terms for all markets outside the U.K. other than in the U.S.A. and Germany where this cannot be done. In addition to the members of the export group, the members of the convention are as follows, and comprise all the important manufacturers of linoleum on the Continent:

- (i) Linoleum Aktiebolaget Forshaga, of Sweden;
- (ii) S. A. du Linoleum a Giubiasco, of Switzerland;
- (iii) N.V. Nederlandsche Linoleumfabriek, of Holland;
- (iv) Société Industrielle Remoise du Linoleum Sarlino, of France;
- (v) Viktoria A/S Linoleumfabriks, of Norway.

All the above are owned by a Swiss holding company and as a group are known as the Continental Linoleum Union (C.L.U.).

- (vi) Deutsche Linoleum-Werke A.G., of Germany;
- (vii) Rheinische Linoleumwerke Bedburg, of Germany;
- (viii) Österreichische Linoleum Wachstum und Kunstlederfabriken A.G., of Austria;
- (ix) Società del Linoleum, S.P.A., of Italy;
- (x) Compagnie Française du Linoleum Nairn, of France;
- (xi) Compagnie Rouennaise de Linoleum, of France.

The last two are each associated with a British member.

The convention in one form or another has existed (subject to wars) since 1906. At times its operations have been facilitated by English control over various continental manufacturers. Since 1927, its control has been fairly rigid and it operates an extremely elaborate system, notwithstanding that other links with the U.K. manufacturers are limited to the two French companies mentioned.

The prices and terms for the U.K. are fixed by the Association. It is not a convention list, since the convention does not fix prices for the U.K. The first convention price list is the Commonwealth price list; the export group in effect fixes this list, though, technically, it is a matter for discussion and agreement by the convention; substantially the basic prices in the Commonwealth list are the same as the U.K. home list, being expressed (except for Eire) in sterling f.o.b. U.K. port, which, for exports by continental manufacturers, is translated into their own currency f.o.b. the relevant continental port, except that they are permitted (so as to be on level price terms) to reduce prices by the amount of the relevant preferential tariff. This system of permitted variation from the agreed list price so as to equalise the tariff situation (except in terms of profit) is applied throughout the convention price lists. Eire and South Africa are included in the Commonwealth list. The Commonwealth list departs from the home list in the field of discounts. The prices for Eire are, in fact, not f.o.b. but delivered prices; terms to wholesalers are the same as in the home list; there is an aggregate turnover bonus scheme applied to one line only. For Canada, approved wholesalers receive a fifteen per cent. discount, certain retailers receive a 2½ per cent. discount; there is a further discount or allowance of 40s. a ton called freight allowance; there is provision for stocking in Vancouver

A and for ex warehouse prices to be fixed in dollars—in effect a delivered duty free price. We pause to add that there, as elsewhere, there are discounts for prompt payment. For New Zealand, there is a discount to all customers of ten per cent. on one or perhaps two lines, and a further discount of ten per cent. to wholesalers except on 1.6 super. For South Africa and the Central African Federation, there is a ten per cent. discount to all on any linoleum gauge 1.6 and 2.0, and an aggregate turnover bonus varying between five per cent. and fifteen per cent. In all other Commonwealth markets, including the most important, Australia, the basic prices are the same, but only the cash discount is allowed. Exporters to Australia do their own wholesaling there, and there must be an understanding (including the Australian company which makes linoleum which is a seventy per cent. subsidiary of an Association member)

C as to the delivered duty free price in £A.

The next convention list covers non-European markets outside the Commonwealth list, and is the general export list. The prices for this list are generally put forward by the export group for approval by the convention; it tends to be below, and to depart increasingly from, the home list, as a result of not applying to it increases in the home list; this list is expressed in terms of sterling

D f.o.b. U.K. port. The next list is the continental sterling list or European schedule and is put forward by the export group for approval; this covers all European countries for which prices are not separately fixed—the less important markets such as Portugal and Spain; this is also expressed in sterling f.o.b., and normally is also somewhat below the home list prices.

Finally, there is the special list, covering the various important European

E markets; it is in this field that the U.K. voice may be said to lose its predominance. In some cases, the price is fixed in the currency of the importing country, delivered and duty paid. In some, the price is fixed in the same currency c.i.f. duty not paid. In other cases, the price is fixed f.o.b., sometimes in the currency of the exporting country. In these special cases, wherever there is a domestic manufacturer, it is plain that, though he has no power to dictate the

F price, his voice is predominant in the fixing of prices in his country, and is recognised as such; there is no absolute system of voting in the convention, and, if there are differences of opinion, the chairman takes the sense of the meeting and regards the views of the domestic manufacturer as of the greatest, though not invariably decisive, weight. It is clear that market conditions in a particular country are of great importance in determining the price fixed for that country, and that the price in any one country bears no necessary relation to the home

G prices in any exporting country. Document 53 (convention price lists) illustrates this, in relation to the U.K. as the exporting country, by calculating backwards from various European convention franco domicil prices the figure in sterling which would be the f.o.b. U.K. price, and comparing that with the U.K. home list price. In most cases, the f.o.b. price thus artificially jobbed back is different

H from the home list price, and, in some instances, the difference is very marked, the extremes being found in Holland (consistently lower than U.K. home list) and Switzerland (higher except in 1.4 printed). The above is intended as a broad outline of the salient features of the convention price-fixing system. As we have said, it is very much more elaborate and fully worked out. It is a structure which has involved great care and detail in its building, and at least reluctance is to be

I expected in any builder to pull it down. Document 53 also contains a comparison of home list and Commonwealth f.o.b. lowest prices (after maximum discounts); as may be expected from the summary of discount terms, these vary—particularly in the case of Australia, where the only discount allowed is the cash discount.

Though the U.K. exports to Europe are only a small proportion of the total consumption in Europe of linoleum, the United Kingdom is the biggest linoleum exporting country. Of its exports, about twenty-five per cent. by value are to Europe and seventy-five per cent. elsewhere, mainly to the Commonwealth list countries. The important position of the export group in the convention is

partly historical; but, undoubtedly, their membership is regarded by the A
continental members as of great importance; the chairman and secretary of the
Association invariably fill the same offices in the export group and the convention;
nearly forty-five per cent. of the expenses of the convention are borne by the
Association members. This, again, is of some relevance when considering the
likelihood of the convention being disrupted by the continental members.

One of the factors which it was submitted would lead to a decline in exports B
was the decline in quality of British made linoleum which would be forced on
the manufacturers by price conditions in the home market: it was in this con-
nexion that we were told that a manufacturer could not produce linoleum to two
differing standards of quality. As we have already dealt with this (3), we can
briefly dismiss it from consideration under para. (f) of the section as a factor.

In the forefront of the Association's case under para. (f) was the submission C
that the convention would be disbanded. We quote para. 7 of the statement of
case, which was in these terms:

"The immediate consequence of the removal of the restrictions as to prices
in the home market would be the termination of these arrangements, known
as the convention, which have been of great importance to members in
respect of export markets. The willingness of the continental manufacturers D
to enter into such arrangements depends upon their confidence that the
agreed selling prices will in fact be observed. They would not feel that
confidence if the members were engaged in unrestricted price competition in
the home market. Even if they accepted that members would endeavour
to comply with their obligations, they would envisage the possibility that
prices in the United Kingdom market would fall to a level where linoleum E
might profitably be bought in the United Kingdom by third parties and
exported to the Continent for sale there below the agreed selling price and
they would envisage in such an event the members would be compelled to
lower their selling prices in those markets. In these circumstances the
continental manufacturers would not wait upon events in the United King- F
dom market, but would immediately on the removal of the restrictions
withdraw from the convention and take steps to secure themselves against
competition on price from the United Kingdom. They would be likely to
do so by the grant of discriminatory discounts to the distributive trade, and
the members would lose a substantial proportion of their outlets in those
countries. Even if members were able to counter such conduct on the part
of their continental competitors, they would be compelled, in order to do so, G
to enlarge their discounts or lower their prices or both, and their export
earnings in European markets, which account for about one-quarter of their
export trade, would be substantially reduced . . ."

It is our clear impression from the evidence of U.K. manufacturers that the
members of the export group would not take steps to disrupt the convention, H
which they regard as of great importance to their business interests. The evi-
dence of Mr. Sijpesteijn, a leading figure in the continental Linoleum Union
Group, clearly showed that the continental manufacturers regard the convention
as of great importance to their business interests, and, for their part, would
only take the step of ending the convention if the whole fabric of the price-
fixing system were undermined by exports of linoleum from the U.K. at cut prices. I
With the continuation of the convention, direct undercutting exports by mem-
bers of the export group is not, in our view, to be expected, nor sales by them
in the United Kingdom obviously destined for export at cut prices. It was
suggested that larger discounts in the home market would afford an opportunity
(which would be taken) for purchases delivered to the United Kingdom to be
then exported to the Continent at prices lower than convention prices, and it
was said that this could not be effectively prevented, and would reach such a pitch

(3) See p. 906, letters C to G, ante.

A that the continental manufacturers would abandon the convention in order to stop their loss of sales. On the evidence, we are unable to accept that this will happen. We have already given our views on the forecast of a chaotic price war in the home market. We add, on this aspect of the case, the following additional comments. Nothing of the kind happened between 1927 and 1934—a period which involved considerable margins in printed and plain brown between home

B prices and continental price translated into f.o.b. U.K. port. There are at all times differences between any particular exporting country's home prices and any particular importing country's home prices translated into f.o.b. that exporting country, sometimes with a margin wide enough to favour attempts to buy for the importing country at prices f.o.b. the exporting country; but such attempts have been rare, and such success as has attended them has done nothing to

C undermine the convention. Wholesalers in the U.K. taking linoleum into their warehouses receive fifteen per cent. discount on present home prices as well as cash discount. Document 53 compares prices charged to them with the lowest prices charged in various continental countries translated into f.o.b. U.K. port. In 2.0mm. sheet marble, the wholesaler here buys at 82 pence per square yard net; a buyer in Switzerland pays a price which when translated as above is

D 101 pence (if he gets the worst discount) and 95 pence (if he gets the best discount); in 3.2mm. sheet marble, the three comparable figures are 122, 152 and 136 pence; in 1.6mm. super inlaid, the three comparable figures are 90, 122 and 109 pence; and in felt backed tiles, the three comparable figures are 74, 104 and 93 pence. But there are no attempts at purchases of these lines from U.K. wholesalers by the Swiss trade. Those are, it is true, extreme examples of the

E current variations; but they must throw considerable doubt on the validity of the fears expressed that a widening of discounts will lead to such an export trade developing, through purchasers in this country taking delivery into store in this country, as to undermine the price structure of the convention and lead to its disruption. It is, of course, true to say that, with the home agreement in being, it would be easier for the U.K. manufacturers to control such sales by wholesalers

F for export, should the approved wholesalers' list be kept in being; but, according to the evidence, the most important sanction against undercutting imports into any country is the existence of the convention, and we are, of course, considering what might happen during the continued existence of the export group and the convention.

The Association have failed to satisfy us that the condemnation of the home

G price restrictions will lead to the disruption of the export group or convention, and that part of their case under para. (f) fails.

On the footing that the convention will continue, we need not examine here various aspects of its operations which were suggested to be detrimental to the level of exports from the United Kingdom. It suffices for the purpose of this judgment that we should proceed on the assumption that the continuance of the

H convention is beneficial to U.K. exports without expressing any view on the correctness of that assumption. Nor need we examine here the assertions that, without the convention, the continental manufacturers, either separately or in combination, would be advantageously placed vis-à-vis the U.K. manufacturers in the continental markets. If there is a degree of indirect undercutting exports from the U.K. to continental markets, it will, in our view, be limited in extent and

I insufficient to result in any, or any substantial, decline in U.K. export earnings in those markets. Such exports would be at the expense partly of U.K. manufacturers' direct exports and partly at the expense of the trade of the continental manufacturers; in the first case, they would still be U.K. exports but earning slightly less; in the second case they would be a clear increase in exports.

The other aspect of the Association's case on exports related to the markets on the Commonwealth list, and was independent of the possible disruption of the convention. Shortly stated, it was that the Commonwealth price list, which, as we have said, is expressed in sterling f.o.b. U.K. port, must be substantially

the same as home prices—as, indeed, it is now in the basic prices, and substantially always has been; and that a decline in prices at home must be reflected in prices to the Commonwealth list countries, and this will be sufficient to bring about a fall in export earnings large enough to qualify under para. (f) of the section. Moreover, it was said that, with the lowering of export prices in countries where there are domestic manufacturers of linoleum (Australia and Canada), applications would be made to raise tariffs to the further detriment of export earnings; and this might happen in other countries at the instance of manufacturers of other types of floor covering. We quote the relevant para. 8 of the statement of case, which is as follows:

“In British Commonwealth countries, to which about three-quarters of the members’ export trade is directed, lowering of prices in the home market would lead to the development of sales resistance if f.o.b. prices were not lowered commensurately. In order to avoid a reduction in the volume of their sales, members would therefore be compelled to lower their f.o.b. prices and as a result a substantial reduction in earnings would be incurred. In certain countries, notably Australia and Canada, where there are local linoleum manufacturing industries, applications would in that event be likely to be made for tariff protection. If such applications succeeded (as they would be likely to do), a further reduction in the yield on members’ exports to those countries would occur.”

We have already referred to the proportion of Association exports to countries on this list. In 1960, the breakdown in £M sterling was Australia 1.5, New Zealand 0.9, Canada 0.6, Eire 0.3 and South Africa and Central African Federation together 0.2. We see no necessity for the prices and discount terms to the Commonwealth to follow falls in prices in the home market. In general, different conditions in different markets may be expected to lead to different prices. No doubt, purchasers in these Commonwealth markets will become aware of the sort of prices ruling in the home market through various sources, including the “comparative domestic value” statement required in invoices, but we are not satisfied that there will be sales resistance as a result of ascertaining that the f.o.b. prices to the trade (less discounts) in these markets are higher than the comparable prices (less discounts) in the home market or at any rate sales resistance such as will lead to any significant diversion of purchases to domestic manufacturers of linoleum, or to other floor coverings. It was frequently urged on us by the Association that demand for linoleum was not sensitive to price changes. We were told that with the present convention prices the profit to the U.K. manufacturers from sales in Australia was no more than the profit earned by the Australian company which sells at the same delivered prices. With the continued maintenance of prices by the domestic manufacturer and by the export group and the rest of the convention countries, we see little prospect of any effective sales resistance, or any necessity to offer on this ground reductions in price equivalent to such reductions as may take place in the home market. Tariff action and anti-dumping measures need not be considered where no substantial price falls in these markets are envisaged, and certainly no sales at lower than home prices.

There remains for consideration, under this head exports to these markets by purchasers buying in the U.K. for delivery in the U.K. at home prices—a subject which we have already considered in relation to continental markets. Similarly, we do not envisage this taking place. It is pertinent to point to the substantial difference in trade terms which already exist in Australia and New Zealand. In Australia, where the manufacturers maintain their own stocks, wholesalers receive no better terms than the retailers, only discounts for cash. Their trade in linoleum is, therefore, limited to selling in isolated places at a mark up. There is no instance of an Australian wholesaler obtaining imports at a lower price from a source in the United Kingdom, taking advantage of the

A fifteen per cent. discount allowed in the United Kingdom; indeed, in the only example referred to in evidence of a U.K. wholesaler exporting to Australia (in the 1920's), it appeared that he charged the same price as the convention price. We do not consider it likely that, by this method, the prices to these markets will be brought down to a significant extent. Taking the continental and Commonwealth and other markets as a whole, the Association have failed to satisfy

B us, in the terms of para. (f) of the section that the removal of the home price restrictions would be likely to cause a reduction in the volume or earnings of the U.K. export business in linoleum which is substantial in those terms.

It is not necessary for us to deal separately with the remaining restrictions which have been referred to us. It is not disputed that, if the basic system of minimum price maintenance goes, the rest of the restrictions cannot stand.

C Consequently, we declare that all the restrictions referred to us are contrary to the public interest by force of the statute. In the circumstances, it is not necessary for us to consider whether the agreement involved any detriments to the public other than the general detriment which the statute pre-supposes. We think it right, however, to say in favour of the Association that it has adapted its activities and machinery to meet criticisms and recommendations

D made by the working party on the industry, and by the Monopolies Commission, wherever it thought them to be practicable.

Order accordingly.

Solicitors: *Claremont, Haynes & Co.* (for the Linoleum Manufacturers' Association); *Treasury Solicitor.*

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

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THAMES LAUNCHES, LTD. v. CORPORATION OF THE TRINITY HOUSE OF DEPTFORD STROND (No. 2).

[CHANCERY DIVISION (Wilberforce, J.), May 1, 2, 3, 4, 18, 1961.]

Harbour—Pilot—Compulsory pilot—London Pilotage District—Passenger boats of over fifty tons gross tonnage—Navigated by licensed watermen—Whether navigating “for the purpose of making use of” the port—Whether custom superseded by pilotage order—Whether passenger boats of over fifty tons gross tonnage, navigated by licensed watermen, subject to compulsory pilotage—Pilotage Act, 1913 (2 & 3 Geo. 5 c. 31), s. 11 (1), s. 59—Port of London (Consolidation) Act, 1920 (10 & 11 Geo. 5 c. clxxiii), s. 318.

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The plaintiff company owned some sixteen small passenger boats which it operated on the River Thames. Nine of the boats exceeded fifty tons gross tonnage. All the masters of the boats were watermen licensed by the Port of London Authority. The company's regular passenger services operating downstream could be divided into four categories: (a) regular scheduled services from Westminster to Greenwich; (b) trips arranged by schools or other groups, these being usually round trips; (c) trips by privately hired vessels starting upstream of London Bridge and landing at Greenwich or some private wharf; (d) cruises, for which the boats started upstream of London Bridge, picked up passengers at Tower Pier, toured some of the London Docks and returned to Tower Pier. The company and its predecessors had run similar services for many years without the boats being under the pilotage of pilots licensed by Trinity House, the pilotage authority for the London Pilotage District. This district (as defined by the London Pilotage (Amendment) Order, 1937, as amended) began at London Bridge and extended seawards to a line from Dungeness to Felixstowe Pier, and included locks leading to docks but not the docks themselves. The Port

of London (as defined by the Port of London (Consolidation) Act, 1920, Sch. 1, as amended) began at Teddington and extended to a line drawn across the river from Havengore Creek, in Essex, to Warden Point, in Kent. The rights of watermen to ply for hire on the Thames had been regulated by legislation dating from the reign of Henry 8 to a consolidating Act in 1827 (7 & 8 Geo. 4 c. lxxv) and an Act in 1859. Under these Acts the watermen (freemen of the Watermen's and Lightermen's Company and persons licensed by that company) were given exclusive rights (with certain exceptions, which are not material) to navigate passenger boats for hire within their statutory limits, which included the stretch of the River Thames from Teddington to Lower Hope Point, and the Acts contained no reference to pilotage. By the Port of London Act, 1908, the right of licensing watermen was transferred from the Watermen's and Lightermen's Company to the Port of London Authority, but this Act, again, contained no reference to pilotage. The Port of London (Consolidation) Act, 1920, re-stated, in s. 318, that only licensed watermen were entitled to navigate for gain any passenger boat on the Thames within the watermen's limits. Under statutory provisions relating to the construction of piers, the Port of London Authority and the London County Council had powers to erect piers for the convenience of the public using the Thames as a highway. On the question whether s. 11 (1)* of the Act of 1913 (which requires compulsory pilotage for every ship carrying passengers, except ships of less than fifty tons gross tonnage, while navigating in a pilotage district "for the purpose of entering, leaving, or making use of any port in the district"), applied to the plaintiff company's boats of over fifty tons gross tonnage,

Held: the plaintiff company was entitled to navigate its passenger boats on the River Thames anywhere between London Bridge and Lower Hope Point on passenger-carrying tours of the kind specified in categories (a), (b) and (c)† without being subject to compulsory pilotage under s. 11 (1) of the Pilotage Act, 1913, for the following reasons—

(i) the history of the legislation showed a separation between enactments dealing with the Thames as a highway navigable by the public and those dealing with the pilotage of ships coming into or leaving the Thames, and, viewed against that background, the true construction of s. 11 (1) of the Act of 1913 was that navigation for the purpose of using the river as a highway, which the plaintiff company's navigation was, was not navigation for the purpose of "making use of [the] port" within s. 11 (1) of the Act of 1913 (see p. 925, letters A and G, and p. 927, letter F, post).

(ii) at the time of the passing of the Act of 1913, there was, on the evidence, a custom that within the watermen's district passenger boats plying for hire should be navigated only by licensed watermen or lightermen and should be exempt from compulsory pilotage, and there was nothing in the London Pilotage Order superseding this custom, within s. 59‡ of the Act of 1913 (see p. 926, letter H, and p. 927, letter B, post).

[As to compulsory pilotage, see 30 HALSBURY'S LAWS (2nd Edn.) 938, 939, paras. 1299-1301; and for cases on the subject, see 41 DIGEST 906-911, 7991-8043.]

As to the Port of London, see 33 HALSBURY'S LAWS (2nd Edn.) 572, paras. 978, 979, and note (d).

For the Pilotage Act, 1913, s. 11 and s. 59, see 23 HALSBURY'S STATUTES (2nd Edn.) 842, 866.

For the Port of London (Consolidation) Act, 1920, s. 318, s. 327, and Sch. 1 (as amended), see 23 HALSBURY'S STATUTES (2nd Edn.) 1299, 1302, 1327.]

* The terms of the subsection are printed at p. 917, letter E, post.

† There was insufficient evidence for the court to come to a decision in regard to category (d).

‡ The relevant terms of s. 59 are printed at p. 926, letter F, post.

A Cases referred to:

Buck v. Tyrrel, (1922), 10 Lloyd's Rep. 74; 41 Digest 904, 7979.

Cannell & Trinity House Corpn. v. Lawther, Latta & Co., [1914] 3 K.B. 1135; 83 L.J.K.B. 1832; 112 L.T. 84; 12 Asp. M.L.C. 578; 41 Digest 909, 8030.

B *Original Hartlepool Collieries Co. v. Gibb*, (1877), 5 Ch.D. 713; 46 L.J.Ch. 311; 36 L.T. 433; 41 J.P. 660; 3 Asp. M.L.C. 411; 44 Digest 105, 833.

Tisdell v. Combe, (1838), 7 Ad. & El. 788; 3 Nev. & P.K.B. 29; 1 Will. Woll. & H. 5; 7 L.J.M.C. 48; 112 E.R. 667; 42 Digest 617, 161.

Adjourned Summons.

C The plaintiff company, Thames Launches, Ltd., by its originating summons dated Apr. 13, 1960, and amended on Dec. 16, 1960, claimed a declaration (among others) that on the true construction of the Pilotage Act, 1913, and the Port of London (Consolidation) Act, 1920, the company was entitled to navigate its passenger boats through the whole of the Port of London on passenger-carrying tours operating from piers on the River Thames, whether inside or outside the London Pilotage District, without being (in effect) subject to compulsory pilotage under s. 11 (1) of the Pilotage Act, 1913.

D The defendants, the Corporation of the Trinity House of Deptford Strond, were the pilotage authority for the Port of London. The facts appear in the judgment.

L. A. Blundell, Q.C., and *K. R. Bagnall* for the plaintiff company.

E *J. V. Naisby, Q.C.*, and *Gerald Darling* for the defendants.

Cur. adv. vult.

F May 18. **WILBERFORCE, J.**, read the following judgment: The purpose of this action is to ascertain whether some small passenger boats, when operated on a portion of the River Thames, are obliged to request or accept the services of pilots licensed by Trinity House. The plaintiff company, which owns boats of the type in question, is the recently formed successor of other concerns, which have between them provided similar services since the beginning of this century. It owns some sixteen vessels, nine of which exceed fifty gross tons: one of them, the *Princess Beatrice*, dates from 1896, and has been in this service ever since. Apart from the plaintiff company, a number of other companies runs passenger boats on the river, and of these boats twelve exceed fifty tons in size. The defendants, the Corporation of Trinity House, are the well-known corporation whose responsibilities extend (inter alia) to the provision of licensed pilots in many districts (called pilotage districts) in the United Kingdom, and they claim that their pilots are entitled to be called on to pilot within the London pilotage district such of the plaintiff company's vessels as exceed fifty tons. No claim is made in respect of smaller boats.

H There are three geographical areas which I must describe. First, there is the London pilotage district, which is defined by a pilotage order (1) made under the Pilotage Act, 1913. This district begins at London Bridge and includes the water from that point seawards to a line from Dungeness to Felixstowe Pier. It does not include any docks, but does include locks leading to docks. Secondly, there is the Port of London, whose limits are defined by the Port of London (Consolidation) Act, 1920 (c. clxxiii), Sch. 1, as amended (2). It begins at Teddington, and extends to a line drawn across the river from Havengore Creek,

I (1) London Pilotage (Amendment) Order, 1937 (S.R. & O. 1937 No. 1122), schedule, para. 1 (2).

(2) By the Port of London (Various Powers) Act, 1932, the words "on a bearing 169 degrees reckoned clockwise from the true north point of the compass to high-water mark on the Kent bank of the river" were substituted for the words "to the Land's End at Warden Point in the Isle of Sheppey in the county of Kent," in Sch. 1 to the Act of 1920.

in Essex to Warden Point, in Kent, the limits of the port, broadly, including all streams, docks and places within them. The eastward line is, of course, well within the eastward limit of the London pilotage district; and the westward limit is well outside the westward limit of the district. The port being defined by reference to its limits, it is clear that not everything within these limits is part of the port—an obvious exception is bridges; but the Act provides no guidance as to what precisely the port is, or what it consists of. Thirdly, there is the area within which the Company of Watermen and Lightermen has certain privileges and rights, to be later explained. This area includes the stretch of the River Thames from Teddington to Lower Hope Point, which latter limit is inside, that is, to the west of the eastern or seaward limit of the Port of London.

The plaintiff company runs services both up and down the river from Westminster Bridge, but these proceedings relate only to services downstream. They are all passenger services and can be divided into the following categories: (a) Regular scheduled services from Westminster to Greenwich, sometimes calling at Festival Hall Pier. These, it can be seen, start outside the London pilotage district, but enter it at London Bridge. (b) Trips arranged by schools, companies or other groups. These usually start somewhere upstream of London Bridge, and make a round trip, perhaps as far as Woolwich and back, without stopping anywhere during the voyage. (c) Privately hired vessels starting upstream of London Bridge and landing at Greenwich or some private wharf. (d) Cruises, for which the boat starts upstream of London Bridge, picks up passengers at Tower Pier, which is below London Bridge, tours some of the London Docks, and returns to the Tower Pier. For these purposes several piers or landing wharves are used which I will specify later. The boats themselves are usually moored, when not in use, at private moorings near Westminster Pier.

The number of passengers carried by the plaintiff company and similar undertakings is considerable. It amounts to an average of two and a half million a year, and during the year of the Festival of Britain it reached six and three-quarter million. About a quarter of the total is carried below London Bridge, and out of these the plaintiff company carries one hundred thousand. Although in the defendants' evidence there are references to the safety of the travelling public, it does not appear in fact that the defendants' claims to provide pilots for the plaintiff company's boats are soundly based on safety considerations.

The services of the plaintiff company and its predecessors have been conducted for many years without pilots and without serious mishap, and it is said that during the Festival year there was not a single collision or accident. The masters of the plaintiff company's boats are all watermen licensed by the Port of London Authority, and in order to obtain a licence the applicant must have a period of experience of the river and pass an examination. It is said (and not challenged) that those in charge of the vessels over fifty tons are men who have spent their whole lives on the river and who are familiar with every nook and cranny of it. Mr. Rawlings Smith, who gave evidence for Trinity House, and gave it very fairly, was hard pressed to suggest any practical benefit which would be gained by compelling the plaintiff company to accept licensed pilots, and the best he could do was to suggest that the pilots would know about wrecks in the river, or where divers were working, or about conditions of fog. But, generally, he had to agree that the watermen and lightermen, from whom the plaintiff company's masters come, know the river as well as the pilots. The plaintiff company, for its part, maintains that the pilots would not have the special skill and knowledge to navigate their vessels.

I have said that the plaintiff company and its predecessors have been running similar services to the present since about 1900; but watermen have been plying for hire on the Thames for much longer than that. Legislation concerning them

- A can be traced back to the time of Henry 8 (3), and they occupied as well-known a place in the transport system of Georgian and Victorian England as the hansom cab in its time, or the taxi in ours. Pilots have also been working on the Thames for a very long time, and are said to have been, in some sense, compulsory since about 1604 (4). But throughout all this period from the seventeenth century to the present, Thames river boats have never, so the evidence goes, carried pilots; and it has never been suggested that they should carry pilots, until 1933, when Trinity House put forward a claim against a predecessor of the plaintiff company. It is not quite clear what happened on that occasion. The company is said to have accepted the claim; then there were negotiations about a new bye-law to regulate the matter, which never came to anything. But apart from this, and one other case which arose in 1936, the watermen have been undisturbed until 1959.

- C However, the claim is now made, and is based directly on statutory provisions; and all that I have to do is to decide whether the claim is good in law. The fate of the defendants' claim depends on the construction of a very few words in the Pilotage Act, 1913. This Act confers on the Board of Trade power to make pilotage orders defining pilotage districts and the part of pilotage districts where pilotage is to be compulsory (5), and for pilotage authorities continuing the powers of previously existing authorities, of which Trinity House is one. By s. 10 (1) it is provided:

"... subject to the provisions of this Act all exemptions from compulsory pilotage in force at the date of the passing of this Act shall cease to have effect."

- E Then s. 11 (1) reads:

- F "Every ship (other than an excepted ship) while navigating in a pilotage district in which pilotage is compulsory for the purpose of entering, leaving, or making use of any port in the district, and every ship carrying passengers (other than an excepted ship), while navigating for any such purpose as aforesaid in any pilotage district (whether pilotage is compulsory or not compulsory in that district) shall be either—(a) under the pilotage of a licensed pilot of the district; or (b) under the pilotage of a master or mate possessing a pilotage certificate for the district who is bona fide acting as master or mate of the ship."

- G It is the second limitation which applies here, and it is only with alternative (a) that the case is concerned. Section 11 (2) provides for penalties if s. 11 (1) is not complied with; and then s. 11 (3) provides a list of "excepted ships". The relevant exceptions are (e) and (f). Paragraph (e) reads: "Ships of less than fifty tons gross tonnage", and para. (f) reads: "Ships exempted from compulsory pilotage by bye-law as hereinafter provided in this section." The application of para. (f) is explained by s. 11 (4) which does not apply to ships carrying passengers; so that the only effective exception is in favour of ships of less than fifty tons gross tonnage. If a ship is of more than this, it is subject to pilotage if (returning to s. 11 (1)) it is

- H "... navigating in a pilotage district ... for the purpose of entering, leaving, or making use of any port in the district ..."

- I The whole case turns on these words. There are other provisions in the Act to which I shall have to return later, but I need not read more at the present stage.

At first sight it would not seem a difficult matter to arrive at a correct interpretation of the words which I have quoted. There is, it is true, an initial difficulty, in that the only relevant port here is the Port of London, and that port is not,

(3) 6 Hen. 8 c. 7: see p. 919, letter C, post.

(4) See 1 Jac. 1 c. 16 (an Act concerning Wherry-men and Watermen).

(5) Section 7 (1) (c).

literally, "in the district." It is partly in and partly outside this district. Not only are all the parts of the port above London Bridge outside the district, but even below London Bridge there are extensive and important areas of the port outside it—namely, the docks. However, without undue strain, the phrase could be read as referring to so much of the port as is in the district, and I have not been invited by the plaintiff company to stop at this particular obstacle. That being out of the way, I am left with the words "navigating in [the] district . . . for the purpose of entering, leaving, or making use of" the port. Here there is no question of "entering" or "leaving"; but it is claimed that there is "making use". As to this, it is to be noticed, first, that there exists room for discussion as to what is meant by the "port". The reference is not to "the limits of the port", but to the "port" itself. There are other things within the limits than the port itself and, more significantly, the waters of the River Thames itself may have a dual character, being at the same time a port and (a different thing) a navigable highway. It may be very material to ascertain in which character it is used by the plaintiff company. Secondly, the question is not simply whether the plaintiff company "makes use of" the port; it is whether the company "navigates in the district for the purpose of making use" of it, which is not the same thing. To take an example, there might be certain navigation marks put up to guide certain types of vessels, for example, barges, or boats with funnels, which those in charge of the plaintiff company's boat, though of a different type, might find it convenient to take notice of, but that would not be "navigating for the purpose of making use" of the marks, even though the marks were used.

Does, then, the plaintiff company navigate for this purpose? It seems to me that this statutory expression is, on the face of it, one that cannot be interpreted *in vacuo*. It is the sort of expression which evidently requires to be filled out by knowledge of its purpose and of the history behind it. But before embarking on an examination of these matters, it is worth trying to see whether, *prima facie*, it covers what the plaintiff company is doing. There are four kinds of making use suggested. First, it is said that the plaintiff company embarks passengers from piers in the limits of the port. In fact, it is this which represents the most visible and concrete action which the plaintiff company takes within the pilotage district. I shall have to consider the evidence as to these piers and the statutory powers under which they are constructed; but I can say at once that there is an alternative view of them, namely, that, though within the limits of the port, they are not part of the port—they are part of the Thames as a public highway—and that it is as users of the highway, and not as users of the port, that the plaintiff company and its passengers resort to them. Secondly, it is said that the plaintiff company makes use of the port's navigational facilities. This is, in part, a question of fact and it also involves the question whether, even if it does, the company is navigating for this purpose. Thirdly, it is said that the plaintiff company makes use of the port in a more general sense, in that it exploits the port's existence for gain; the company charges its passengers money to visit and see the port. The fact may be accepted, but the question remains whether this is the sort of use which s. 11 (1) contemplates. Fourthly, it is said that the plaintiff company makes use of locks in order to get into the docks. There is a question of fact here, but it cannot be disputed that the locks are part of the port. With these facts in mind, I now approach the legislation which preceded the Pilotage Act, 1913, in order to see what the intention of that Act was. There is a great deal of this legislation, to which I have been very properly referred; but I hope that I shall not be considered to be treating the careful and instructive argument of counsel for the plaintiff company too lightly if I endeavour to summarise it fairly shortly.

For an understanding of the way in which Parliament has worked, it is useful to appreciate that there are several quite separate strands or streams of legislation. For the most part, these are kept distinct, but there are points where they meet in

- A a single Act, such as a Merchant Shipping Act, which deals with more than one of the individual subjects. Even on these occasions it will be seen that the separate streams, like the Rhone and the Somme, though joined do not mix, and sometimes they divide again at a later stage. The streams to which I refer are (i) legislation as to the Thames as a river or highway; (ii) legislation as to the Thames watermen and lightermen; (iii) legislation as to the Port of London; and (iv) pilotage legislation. Rather than deal separately with each category, I will attempt to summarise the whole of it chronologically. I begin with the fact which existed at common law, that the Thames, so much of it as this case is concerned with, has at all times been a highway navigable by the public. This follows from the fact that it is a tidal navigable river. That such was the case was decided, or at any rate, accepted, in 1877 in *Original Hartlepool Collieries Co. v. Gibb* (6). It was confirmed by statute in 1894: the Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii), s. 72.

- In the vicinity of London, the right to ply for hire was from a very early date the subject of legislation. After an Act of Henry 8 (6 Hen. 8 c. 7) (7), which fixed fares, an Act of 1555 (2 & 3 Ph. & M. c. 16), (8), established a system of licensing of watermen by overseers, and thereafter there developed, and was sanctioned by numerous statutes, a system of monopoly or exclusive rights for freemen of the Company of Watermen and Lightermen, which became, like similar bodies, a recognised guild. From the sixteenth century to the nineteenth century there were numerous enactments which, in approximately identical language, provided that it should not be lawful for any person to ply for hire in the watermen's district for the carriage of passengers unless he was a licensed waterman, with a similar provision as regards lightermen.

- Turning to pilotage, the earlier Acts were of a special or local character. The first general Act was in 1808 (48 Geo. 3 c. 104), (9). This Act provided (by s. 2) for the licensing by Trinity House of pilots for the purpose of conducting all ships "... sailing, navigating, and passing up and down or upon the Rivers of Thames and Medway ...", and that such ships might only be piloted by pilots so licensed. It laid down (in s. 11) that ships "... coming from the Westward, and bound to any place in the Rivers of Thames or Medway ..." must take a licensed pilot on board and "... give the charge of piloting of [the] ship " to that pilot, and that such ships might not be conducted or piloted by any other persons. It also contained, in s. 27, exemption in favour of British registered ships of less than sixty tons from the pilotage requirements, and, in s. 2, other exemptions for colliers, ships trading to specified places in and beyond the North Sea, and for coasting vessels. This Act was replaced in 1812 by a similar Act (52 Geo. 3 c. 39), (10), which repeated the provisions which I have referred to. There was a further Act (11), of a similar character, in 1825 (6 Geo. 4 c. 125), which, by s. 59, extended the exemptions to any ship while "... within the limits of the port or place to which she belongs, the same not being a port or place in relation to which particular [statutory provision had been made]."

- These three compulsory pilotage Acts were shortly followed in 1827 by a consolidating Watermen's Act. This Act (7 & 8 Geo. 4 c. lxxv), (12), recites the

(6) (1877), 5 Ch.D. 713; 3 Asp. M.L.C. 411.

- (7) An Act for Regulating the several sums that Watermen on the River Thames should take for their fare from one place to another near the City of London.

(8) An Act touching Watermen and Bargemen upon the River of Thames.

- (9) An Act for the better Regulation of Pilots, and of the Pilotage of Ships and Vessels navigating the British Seas.

By s. 77, this Act was to be in force for four years from the passing thereof.

- (10) An Act for the more effectual Regulation of Pilots, and of the Pilotage of Ships and Vessels on the Coast of England.

(11) An Act for the Amendment of the Law respecting Pilots and Pilotage ...

- (12) An Act for the better Regulation of the Watermen and Lightermen on the River Thames, between Yantlet Creek and Windsor. The Watermen's and Lightermen's Company was incorporated under this Act.

previous watermen's legislation from Henry 8 onwards, and re-states (in s. 37) A the watermen's monopoly as the sole right to "ply, or work or navigate" any craft on the Thames from or to any place or ship within the watermen's limits for hire or gain. It is also interesting as containing (in s. 70) special provisions saving the rights of mariners licensed by Trinity House. These persons were not pilots; they were mariners licensed "to row or use any boat or wherry on the . . . River Thames", that is, persons performing the same functions as the watermen, B but licensed by Trinity House instead of being freemen of the Watermen's and Lightermen's Company. A saving to this effect appears again in later Acts, and an argument was founded on it. Its purpose at this stage is at all events clear.

The comment to be made at this stage is that the Watermen's Act of 1827 makes no reference whatever to the subject of pilotage. It continues, as had its numerous predecessors, to confer a monopoly as regards passenger carrying in the watermen's district—which extended at this date well into the pilotage district—on the watermen. The plaintiffs naturally submit that, if it had been thought that the three Pilotage Acts (13) could have affected the position of the watermen in their district, there would have been some reference to the fact in the Watermen's Act of 1827, and that the complete silence on the subject— C coupled, be it added, with the explicit saving of other rights of Trinity House (s. 70, s. 71)—is only consistent with a supposition that the Pilotage Acts did not touch the watermen at all. D

Before proceeding with the legislative history, it is convenient to mention *Tisdell v. Combe* (14), decided in 1838. This was a prosecution for breach of a bye-law made under the Watermen's Act of 1827, the offending boat being of 187 tons; and it shows that at this date boats of over sixty tons, that is, outside the Pilotage Acts' exemption, were operating under the Watermen's Act: so that the possibility of the Pilotage Act applying to them was real and not theoretical. It may be added that, although the boat in this case was being navigated below London Bridge, there is no suggestion in the report that a licensed pilot was in charge. The bye-laws considered in *Tisdell v. Combe* (14) E were replaced in 1845 by fresh bye-laws made by the Corporation of London (the corporation at this time performed functions later taken over by the Thames Conservators, so that the bye-laws had the character of River Thames legislation). These prohibited any person from "acting as master or in command or management" of a ship within the watermen's limits unless licensed by the Watermen's and Lightermen's Company, and also required the master to be on the bridge or on the paddle-box whilst under way, and not to allow any other person, except members of the crew, to go there—a regulation which, it was said, is wholly inconsistent with any right of a pilot to come on to, or to take charge of, any of these boats. F G

The next group of statutes follows at the turn of the century. In 1853 there was a fresh Pilotage Act (16 & 17 Vict. c. 129), (15). The preamble to this Act stated the desirability of vesting in the same body the right of piloting ships outwards from the Port of London as well as inwards; and the Act so provided another modification, say the plaintiffs, that the pilotage legislation is concerned with seagoing ships and not river boats. In the next year, 1854, there was an important Merchant Shipping Act (17 & 18 Vict. c. 104), (16), which incorporated the law as to pilotage in Part 5. It retained, in s. 331, the powers of pilotage authorities as theretofore existing, and provided, in s. 353, for the enforcement of the compulsory pilotage where it was theretofore enforceable. As regards passenger ships, all home trade ships carrying passengers between any two places in the United Kingdom were made subject to compulsory pilotage (s. 354), H I

(13) The Acts of 1808, 1812 and 1825.

(14) (1838), 7 Ad. & El. 788.

(15) The Pilotage Law Amendment Act, 1853.

(16) The Merchant Shipping Act, 1854.

A and, as there was no exemption for passenger carrying ships below sixty tons, it would seem to follow, unless one accepts that this legislation left river boats on the Thames on one side, that all river boats, navigating within the London pilotage district, whatever their size, ought to have carried, or offered to carry, pilots. There was an exception section (s. 379) similar in structure to s. 11 (3) of the Pilotage Act, 1913 (including ships below sixty tons), but it applied only to ships not carrying passengers.

B To complete the trilogy, there was the Thames Conservancy Act, 1857 (20 & 21 Vict. c. cxlvii), the first of the Acts of that name. This was Thames river legislation. The long title was "An Act to provide for the Conservation of the River Thames and for the Regulation, Management and Improvement thereof". It recites that the public has rights of navigation over the river and that, in consequence of the increase of steam navigation, it was necessary to provide safe and convenient places for embarking and disembarking: then it provides (s. 2) for the appointment of conservators (17), to take over (s. 50) from the Corporation of London the bed and shores of this river. In s. 59 it grants powers to the conservators to erect piers and landing places for the convenience of the public. It also gives them powers to remove obstructions (s. 87); to place buoys and beacons for the navigation of the river (s. 88), and to provide mooring chains (s. 99). All these provisions are relied on by the plaintiffs as illustrating the concern of the legislation with the Thames as a navigable highway, as relating these particular matters to the Thames Conservators as the authority in charge of that highway.

E In 1859 the watermen reappear in the Statute Book. The Act of that year, the Watermen's and Lightermen's Amendment Act, 1859 (22 & 23 Vict. c. cxxxiii), re-defines in s. 8 the limits of the watermen's monopoly—these are the same as they are today—and re-states their monopoly rights (s. 54): namely, to "ply or work or navigate any . . . passenger boat . . . from or to any place or places or ship or vessel" within the limits. Section 94 saves the rights of Trinity House and of the mariners licensed by it. Although this saving is in shorter terms than the previous saving (in the Act of 1827), it still by its terms, which refer to "any mariner or seafaring man licensed by" Trinity House, points to persons doing the same work as watermen, and I do not accept the defendants' contention that it refers to pilots. There is also a section (s. 102) which saves the provisions of the Merchant Shipping Act, 1854, but this is in general terms, and I do not accept that it has the effect of conferring on licensed pilots the right, if they did not have it previously, to pilot river boats.

G I pass over various intermediate Acts, mentioning only that in one of them, the Thames Conservancy Act, 1864 (27 & 28 Vict. c. 113), s. 49, the rights of the Trinity House watermen were abolished (18), and I come to the year 1894. There are two Acts in that year. There is the monumental Merchant Shipping Act, 1894, which—as in the Act of 1854—contains, in Part 10, some sections dealing with pilotage (19). There is not much change as compared with the earlier Act. There is again (in s. 604) compulsory pilotage for all ships carrying passengers between any two places in the British Isles, if in a pilotage district. There is again an exemption (in s. 605) for ships "passing through" a pilotage district on a voyage between "two places both situate out of that district". The predecessor of s. 11 (1) of the Pilotage Act, 1913, and the other exemptions, corresponding to s. 11 (3), still do not apply to passenger-carrying ships.

I The plaintiffs make the point that, unless the river boats are to be regarded as the subject of their own special legislation, and outside the pilotage legislation,

(17) Known as "The Conservators of the River Thames".

(18) The Act of 1864 repealed 8 Eliz. 1 c. 13, an Act "to enable the Trinity House to . . . give licence to mariners to row on the River of Thames".

(19) Part 10, consisting of s. 572 to s. 633, was repealed by the Pilotage Act, 1913, s. 60 and Sch. 2.

all passenger boats on the Thames, however small, would have been subject to compulsory pilotage. A

The other Act of 1894 is the Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii). It recites the expediency of extending the powers of the conservators for improving the navigation of the river for profit and pleasure. It refers, in s. 15, to the Watermen's and Lightermen's Amendment Act, 1859, and it confers (s. 119) powers for the erection of piers below Teddington Lock. B

In 1904 there was passed the Thames River Steamboat Service Act, 1904 (4 Edw. 7 c. ccciii). That recites that

"... it is expedient with a view to making proper use of the river as a highway for the convenience of the public that provision should be made for the acquisition by the London County Council . . . of the piers and landing places . . . and the improvement of piers and landing places so acquired and the establishment of an efficient passenger boat service . . ." C

It also recites that the existing piers on the river are for the most part vested in, and managed by, the Thames Conservators. It then confers powers on the London County Council to take over and construct piers (s. 4-s. 7) and to run a service of vessels for the conveyance of passengers and parcels (s. 16). There is an express saving of the privileges of the watermen (s. 46) with a specific reference to their Acts. There is no reference to pilotage, and the plaintiff company very naturally relies on this as showing (consistently with what it says was the position as regards passenger services run by private companies) that watermen had to be employed to navigate London County Council passenger boats, and that these boats were not subject to compulsory pilotage. D

I think that I should mention at this point the evidence of a Mr. Odell, who says that he started work on the Thames in 1895, and was apprenticed in 1897 to his father, who was a waterman, as was his grandfather and great-grandfather before him. He says that he had never heard it suggested that vessels in charge of a licensed waterman had to carry a pilot within the watermen's limits. He says that the London County Council, acting under the Act of 1904, ran passenger services below London Bridge and that he believes that all the masters were licensed watermen. None that he knew carried pilots. There is also in evidence a list of some thirty London County Council vessels of over fifty tons, which were operated by the London County Council for a period between Hammersmith and Greenwich; and it appears that fourteen of these were taken over and worked by a successor company until 1914. E

The last statute prior to the Pilotage Act, 1913, is the Port of London Act, 1908 (8 Edw. 7 c. 68), which established the Port of London Authority (20). The port authority were given a miscellany of powers in relation to the port and the river. They took over the powers of the Thames Conservators (s. 7) below the upper limit of the Port of London, and the Thames Conservancy Acts were to be read as if references to the port authority were substituted for references to the conservators. The authority took over powers of the Watermen's Company (s. 11), and the Watermen's Acts were to be read as if references to the port authority were substituted for references to the company. The expression "Port of London" was defined (in s. 49) as "the port within the limits described" in Sch. 5 to the Act—which are the present limits. The Act contained no reference to pilotage. It is to be noted that the Port of London Authority from its creation was vested with two separate functions—functions relating to the port and functions (inherited from the Thames Conservators and the Watermen's Company) relating to the river. F G

I need not refer again at this point to the Pilotage Act, 1913, except to mention that, by s. 62, it is to be construed as one with the Merchant Shipping Act, 1894: thus bringing out the continuous character of the pilotage legislation, which is H I

(20) The greater part of this Act was repealed by the Port of London (Consolidation) Act, 1920.

- A sometimes distinct and sometimes combined with other subjects in a comprehensive Act. I pass, finally, to the Port of London (Consolidation) Act, 1920 (10 & 11 Geo. 5 c. clxxiii). This is of interest as showing what Parliament thought the position was after the Act of 1913. The Act of 1920 is, in fact, so far as material, very similar to the Port of London Act, 1908. This does not support a suggestion that the position had been changed by the Act of 1913. There are
- B sections (s. 315 et seq.) dealing with watermen and lightermen, and the privileges of these persons are re-stated. The words used (in s. 318) are "... ply or work or navigate for hire or gain any passenger boat ... upon the Thames ..." within the watermen's limits. There are some newly expressed prohibitions. As to lighters (s. 326), no lighter is to be "worked or navigated" within the limits "unless there be in charge of such lighter" a licensed lighterman or apprentice.
- C The corresponding provision as to watermen is not so full. Section 327 reads: "If any unlicensed person rows steers or navigates for hire any passenger boat ...". The plaintiff company contends that the provision as to lightermen, which expressly requires a licensed lighterman to be in charge, is, on the face of it, quite inconsistent with the application of the Pilotage Act, 1913, which, in s. 44 (1), requires "the charge of piloting" ships to be given to a licensed
- D pilot and entitles a pilot "to take charge of the ship": and that the same argument applies no less to the more abbreviated watermen's section. That this position should have been re-stated in 1920 is, they suggest, highly significant.

This review completed, I now return to s. 11 of the Pilotage Act, 1913, and I reach the following conclusions. First, in my judgment, the plaintiff company makes good its general contention that the whole course of prior legislation shows that there is a separation between, on the one hand, enactments dealing with the Thames as a highway navigable by the public, and, on the other hand, those dealing with the pilotage of ships coming into or leaving the Thames. There are two self-contained compartments, the separateness of which is confirmed more than once over the preceding hundred years as a statute in one group follows or is followed by a statute in the other. Unless recognition is given to this

F separation, the conclusion must follow, contrary to all the evidence as to what in fact happened, that for very many years, until the contrary was explicitly stated in s. 11 of the Act of 1913, passenger-carrying steamboats, of whatever size, whether above or below sixty tons, on the Thames, were subject to compulsory pilotage, and that boats above that size were so subject for an even longer period; and conversely, if that was not the case, the conclusion must follow that,

G in enacting pilotage legislation, the legislature has consistently treated this matter of navigation on the Thames, or on the relevant part of it, as a highway governed by its own special legislation. Within the highway legislation, there is the special area covered by the Watermen's Acts.

- The long history of these Acts, the constant reaffirmation of the watermen's exclusive rights, within their statutory limits, to navigate passenger ships for hire, and the constant refusal of the opportunity which frequently presented itself to subordinate their rights to the claims of licensed pilots, confirm the autonomy of the two legislative strands. And right down to 1908, or one may add to 1920, despite the bringing of control of the Port of London, of the Thames river within the limits of the port, and of the Watermen's and Lightermen's Company's rights and duties under the single aegis of the Port of London
- I Authority, the separate character of the functions of that authority as they relate to the three subjects is preserved, both inter se and in relation to the subject of pilotage. Is there anything in the wording of the Act of 1913 which displaces these conclusions? The Act is an Act to amend as well as to consolidate (21), and Parliament had full power to obliterate any distinctions which previous Acts might have respected. Certainly the language of the Act of 1913 has been changed in some respects, and I must see whether these changes are material.

(21) The long title of the Act is "An Act to consolidate and amend the Law relating to Pilotage".

There is, first, the wording in s. 11 (1), "entering, leaving, or making use of any port". These words compare with the expressions used in the Merchant Shipping Act, 1894, s. 604 (1): "while navigating within the limits of" a pilotage district, and within the exemption in s. 605 (1) in favour of ships "passing through [a] district . . . on a voyage between two places both situate out of that district", which exemption is itself subject to an exception, in s. 605 (2), for ships "loading or discharging at any place situate within the district . . ." The revised wording of s. 11 may well have been used to get over this awkward combination of rule, exemption and exception, and the words "making use of" may have been employed as compendious of, and perhaps somewhat enlarging, "loading or discharging". However this may be, the relevant point for present purposes is that the section, in its actual form, is quite consistent with the hypothesis that it does not apply to any highway use of the Thames. Given the dual character of the river at London, it seems to be quite intelligible and natural that the Pilotage Act, 1913, s. 11 (1), should be dealing only with it as part of a port, leaving aside for separate regulation the river as a highway.

The second substantial change which has been made is in the part of the section which deals with excepted ships (s. 11 (3)). Whereas previously there was a list of exceptions (last set out in the Merchant Shipping Act, 1894, s. 625) which was not applicable to passenger ships, the new list extends to passenger ships, and also, by s. 11 (4), allows additions to be made to the exceptions by bye-law, provided that they relate to coasters, home trade ships and ships navigating within a port, and do not cover ships carrying passengers. This change may well have been made in the interests of clarity and flexibility, and I do not see in it anything to support an argument that the Act of 1913 has been extended to cover Thames river boats if these were not covered before. The only 1913 exemption which has been relied on by the defendants is that provided for in s. 11 (4) (iii), that is to say, for non-passenger ships not ordinarily navigating outside the limits of a harbour authority, the argument being that this exemption by implication excludes passenger boats such as those of the plaintiff company. But the exemption was included in substantially the same form in the Merchant Shipping Act, 1894, s. 625 (5), and in the Merchant Shipping Act, 1854, s. 379 (5), so that its presence in the Act of 1913 cannot give rise to any argument based on the latter Act alone. If the plaintiff company's boats were not caught by the earlier Acts, they are not caught by this section of the later Act. In any event, s. 11 (4) merely provides a means of escape from the obligation of compulsory pilotage established by s. 11 (1)—an escape which is now not open to ships carrying passengers. But the scope of s. 11 (4), be it broader or narrower than it was before, does not seem to me to assist on the interpretation of s. 11 (1).

I return, therefore, to the critical words of s. 11 (1), "navigating in a pilotage district . . . for the purpose of entering, leaving, or making use of any port"—and I must now, with this background consideration which I have stated, seek to ascertain its application to the facts of this case.

It is a simple phrase, each limb of which must be construed in the context as a whole—and "making use" is evidently added in order to cover some situation not covered by "entering" or "leaving". Equally, "making use" throws some light on what is meant by "any port". Where, as here, there is an area defined by "limits" in which there are areas, or installations, or facilities which together make up a port, but which area includes other things which are not part of a port, it seems that the requirement for pilotage arises when the navigation is for the purpose of making use of these installations or facilities: an example of this is given by *Cannell & Trinity House Corpn. v. Lawther, Latta & Co.* (22), where a ship came to the vicinity of a port in order to receive instructions as to her future voyage through a boat despatched from the port. But, if the navigation, though within the geographical limits of the port, is not for the purpose of making use

A of it, in particular where it is for the purpose of making use of the river, which flows through the port, as a highway, then, in my judgment, this does not apply.

In the main, there is no doubt that the plaintiff company's navigation is for the purpose of using the river as a highway; but it remains to ask whether, in the course of so doing, it is also for the purpose of "making use of [the] port". I revert to the four alleged uses which I have already mentioned. First, there are

B the piers. I have already referred to the statutory provisions relating to the construction of piers: it is clear from their terms that the Thames Conservators, their successors, the Port of London Authority, and, for the purposes of the services organised by them, the London County Council, all have powers to erect piers for the convenience of the public using the Thames as a highway. In so far, therefore, as the piers are of this character, the use of them by the plaintiff

C company cannot amount to making use of the port. They have nothing to do with the port, any more than Westminster Bridge, which has been constructed for the convenience of those wishing to cross the river, is a facility of the port. Mr. Caisley (23), in his affidavit, gives a list of the piers. From his description of them and of their ownership, there is no reason to suppose, or evidence to suggest, that any of them are other than piers of the kind which I have mentioned.

D On the contrary, there is a good deal of evidence that they were of this kind. It was recited in the Thames River Steamboat Act, 1904, that most of the piers were vested in, and managed by, the Thames Conservators, the authority in charge of the river, and there is in evidence a list of piers used as plying places in 1896, which includes most of the piers mentioned by Mr. Caisley as now in use. Others of the latter piers are either private piers, for example, Dagenham,

E or the British Railways piers, which must have been constructed as part of the communications system. There is some specific evidence about Tower Pier which, it seems, was constructed about thirty years ago by the Port of London Authority under the powers conferred on them by their Act of 1920. It replaced the Old Swan Pier, which was just above London Bridge, the approaches to which were congested. Old Swan Pier seems to have been built about one hundred years

F ago, to replace some old stairs which had been there at any rate since the sixteenth century, and which were known as Ebgate. They appear in a list of public plying places of watermen published in 1708. There is also some specific evidence about Greenwich Pier which shows that it was constructed by a company in the first part of the nineteenth century for the convenience of passengers, since when it has passed into the hands of the London County Council. These historical

G details illustrate and emphasise the continuity of the present watermen's services through steamboats with the old watermen's services on the Thames going back probably to medieval times, and they confirm me in the conclusion that, on the material before me, boats using the piers are not navigating for the purpose of making use of the port.

Secondly, there are the navigational facilities. I can deal shortly with these:

H in the first place, there is no evidence that any such facilities are used by the plaintiff company, and, if they were, I should feel great doubt whether the plaintiff company's navigation was for the purposes of making use of them. With regard to the moorings used by the plaintiff company, the facts, as I understand them, are that these are provided by the plaintiff company itself, and that it leases the right to place them where they are placed, that is, outside

I the London pilotage district, from the Port of London Authority. It seems to me that the Port of London Authority is here acting as a River Thames authority, and not as a port authority, and that in any event, even if in using the sites of the moorings the plaintiff company is making use of the port, the company cannot be said to be navigating in the London pilotage district for the purpose of making use of them. Thirdly, there is the use which consists of exploiting the port as an

(23) The secretary and a director of the plaintiff company, and secretary of the Thames Passenger Services Federation.

attraction. As to this, again there is no evidence that this is done by the plaintiff company, and in fact I should suppose that many of the people who use the scheduled services do so for reasons of convenience or salubrity, and that the visible attractions of the port, if any, make no, or only a marginal, appeal to them. In any case, I cannot think that user of this kind is within the section. Fourthly, there is the use of the locks. There is no evidence of this user, or its nature or extent, and I should require to be fully informed on these matters before I could determine whether the section applied to them. I therefore decide nothing either way as to this type of user, if it exists.

Before expressing a final conclusion, I must deal briefly with certain arguments put before me. First, I understand that some vessels running downstream from London Bridge go outside the watermen's district—which ends at Lower Hope Point—possibly as far as Southend; and the originating summons seems to ask whether trips of this kind are subject to compulsory pilotage. *Prima facie*, it would seem that they ought to be treated in the same way as trips confined to the watermen's district, and, in the absence of some proved element of "making use", considered as exemptions from compulsory pilotage. I do not, however, consider that I have enough evidence to enable me to deal with these services and propose to confine any declarations to be given to the watermen's area. Secondly, the plaintiff company relies on the maxim *generalalia specialibus non derogant*. The company says that the maxim applies here because the Thames river legislation is special legislation, and should not be displaced by the more general pilotage legislation in the absence of specific reference by the latter to the former. It will be seen that the argument which I have accepted is one very similar to this, and I forbear to consider whether this maxim provides an alternative to, or merely a re-statement of, that argument.

Thirdly, the plaintiff company additionally, or alternatively, relies on s. 59 of the Pilotage Act, 1913, which provides:

"... Any ... custom ... with reference to pilotage affecting any pilotage district in particular, and in force at the time of the passing of this Act, including any exemptions from compulsory pilotage taking effect thereunder, shall remain in force notwithstanding anything in this Act ... until provision is made by pilotage order ... made under this Act superseding any such ... custom ..."

This raises two questions. (a) Was there a custom with reference to pilotage in force at the time of the passing of the Act? The plaintiff company says that there was—namely, a custom that within the watermen's district passenger boats plying for hire should be navigated only by licensed watermen or lightermen, as the case might be, and exempt from compulsory pilotage. The company relies on the evidence of Mr. Odell, to which I have already referred (24), as carrying this factual situation back for one hundred years before the Act. On the evidence of the legislation in the nineteenth century, I think that a custom to this effect is established, and I accept also that it was a custom with reference to pilotage. The words "including any exemptions from compulsory pilotage" seem to show that this is so. I do not agree with the defendants' argument that this custom must be a custom to refuse a licensed pilot if he offers his services.

(b) Was the custom superseded by a pilotage order? The defendants rely on the London Pilotage (Amendment) Order, 1937 (S.R. & O. 1937 No. 1122), made under the Act, para. 3 of the schedule to which order says that:

"Pilotage shall be compulsory in the whole of the London pilotage district with the exception of any lock."

When it is argued against this that the order does not, in terms, "supersede" the custom, the defendants refer to *Buck v. Tyrrel* (25), decided by the Divisional Court in 1922 on s. 59 of the Act of 1913. That was a case where the alleged custom

(24) See p. 922, letter E, ante.

(25) (1922), 10 Lloyd's Rep. 74.

A related to moving ships within a harbour, and this particular matter is, by s. 32 of the Act of 1913, required to be regulated by bye-law. In fact, a bye-law was made which did not confer the exemption claimed to exist by custom, and the court held that the custom, if any, was superseded.

The pilotage order in the present case stands on a different footing. It is made under s. 7 of the Act of 1913 which empowers the Board of Trade to distinguish in which part of a district pilotage is to be compulsory or not compulsory (s. 7 (1) (c)), and also to provide that it shall be compulsory in any area where it has not previously been compulsory (s. 7 (1) (h)). Here all that the Board has done is to say that pilotage is to be compulsory in the whole of the London pilotage district, except in the locks. In my judgment, this is not sufficient to supersede the custom. The existence of the custom is perfectly compatible with the whole of the London pilotage district being a compulsory district. Indeed, it only has significance as a custom if the district is a compulsory district. In fact, the district had been a compulsory district long before the Act was passed. There is the further point that para. 7 of the schedule to the pilotage order expressly mentions certain provisions deemed to be superseded for the purpose of s. 59, which seems to be inconsistent with the suggestion that the custom was superseded. If necessary, therefore, I would hold that the plaintiff company is entitled to succeed on this alternative ground.

Fourthly, it is claimed by the defendants that too much significance is attributed by the plaintiff company to the watermen's legislation—that it is nothing more than special legislation of the same character and quality as the general legislation contained in the Merchant Shipping Act, 1894, s. 92, requiring all merchant ships to carry a certificated master. If this general legislation is consistent with the employment of pilots, so, it is said, should be the watermen's legislation. In my judgment, however, this general legislation is not of the same character as the watermen's legislation. It merely says (in s. 92 (1)) that ships are to "be provided" with persons having the qualifications stated. The strength of the Watermen's and Lightermen's Company lies, however, in the exclusive power of the watermen and lightermen to navigate and be in charge of the ships, which excludes pilots in the way that the Merchant Shipping Act, 1894, does not. I therefore do not accept the suggested comparison.

I come, therefore, to the conclusion that as regards the area covered by the watermen's legislation, that is to say from London Bridge to Lower Hope Point, the plaintiff company is not, as regards the services (26) referred to in para. 5 of Mr. Caisley's affidavit (other than visits to the docks, as to which I have not sufficient evidence to enable me to give a decision), obliged to request the services of a licensed pilot.

Declaration accordingly.

Solicitors: *J. A. & H. E. Farnfield* (for the plaintiff company); *Freshfields* (for the defendants).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

R. v. ELLIS. R. v. ELLIS.

A

[COURT OF CRIMINAL APPEAL (Ashworth, Salmon and Elwes, JJ.), June 6, 12, 1961.]

Criminal Law—Evidence—Evidence by one prisoner against another—Right of latter to cross-examine as to previous convictions—Cross-examining prisoner subsequently changing plea to guilty—No application to discharge jury—Conflict of testimony between prisoners not pleading guilty—Judge in summing-up told jury to approach evidence of previous convictions from the viewpoint whether the prisoner could be regarded as a truthful witness—Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), s. 1 (f) (iii).

B

If at the trial of a criminal charge one prisoner applies to cross-examine (pursuant to the Criminal Evidence Act, 1898, s. 1 (f) (iii)*) a co-prisoner on his criminal record, the court has no overriding discretion to allow or to disallow the cross-examination, but, if the facts bring the matter within the relevant statutory exception, such cross-examination is a matter of right (see p. 930, letter F, post).

C

The appellants, J. and R., together with G., were tried on an indictment containing counts of warehouse-breaking, larceny and receiving. In the course of cross-examination of prosecution witnesses it appeared from questions put on behalf of G. that his defence would be that he merely hired a van at the request of J. and drove it to the place where the alleged crime took place. J., giving evidence-in-chief, stated that G. had asked him to help to move bankrupt stock. G.'s counsel then asked leave to cross-examine J. on his criminal record, on the ground that J. had given evidence against a co-prisoner charged with the same offence. The judge ruled that this cross-examination was permissible. On the next day G. changed his plea to guilty on a joint charge of receiving. Counsel for J. and R. did not apply for the jury, who had heard the cross-examination of J., to be discharged. In summing-up the judge told the jury to approach the evidence of J.'s character with a view to deciding whether he could be regarded as a truthful witness, not on the basis that because he had been previously convicted he would be guilty of the offences then being tried. The trial judge then went on to contrast the evidence given by J. and R., which was conflicting on a material point.

D

E

F

Held: although an application at the trial to discharge the jury would have been upheld the verdict should stand, the trial judge's observation to the jury being legitimately directed to contrasting conflicting testimony, as the position at the time of the summing-up was that the evidence of J.'s criminal record had been rightly admitted and that no objection had been made to the continuation of the trial before that jury.

G

Appeals dismissed.

[**Editorial Note.** On the right of a co-prisoner to cross-examine, as stated at letter C above, see also *Rigby v. Woodward*, [1957] 1 All E.R. at p. 392, letter G.

H

As to cross-examination of a defendant as to character, see 10 HALSBURY'S LAWS (3rd Edn.) 450, para. 828, note (c), 451, para. 830; and for cases on the subject, see 14 DIGEST (Repl.) 410, 411, 4011, 4015, 4019, 4120, 518, 5018.

As to reasons for discharging a jury during trial, see 10 HALSBURY'S LAWS (3rd Edn.) 427, para. 787, note (i).

I

For the Criminal Evidence Act, 1898, s. 1 (f) (iii), see 9 HALSBURY'S STATUTES (2nd Edn.) 614.]

* Section 1 (f) reads: "A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless . . . (iii) he has given evidence against any other person charged with the same offence."

A Cases referred to:

- R. v. Hadwen*, [1902] 1 K.B. 882; 71 L.J.K.B. 581; 86 L.T. 601; 66 J.P. 456; 14 Digest (Repl.) 518, 5018.
R. v. Miller, [1952] 2 All E.R. 667; 116 J.P. 533; 36 Cr. App. Rep. 169; 14 Digest (Repl.) 411, 4014.
R. v. Wattam, [1942] 1 All E.R. 178; 28 Cr. App. Rep. 80; 14 Digest (Repl.) 639, 6484.

B

Appeals.

These were appeals by James Ellis and Richard Sidney Ellis who, together with one Gamble, were tried at the Central Criminal Court on Jan. 16, 1961, before JUDGE BLOCK and a jury on charges of receiving stolen goods. There were seven counts in the indictment, but the appellants were convicted only on two counts each. All three prisoners were convicted on one count of receiving (count 3) on which they were jointly charged and to which Gamble pleaded guilty in the course of the trial. James Ellis was convicted also on another count charging him alone with receiving and was sentenced to four years' imprisonment concurrent on each count. Richard Sidney Ellis was also convicted on another count charging him alone with receiving and was sentenced to four years' imprisonment concurrent on each of the two counts. On Apr. 13, 1961, the court (HILBERY, STEVENSON and LAWTON, JJ.), granted leave to both appellants to appeal against conviction on a question whether cross-examination of James Ellis as to his previous convictions was properly permitted by the trial judge. The facts are stated in the judgment of the court. The cases enumerated below were cited in argument in addition to those in the judgment*. The court (ASHWORTH, SALMON and ELWES, JJ.), dismissed the appeal on June 6, 1961, stating that they would give their reasons for so doing at a later date.

P. B. Pollock for the appellants.

B. L. Leary for the Crown.

Cur. adv. vult.

F

June 12. ASHWORTH, J., read the following judgment of the court: These two appellants were charged, together with a man named Gamble, on an indictment containing seven counts, of which only the first five are material. In count 1 all three accused were charged with breaking and entering a warehouse and stealing groceries therein, the date being early November, 1960. In count 2 there was a similar charge against all three, the date being early December, 1960.

G

In count 3, all three men were charged with receiving 304 cartons of grocery provisions early in December knowing them to have been stolen. Count 4 contained a separate charge of receiving against the appellant James Ellis and count 5 a separate charge of receiving against Richard Ellis. The trial took place at the Central Criminal Court on Jan. 12 and 13, 1961, before His Honour JUDGE BLOCK, and at the trial Gamble was separately represented by counsel, the two appellants being jointly represented by counsel representing them on this appeal.

H

On Dec. 5, 1960, police officers were keeping observation opposite the premises in question when they saw the two appellants arrive in a black Austin motor car. Shortly afterwards a van appeared driven by Gamble. According to the police the appellant James Ellis and Gamble were seen to be removing articles from the warehouse and putting them in the van, while the appellant Richard Ellis kept watch.

I

In the course of the case for the prosecution, on two separate occasions, counsel appearing for Gamble asked questions in cross-examination suggesting

* I.e., *R. v. Beecham*, [1921] 3 K.B. 464; 16 Cr. App. Rep. 26; *R. v. Fripp*, *R. v. Jones*, (1942), 29 Cr. App. Rep. 6; *R. v. Flower*, (1956), 40 Cr. App. Rep. 189; *R. v. Thomas*, [1957] 3 All E.R. 350; 41 Cr. App. Rep. 236; *R. v. Lashbrooke*, (1958), 43 Cr. App. Rep. 86 (quoting at p. 88 LORD GODDARD, C.J., in *R. v. Neal*, [1949] 2 All E.R. at p. 441; 33 Cr. App. Rep. at p. 195); *R. v. Rothery*, (1958), Cr. Law R. 618.

to the police officers concerned that Gamble had no real part in the raid but had merely hired the van at the request of the appellant James Ellis. The question on the first occasion was as follows: A

"I suggest the position is that as you say, Gamble drove up in the van, and he afterwards left immediately, did he not? A.—No, sir."

On the second occasion, after the police officer had deposed that Gamble had said "I agree I hired the van", counsel suggested that Gamble added, "because my brother-in-law wanted to move some gear". Again, the answer was: "No, sir". B

James Ellis was the person first named in the indictment and gave evidence first after the close of the prosecution case. He said that he visited Gamble's home on Dec. 4, and the following questions and answers appear in the transcript: C

"(Mr. Pollock): Q.—While you were there was any suggestion made?

A.—Yes. Q.—What was that? A.—Apparently Mr. Gamble bought some bankrupt stock . . . Q.—Is this what he told you? A.—Yes. Q.—That he had bought some bankrupt stock? A.—Yes. Q.—Where did he say he got it from? A.—He did not say where; he had just bought it in a deal, and he asked me and my brother if we would help him to move it on the Monday morning. Q.—The following day? A.—Yes."

After James Ellis had given evidence-in-chief, counsel appearing for Gamble applied to the learned judge for permission to cross-examine James Ellis on his criminal record on the basis that James Ellis had given evidence against a co-prisoner charged with the same offence. After hearing argument, the learned judge ruled that such cross-examination was permissible. In passing, it may be worth mentioning that at the hearing of the appeal the question arose whether there was any discretion in the court to permit or disallow such cross-examination, assuming that the evidence given by James Ellis had *prima facie* exposed him to it. In the opinion of this court in such circumstances there is no overriding discretion in the court to allow or disallow such cross-examination; if the facts bring the matter within the relevant statutory exception, such cross-examination is a matter of right and not of discretion. For a discussion of the principles involved see *R. v. Miller* (1). D

The first ground of appeal put forward by the present appellants is that in the circumstances the cross-examination was wrongly permitted. The words of the exception, to be found in s. 1 (f) (iii) of the Criminal Evidence Act, 1898, are: "he has given evidence against any other person charged with the same offence". Those words were considered in *R. v. Hadwen* (2), and in the judgment reference is made to evidence incriminating or inculcating a fellow prisoner (3). It is right to point out that the issue in that case was not whether evidence against any other person charged with the same offence had been given but what the consequences of such evidence would be. E

The question whether evidence by a prisoner brings him within the exception depends primarily on the nature of the evidence, having regard to the issues involved. It is sufficient in this case to say that having regard to the defence of Gamble as indicated at that stage of the trial, namely, that he was not present for more than a moment and then only as a person who had been asked to hire a van for the appellant James Ellis, the evidence given by James Ellis was properly held by the learned judge to be evidence against Gamble. Accordingly, cross-examination as to James Ellis's criminal record was properly permitted. F

On the following day of the trial there was a surprising development, as Gamble by his counsel informed the court that he wished to plead guilty to the charge of receiving contained in count 3. Counsel for the prosecution was unwilling to drop

(1) [1952] 2 All E.R. 667; 36 Cr. App. Rep. 169.

(2) [1902] 1 K.B. 882.

(3) I.e., [1902] 1 K.B. at pp. 885-888, per LORD ALVERSTONE, C.J. (with whose judgment LAWRENCE, BRUCE and KENNEDY, JJ., concurred), and WRIGHT, J., at p. 888.

A either of the charges of breaking and entering and stealing, and accordingly the trial proceeded. When Gamble gave evidence he frankly admitted his guilt on the receiving charge but he went even further, in that when cross-examined by counsel for the appellants, he admitted that he might have told James Ellis that he had acquired some bankrupt stock.

B It cannot be supposed that counsel appearing for Gamble had the slightest idea, when he applied to cross-examine James Ellis on his past record, that the defence theretofore put forward on behalf of Gamble would be abandoned. But it was in fact abandoned, and the unfortunate result was that the jury had been made aware of James Ellis's record when as subsequent events showed it was unnecessary and, indeed, most undesirable that they should know anything about it.

C In this situation the problem arises whether the trial should have been allowed to proceed before that jury. In the opinion of this court, while it was not incumbent on the learned judge to stop the case and order a re-trial before another jury, an application by counsel for the Ellis brothers (if made) should have been upheld. No such application was made, but this court does not wish thereby to imply any criticism of counsel who defended the Ellis brothers at the trial and

D this court with great persistence and ability. It was for him a complete surprise and his omission to apply for the discharge of the jury is understandable. But so far as this court is concerned, the fact that the trial proceeded when it might have been stopped does not afford a ground on which the verdict can be set aside. A somewhat similar issue arose in *R. v. Wattam* (4), but in that case there had been some irregularity and even then this court held, following its earlier

E decisions, that in the absence of an application to discharge the jury the verdict must be upheld. In the present case this court holds that there was no irregularity in the admission of the evidence and, accordingly, there is stronger reason than existed in the case cited for upholding the verdict.

The last point put forward on behalf of the appellants arises out of the reference made by the learned judge in his summing-up to the evidence regarding James

F Ellis's criminal record. He said this:

"It is perhaps unfortunate in a way that the character of James Ellis had to be put before you, and you will approach that not in the light that because he has been convicted before he committed this offence, but you will approach it in the light whether in the circumstances you can regard him as a truthful witness."

G Taken out of their context those words would in the circumstances of this case be open to criticism, but they were followed immediately by a passage in which the learned judge contrasted the evidence given by the two appellants, which was on a material point conflicting. Once it is appreciated, first, that the evidence as to James Ellis's criminal record was rightly admitted and was

H before the jury and, secondly, that there was no objection to the continuation of the trial before that jury, the comments made by the learned judge were legitimate and their purpose was clearly directed in the first place to the inconsistencies between the two appellants' stories.

For these reasons, this court is of opinion that no ground has been put forward which calls for an interference with the verdict. In these circumstances, it is

I unnecessary to express any concluded view on the question whether in any event it would have been right to set aside the verdict in respect of Richard Ellis, whose character was not attacked at all.

Appeals dismissed.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellants); *Solicitor, Metropolitan Police* (for the Crown).

[Reported by N. P. METCALFE, Esq., Barrister-at-Law.]

R. v. NAYLOR.

[CENTRAL CRIMINAL COURT (Lord Parker, C.J.), July 18, 1960.]

Criminal Law—Jurisdiction—British aircraft outside England—Larceny—Civil Aviation Act, 1949 (12, 13 & 14 Geo. 6 c. 67), s. 62 (1).

On an application to quash a count of an indictment charging the defendant with larceny, contrary to s. 2 of the Larceny Act, 1916, for stealing three rings on a British aircraft in flight over the high seas, it was submitted on her behalf that the court had no jurisdiction to try her on this charge as it was not an offence known to English law.

Held: by s. 62 (1)* of the Civil Aviation Act, 1949, any act or omission which would constitute an offence if done in England was made an offence if done on a British aircraft, except where the act or omission was contrary only to legislation which was purely of domestic application; and, therefore, the court had jurisdiction under the subsection to try the defendant.

R. v. Martin ([1956] 2 All E.R. 86) distinguished.

[As to jurisdiction over offences committed in British aircraft out of England, see 5 HALSBURY'S LAWS (3rd Edn.) 17, para. 22, note (f).]

As to jurisdiction in respect of crimes committed out of England, see 10 HALSBURY'S LAWS (3rd Edn.) 322 et seq.

For the Civil Aviation Act, 1949, s. 62 (1), see 28 HALSBURY'S STATUTES (2nd Edn.) 253.]

Case referred to:

R. v. Martin, [1956] 2 All E.R. 86; [1956] 2 Q.B. 272; 120 J.P. 255; 40 Cr. App. Rep. 68; [1956] 2 W.L.R. 975; 3rd Digest Supp.

Motion to quash part of an indictment.

The defendant, Inga Monica Maria Naylor, was charged on an indictment which, in count 1, charged her with larceny, contrary to s. 2 of the Larceny Act, 1916, in that on June 30, 1960, in a British aircraft in flight over the high seas, she stole three rings. Before the defendant was put to plead, counsel on her behalf submitted that the count was bad and should be quashed on the ground that it disclosed no offence for which the defendant could be tried in this country.

E. J. P. Cussen and *S. A. Morton* for the Crown.

Victor Durand, Q.C., and *J. C. G. Burge* for the defendant.

LORD PARKER, C.J.: Counsel for the defendant moves to quash count 1 of the indictment in this case under which the defendant is charged with larceny, contrary to s. 2 of the Larceny Act, 1916. The particulars of that count are that the defendant, on June 30, 1960, on a British aircraft in flight over the high seas stole three rings. The motion to quash is on the ground that that is not an offence known to English law for which the defendant can be tried in this country. The matter depends on the true construction of s. 62 (1) of the Civil Aviation Act, 1949. That section, which has the sidenote "Jurisdiction", provides:

"Any offence whatever committed on a British aircraft shall, for the purpose of conferring jurisdiction, be deemed to have been committed in any place where the offender may for the time being be."

It is, on any view, rather unfortunate language.

Of the two rival contentions, one is that the subsection is saying in a shortened form what has already been provided in regard to British ships on the high seas (1), namely, that any act or omission which constituted an offence if committed in England constitutes an offence if committed on a British aircraft. On the other hand, it is said that the subsection is only dealing with a matter of jurisdiction and venue, and that one must first find that under English law the acts

* The terms of the subsection are printed at letter H, supra.

(1) See the Merchant Shipping Act, 1894, s. 686 (1); 23 HALSBURY'S STATUTES (2nd Edn.) 711.

A complained of constitute offences if committed on a British aircraft. The matter was considered by DEVLIN, J., in *R. v. Martin* (2), on a motion to quash an indictment containing counts concerning reg. 3 of the Dangerous Drugs Regulations, 1953 (S.I. 1953 No. 499).

Before considering that case, I should say that I have come to the clear conclusion that the wide construction contended for should be put on s. 62 (1) of the Civil Aviation Act, 1949. Although the language is not altogether as clear as it should be, I have little doubt that it does cover any acts or omissions which would constitute offences if committed in this country unless—and this is, I think, where *R. v. Martin* (2) is in point—they are contrary to some purely domestic legislation. I need not repeat the arguments which were adduced in *R. v. Martin* (3) as to the narrow scope that there would be for the operation of s. 62 (1) on the limited construction: offences under the Treachery Act, 1940; bigamy, if one can imagine it taking place, and murder, by reason of s. 9 of the Offences against the Person Act, 1861, are the only possible offences to which the subsection could apply.

I have been referred to McNAIR'S LAW OF THE AIR (2nd Edn.) in which, after the rival contentions have been set out, this passage occurs (at p. 118):

D “It is submitted, however, that their effect is not limited to questions of *venue* but is to render amenable to trial, wherever in the United Kingdom the offender may be, any person, whether British, foreign or stateless, who commits any offence on board an aircraft registered in the United Kingdom, or contravenes any of the relevant statutory provisions on civil aviation.”

E That view, so expressed, was stated before *R. v. Martin* (2) was decided, but, for my part, I would approach the matter in that way. In *R. v. Martin* (2) the offences concerned the Dangerous Drugs Regulations, 1953, which were clearly regulations to prevent the possession of the drugs in *this* country; thus, apart from certain duly qualified medical practitioners and registered veterinary surgeons on the English registers, any person, unless so authorised, was guilty of an offence if he had possession of one of the drugs. DEVLIN, J., took the view, for which there is considerable support, that that, in effect, was purely a domestic regulation, and went on to say (4) that crimes conceived by the common law—which are mostly offences against the moral law, such as murder and theft—are not thought of as having territorial limits. Although he stated expressly (5) that he was not saying that s. 62 applied to offences at common law, it is quite clear from his judgment that he was taking the view that there was ample scope for the operation of the section, in that common law offences might well be covered by the section.

G In my judgment, the approach to this matter is that any act or omission which would constitute an offence if done in England is made an offence if done on a British aircraft, subject to this; if the offence in question is clearly one of domestic application only, then, as in *R. v. Martin* (2), s. 62 (1) does not cover that sort of offence. Accordingly I would dismiss the motion to quash.

Motion dismissed.

H Solicitors: *Director of Public Prosecutions* (for the Crown); *Turberville Smith & Co.*, Uxbridge (for the defendant).

[*Reported by N. P. METCALFE, ESQ., Barrister-at-Law.*]

(2) [1956] 2 All E.R. 86; [1956] 2 Q.B. 272.

(3) Summarised in the judgment, [1956] 2 All E.R. at pp. 87, 88, 90, 91; [1956] 2 Q.B. at pp. 273-278. (4) [1956] 2 All E.R. at p. 92; [1956] 2 Q.B. at p. 286.

(5) [1956] 2 All E.R. at p. 93; [1956] 2 Q.B. at p. 287.

MOLONEY v. A. CAMERON, LTD.

A

[COURT OF APPEAL (Holroyd Pearce, Willmer and Pearson, L.J.J.), June 9, 12, 1961.]

Building—Building regulations—Scaffolding—Scaffold in process of erection—Working platform consisting of trestles with boards—Degree of “immediate supervision” required—Stability—Whether struts necessary—Building (Safety, Health and Welfare) Regulations, 1948 (S.I. 1948 No. 1145), reg. 6, reg. 9, reg. 12.

B

The plaintiff, an experienced painter, was engaged with two workmen of equal status in painting the roof over a platform at a railway station. They used three trestles on which heavy boards were placed and which had to be moved as the work required. The structure so completed was a scaffold within the Building (Safety, Health and Welfare) Regulations, 1948, reg. 3. The men moved the trestles to a new position and, while attempting to set the boards in place, the plaintiff fell from a trestle and sustained injury. A foreman was employed on the site who supervised generally the work which was going on and he had seen the method of moving the trestles and boards. The plaintiff admitted that he needed no supervision. There were no check-bars on the trestles to prevent them from collapsing, but the plaintiff in evidence said that he had no complaint about them and had never seen a trestle with check-bars. The plaintiff claimed damages from his employers, the defendants, for breach of reg. 6* of the Regulations of 1948 in that there was no “immediate supervision” of the erection of the scaffold, of reg. 9† in that there was no proper maintenance and support of the scaffold, and of reg. 12‡ in that the trestles had no check-bars.

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Held: there had been no breach of the Building (Safety, Health and Welfare) Regulations, 1948, for the following reasons—

(i) although by reg. 6 a scaffold might not be erected or altered except under the “immediate supervision” of a competent person, yet the proper extent of that supervision was a question of degree related to the structure being built and the difficulties and dangers involved; the word “immediate” in this context was directed to the responsibility and did not indicate that in all cases every act must be supervised closely, and in the present case the workmen were competent, there was no great danger or difficulty and a breach of reg. 6 was not established.

F

(ii) regulation 9 did not apply to embryo scaffolds as distinct from completed scaffolds, and thus did not apply to the trestle at the time when it was about to have a board placed on it, but reg. 12 might, on its true construction, have applied; there was not, however, evidence that established any necessity for such struts or bracing as reg. 12 required “where necessary . . . to ensure stability.”

G

Sexton v. Scaffolding (Great Britain), Ltd. ([1952] 2 All E.R. 1085) applied. Appeal dismissed.

H

* The Building (Safety, Health and Welfare) Regulations, 1948, reg. 6. “No scaffold shall be erected or be substantially added to or altered or be dismantled except under the immediate supervision of a competent person and so far as possible by competent workmen possessing adequate experience of such work. All material for any scaffold shall be inspected by a competent person on each occasion before being taken into use.”

I

† reg. 9 (1) “All scaffolds shall be properly maintained, and every part shall be kept so fixed, secured or placed in position as to prevent so far as is practicable accidental displacement.”

‡ reg. 12 (1) “Every scaffold shall be securely supported or suspended and shall where necessary be sufficiently and properly strutted or braced to ensure stability and, unless it is properly designed and constructed as an independent scaffold, shall be rigidly connected with the building. (2) All structures and appliances used as supports for scaffolds, working platforms, gangways or runs shall be of sound construction, have a firm footing or be firmly supported, and shall where necessary be sufficiently and properly strutted or braced to ensure stability.”

- A [As to the provision of scaffolds and safety requirements, see 17 HALSBURY'S LAWS (3rd Edn.) 126, para. 206; and for cases on the subject, see 24 DIGEST (Repl.) 1078-1080, 341-352.

For the Building (Safety, Health and Welfare) Regulations, 1948, reg. 6, reg. 9 and reg. 12, see 8 HALSBURY'S STATUTORY INSTRUMENTS 213, 214, 215.]

Case referred to:

- B *Sexton v. Scaffolding (Great Britain), Ltd.*, [1952] 2 All E.R. 1085; [1953] 1 Q.B. 153; 24 Digest (Repl.) 1079, 343.

Appeal.

This was an appeal by the plaintiff from an order of HILBERY, J., dated May 20, 1960, dismissing the plaintiff's claim for damages for personal injuries alleged to have been caused by the defendants' negligence and breach of duty under the Building (Safety, Health and Welfare) Regulations, 1948. The facts appear in the judgment of HOLROYD PEARCE, L.J.

C. L. Hawser, Q.C., and *W. H. E. James* for the plaintiff.

John Thompson, Q.C., and *E. B. Gibbens* for the defendants.

- D **HOLROYD PEARCE, L.J.:** The plaintiff appeals from a judgment of HILBERY, J., dismissing his claim in negligence and breach of statutory duty against the defendants, who were his employers. The plaintiff was a painter of experience. The accident arose during the painting of a roof over the platform of West Drayton railway station. The roof was about fifteen feet high, but the height varied in parts. Three men were working, all painters of equal status. One of the plaintiff's fellow-workers was Mr. Winters, who died before the trial. The other was Mr. Sutton, who gave evidence. They used three trestles, nine feet high. The spread between the trestle legs when fully extended was four feet eight inches. The trestle was about two feet six inches wide from side to side at the top and rather more at the bottom. Two heavy deal boards were placed on top of the trestles. These boards were twelve feet long, one foot wide and two inches thick. When the three men finished painting one part of the roof they moved to another. The accident happened when they had moved and were setting up the trestles in fresh positions. The planks were then on the ground and had to be handed up by a man on the ground to a man standing on the trestles. First one end had to be handed to one man on the trestle and then the other end had to be handed to another man standing on another trestle. The trestles had been put in a row at a distance of some ten feet from each other. The plaintiff was on one of the outside trestles. He says that he climbed to the top and tested it to see that it was firm. He then came down one or two rungs, so that the middle of his chest was in line with the top. He was on the outside of this trestle—that is to say facing inwards towards the others. Sutton was on the trestle at the other end. Winters' trestle was in the middle. Winters took a board which was between the plaintiff's trestle and Winters' trestle. According to the plaintiff's account, Winters brought the board forward to the plaintiff's outstretched hands, missed them, and dropped the board, which hit the leg of the trestle two feet from the ground. As a result, the trestle started to collapse inwards towards the other trestles. When the trestle started to collapse, the plaintiff fell down on to his feet and then fell over backwards.
- I If the plaintiff's account is correct, it was the blow caused by the falling plank that caused the accident, and the defendants are clearly liable for Winters' negligence. Sutton, however, gave a different version, which the learned judge accepted. His account was this. He was standing by the other outside trestle, about twenty feet away, with Winters' trestle between him and the plaintiff. As Winters handed the board to the plaintiff, the plaintiff leaned over too far and the trestle collapsed. Sutton says that the plank did not hit the trestle. [His LORDSHIP referred to the evidence and continued:] HILBERY, J., accepted Sutton's story. In my view the learned judge was right in seeing practical

difficulties in the story as told by the plaintiff, and I do not think that he was under any erroneous delusion which should lead us to think that he did not decide this case correctly. In my view the transcript leads to the same conclusion as that at which the judge arrived by a more reliable assessment founded on the actual hearing of the witnesses. A

Counsel for the plaintiff argues that even if the judge's findings as to the accident are correct, he is entitled to succeed at all events to a partial extent in respect of the breaches of the Building (Safety, Health and Welfare) Regulations, 1948. B
All that the learned judge said on this point was:

"There was nothing the matter with the equipment. I think the plaintiff was an experienced man and says himself that he did not require supervision when moving these trestles from one position to another in order to get the scaffold into a new position required for cleaning down or painting some fresh area of the roof." C

These trestles, with planks on top, are clearly scaffolding within the definition of "scaffold" in reg. 3 (2). The plaintiff relies on reg. 6, which says:

"No scaffold shall be erected or be substantially added to or altered or be dismantled except under the immediate supervision of a competent person and so far as possible by competent workmen possessing adequate experience of such work . . ." D

Admittedly all these three men were competent; but it is argued that, though competent, they must be supervised, since a man cannot, however competent, supervise himself. That may lead to practical absurdities in certain applications of the regulation to small jobs of house decorating; but the regulation is directed to large and small tasks alike, and it does not discriminate. The words, so counsel for the plaintiff argues, are clear and mandatory. I accept, however, counsel for the defendants' submission that, though there must be supervision, the proper extent of that supervision must be a question of degree related to the structure being built, the difficulties and dangers involved. There must be some person—not the workman himself—who is "immediately" responsible. The word "immediate" is, I think, directed to this relationship rather than intended to indicate that every act must be closely supervised. In some cases the supervision may have to be constant and relate to every act that is done—where, for instance, great danger and difficulty are involved. In other cases, where there is no risk and the men are competent, the supervision may be less intensive. Here the workmen were competent; there was no great element of danger, and no element of difficulty. E
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The evidence as to supervision was this. The plaintiff said:

"There was nobody supervising us that morning. Shortly before the accident Mr. Little, the foreman, came along."

The plaintiff was asked the following questions and gave the following answers:

"Q.—You did not require supervision in the work that you were doing at West Drayton station, did you? A.—No. Q.—Mr. Little, the foreman, did keep an eye on the work which was going on, did he not? A.—Yes. Q.—He had seen the method of moving the scaffolding along? A.—Yes. Q.—You had to move the scaffold along about every two hours, did you not, because it took that time to clean a section of the roof? A.—It would not be two hours. Q.—Within two hours? A.—Say a good hour." H
I

The foreman had died, and could not be called. The plaintiff was maintaining that he did not require supervision. No detail was investigated how often the foreman came round and how close were the instructions that he gave them with regard to their work. Counsel for the plaintiff says that it was for the defendants to produce such detail; but in my view it was for the plaintiff to do so if he was alleging a breach. I do not find any satisfactory evidence that there was a breach by the defendants of reg. 6.

- A Then counsel for the plaintiff relies on regs. 9 and 12. These trestles have no check-bars, i.e., no stiff rods which could be fastened in position across the base of the legs in order to ensure that they were at their fullest extent to stop them shifting. Had there been check-bars the accident might have been prevented. It was a question of evidence whether such check-bars were necessary. No evidence was called on that point; but the plaintiff, having said that there were no check-bars on these trestles, was asked:

“Q.—Have you ever seen scaffolds of this sort with check-bars? A.—No. In the last ten years I have been working on painting and I have never worked on one with check-bars.”

In cross-examination, he gave this evidence:

- C “Q.—And you had no complaint whatever about the scaffold that you were working on? A.—None whatsoever. Q.—Indeed, as regards the different kind of trestles, you have never seen one, I think you said, with check-bars? A.—Yes. Q.—You said that? A.—I said that . . . Q.—So they do not need a rope; they are locked by a hinge, as it were, at the top? A.—Yes.”

- D It is dangerous for this court to express views on the propriety of trade equipment when there is no evidence to support those views. To a judge it may seem that he can devise better equipment or better methods of doing work than those which are used in the trade. But this view may well be caused by ignorance of the practical aspects of the matter and difficulties of practice involved. Laymen fall into similar difficulties with regard to the law. In my view, all the evidence in this case shows that the equipment was satisfactory, and it is not for us to say that there should have been check-bars.

For those reasons, I think that no case has been made out on the facts under regs. 9 and 12.

- F Counsel for the defendants seeks further to say that regs. 9 and 12 apply only to completed scaffolds and not to embryo scaffolds. They therefore do not apply to the trestles on the facts of this case, since the trestles had not yet been fitted up to become a scaffold, and therefore they had not reached the stage at which they would be covered by regs. 9 and 12. He referred to *Sexton v. Scaffolding (Great Britain), Ltd.* (1). Undoubtedly so far as reg. 9 is concerned counsel gets support for his argument. SOMERVELL, L.J., said (2):

- G “On the other hand, it is, to my mind, clear that some of the regulations, owing to their language, are plainly inapplicable to the process of erecting at the initial stage and dismantling at the final stage scaffolding which is necessary for the building work in question. For example, reg. 9 (1), which deals with the proper maintenance of scaffolding, provides that every part shall be fixed, secured or placed in position, and that is, of course, inapplicable to the process of erecting the scaffolding and fixing those parts in position.”

- H I would accept on that that reg. 9 did not apply to the trestle at the time when it was about to have the plank laid on it. In so far, however, as reg. 12 is concerned, I feel some doubt whether that did not apply to the trestle in this case. In my view that matter does not arise for decision, since under reg. 12 (1):

“Every scaffold shall be securely supported or suspended and shall where necessary be sufficiently and properly strutted or braced . . .”,

and on the evidence in this case there is nothing to show that it was not so supported or that check-bars were necessary for its support. For those reasons I would dismiss the appeal.

(1) [1952] 2 All E.R. 1085; [1953] 1 Q.B. 153.

(2) [1952] 2 All E.R. at p. 1087; [1953] 1 Q.B. at p. 158.

WILLMER, L.J.: I agree; and there is very little that I desire to add. A
So far as the facts of the case are concerned, this is, in my judgment, a case in
which it is quite impossible to interfere with the findings arrived at by the learned
judge after seeing the witnesses. I add no more on that, beyond expressing my
agreement with what **HOLROYD PEARCE, L.J.**, has said.

So far as the applicability of the Building (Safety, Health and Welfare)
Regulations, 1948, is concerned, I confess that for some time I felt a certain B
element of doubt with regard to reg. 6. Counsel for the plaintiff's argument is no
doubt attractive. *Prima facie*, he says, the regulation must be construed as
meaning exactly what it says. In answer to questions from us, he agreed that that
would mean that if, in the course of painting operations, a painter had occasion
to move the plank on which he was standing, or the trestle on which it was sup- C
ported, a matter of a few inches, in order to get better access to his work, that
would be an operation caught by reg. 6, and would have to be done "under the
immediate supervision of a competent person". It seems to me that, if the
regulation is to be construed as strictly as that, it must make operations of this
sort very difficult to carry out at all. In the result, I have come to the con-
clusion, in agreement with **HOLROYD PEARCE, L.J.**, that, in construing this D
regulation, a question of degree is involved as to the amount, or the nature, of the
supervision that is required. I think that the degree of supervision required must
be related to the nature of the work in hand and to the competence of the men
who are actually performing it. Judged by that standard, I would agree with
HOLROYD PEARCE, L.J., that in this case it has not been shown on the evidence
that there was any falling short of the degree of supervision which the nature of
the operation called for. I do not think that it is possible, therefore, in spite of the E
doubts which I entertained, to say that there has been any breach of reg. 6.

With regard to regs. 9 and 12, for the reasons already expressed by **HOLROYD**
PEARCE, L.J., I think that counsel for the defendants' argument that these
never came in question at all, because this was not ever a completed scaffold,
goes too far. That argument has, I think, some merit in relation to reg. 9; because F
(as I ventured to point out quite early in the argument) reg. 9 is directed to
"maintenance"; and that, I think, must *prima facie* mean maintenance of a
completed scaffold. In the body of reg. 9 (1) it is to be noted that the requirement
is that "every part shall be *kept* so fixed, secured or placed in position". That
seems to indicate that, so far as that regulation is concerned, what is aimed at is
the maintenance of a completed scaffold. I do not think, therefore, that the
partially erected scaffold with which we are concerned in this case was, in the G
circumstances, caught by reg. 9.

In relation to reg. 12, however, I venture to think that that regulation is applic-
able, and that, if it could be shown that a check-bar or some other form of strut
was "necessary" for the purpose of ensuring stability, the plaintiff would be
entitled to say that there had been a breach here of that regulation. But the H
argument under reg. 12 fails, in my judgment, on the evidence. Not only was there
the evidence to which **HOLROYD PEARCE, L.J.**, has already referred—that, in the
experience of the plaintiff, himself an experienced man, he had never seen
check-bars used on trestles like this at all. There was also the evidence given by
a safety officer of the defendants, on behalf of the defendants, the effect of which
was to show that, if one of these trestles is properly set up, it does not require I
any strutting or check-bar because it is not possible for it to collapse inwards.
The experiment which he tried showed that the legs had to be moved at least two
feet inwards before there was any danger of collapse. That evidence, as it seems
to me, goes to confirm the inference one would have drawn from the plaintiff's
own evidence that no check-bar was in fact "necessary" to ensure proper
stability for a trestle such as this. The suggestion, therefore, that there was a
breach in this case of reg. 12 fails, in my judgment, on the evidence of fact which
has been given. In those circumstances, I agree that the plaintiff has failed to

A make out any case of breach of any of these regulations, and, consequently, the appeal must be dismissed.

PEARSON, L.J.: I agree; and have nothing to add as to the questions of fact, or as to reg. 6 or as to reg. 9 of the Building (Safety, Health and Welfare) Regulations, 1948. As regards reg. 12, I agree with almost everything that has

B been said, but there is one point that I think it right to keep open.
First of all, the question whether any of regs. 5-30 of the Regulations of 1948 applies to the operation of erecting a scaffolding or altering a scaffolding must depend on the application of the words in reg. 4,

C "... and it shall be the duty of every contractor and employer of workmen who erects or alters any scaffold to comply with such of the requirements of regs. 5-30 as relate to the erection or alteration of scaffolds . . ."

and then the next words (in case they have any application) are,

"... having regard to the purpose or purposes for which the scaffold is designed at the time of erection or alteration . . ."

D One, therefore, must start with the supposition that any one or more of regs. 5-30 may apply to the erection or alteration of a scaffold; but one has to look at them individually to see whether they do or not. For instance, on looking at reg. 6, it is quite plain that that regulation does apply to the erection or alteration of scaffolds, because it says so in terms. It is certainly arguable that regs. 7 and 8, or parts of them, also apply. But when one comes to reg. 9, it is plain for the reasons that have been given that that regulation does not apply

E to the erection of a scaffold, because it refers to maintenance after the erection has been completed.

When one comes to reg. 12 (and this is the point on which I do not entirely agree with what has been said), that reg. provides by para. (1):

F "Every scaffold shall be securely supported or suspended and shall where necessary be sufficiently and properly strutted or braced to ensure stability . . ."

In most cases, at any rate, one would not know whether there had been a breach of that regulation or not until the erection of the scaffold had been completed, because the "sufficient and proper strutting" may be put on at any stage of the operation and, therefore, until the operation has been completed, one cannot say whether there has been any wrongful omission of sufficient and proper

G strutting. On the other hand, there may be a possible argument when erecting a scaffold, at any rate of an extensive character. There may be some intermediate stage at which one can say that there is already in existence a scaffold from which the next set of operations has to be performed. That, however, raises a question of some difficulty, when one looks back at the definition of "scaffold" in reg. 3 (2), as to what exactly is the meaning of the words "persons

H perform work in connexion with an operation to which these regulations apply". There is a problem on which it is better not to express any firm opinion in this case because it may arise for decision in some other case. It is quite clear, to my mind, on the application of reg. 12, that it has not been shown, under the words "where necessary", that it was necessary to have check-bars in the present case. On that ground, I agree that the plaintiff's claim under reg. 12

I fails. I agree that the appeal should be dismissed.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Thomas V. Edwards & Co.* (for the plaintiff); *E. P. Rugg & Co.* (for the defendants).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

DENNIS HOTELS PROPRIETARY, LTD. v. STATE OF
VICTORIA AND ANOTHER, ATTORNEY-GENERAL OF THE
COMMONWEALTH OF AUSTRALIA AND OTHERS (Intervenors).
WHITEHOUSE v. STATE OF QUEENSLAND AND OTHERS,
ATTORNEY-GENERAL OF THE COMMONWEALTH OF
AUSTRALIA AND OTHERS (Intervenors).

[PRIVY COUNCIL (Viscount Simonds, Lord Reid, Lord Radcliffe, Lord Tucker and Lord Hodson), April 24, 25, 26, 27, May 1, June 14, 1961.]

Privy Council—Australia—Appeal—Right to appeal without certificate of High Court of Australia—Determination of question “as to the limits inter se of the constitutional powers of the Commonwealth and those of any state or states”—Provisions in state Acts as to fees payable for victualler’s licence—Validity—Commonwealth of Australia Constitution Act (1900) (63 & 64 Vict. c. 12), s. 9, art. 74, art. 90.

Privy Council—Appeal—Leave to appeal—Jurisdiction—Question as to the jurisdiction to hear the appeal—Decision on jurisdiction before advising the grant of leave.

The question whether a law passed by an Australian state legislature imposes a duty of excise within the meaning of art. 90 of the Constitution of the Commonwealth of Australia, 1900, however that question is answered, is a question as to the limits inter se of the constitutional powers of the state and the Commonwealth of Australia, and, therefore, the Judicial Committee of the Privy Council have no jurisdiction to hear an appeal concerning such a question in the absence of a certificate of the High Court of Australia granted under art. 74 of the Constitution of the Commonwealth of Australia, 1900.

Dictum of EVATT, J., in *Hopper v. Egg and Egg Pulp Marketing Board (Victoria)* ((1939), 61 C.L.R. at p. 681) approved.

Dicta of the Board in *Nelungaloo Pty., Ltd. v. Commonwealth of Australia* ([1951] A.C. at p. 48), and in *A.-G. of Commonwealth of Australia v. R. and Boilermakers’ Society of Australia* ([1957] 2 All E.R. at p. 59) disapproved.

Per CURIAM: in future, when a petition for special leave to appeal to the Judicial Committee of the Privy Council discloses a question as to the Board’s jurisdiction to hear the appeal, the Board will make it their general practice to endeavour to give their final decision on the point before advising the grant of leave (see p. 948, letter F, post).

Appeals dismissed.

[As to appeal from the High Court of Australia, see 5 HALSBURY’S LAWS (3rd Edn.) 690, para. 1476; and for cases on the subject, see 8 DIGEST (Repl.) 830-832, 831-842.]

As to financial relations between the Commonwealth and the states, see 5 HALSBURY’S LAWS (3rd Edn.) 516, para. 1127.

For the Commonwealth of Australia Constitution Act (1900), s. 9, art. 74, art. 90, see 6 HALSBURY’S STATUTES (2nd Edn.) 282, 285.]

Cases referred to:

A.-G. for New South Wales v. New South Wales (Collector of Customs), [1909] A.C. 345; 78 L.J.P.C. 114; 100 L.T. 578; 8 Digest (Repl.) 831, 836.

A.-G. of Commonwealth of Australia v. R. and Boilermakers’ Society of Australia, Kirby v. R. and Boilermakers’ Society of Australia, [1957] 2 All E.R. 45; [1957] A.C. 288; [1957] 2 W.L.R. 607; 3rd Digest Supp.

Baxter v. Taxation Comrs., (1907), 4 C.L.R. 1087; 8 Digest (Repl.) 833, 1466.

Hopper v. Egg and Egg Pulp Marketing Board (Victoria), (1939), 61 C.L.R. 665.

James v. Commonwealth of Australia (No. 2), [1936] 2 All E.R. 1449; [1936] A.C. 578; 105 L.J.P.C. 115; 155 L.T. 393; 8 Digest (Repl.) 753, 299.

- A *James v. Cowan*, [1932] All E.R. Rep. 413; [1932] A.C. 542; 101 L.J.P.C. 149; 147 L.T. 321; 8 Digest (Repl.) 759, 303.
M'Arthur (W. & A.), Ltd. v. Queensland, (1920), 28 C.L.R. 530, 556; 8 Digest (Repl.) 761, 911.
Nelson (No. 2), Ex p., (1929), 42 C.L.R. 258; 3 A.L.J. 66; [1929] A.L.R. 177; 8 Digest (Repl.) 833, 1468.
- B *Nelungaloo Pty., Ltd. v. Commonwealth*, (1952), 85 C.L.R. 545.
Nelungaloo Pty., Ltd. v. Commonwealth of Australia, [1951] A.C. 34; 8 Digest (Repl.) 831, 841.
Pirrie v. McFarlane, (1925), 36 C.L.R. 170; 8 Digest (Repl.) 757, 848.

Appeals.

- C Appeals by special leave from orders of the Full Court of the High Court of Australia (DIXON, C.J., McTIERNAN, FULLAGAR, KITTO, TAYLOR, MENZIES and WINDEYER, JJ.), dated Feb. 26, 1960, allowing demurrers by the respondents in each appeal to statements of claim of the appellants in each appeal.

- In *Dennis Hotels Proprietary, Ltd. v. State of Victoria and Another*, the appellants claimed that s. 19 (1) (a) and s. 19 (1) (b) of the Licensing Act, 1928, of the State of Victoria were invalid. The Attorney-General of the Commonwealth of Australia, and the States of New South Wales, Western Australia, South Australia and Tasmania, and their Attorney-Generals, intervened. In *Whitehouse v. State of Queensland and Others*, the appellant claimed that s. 18 (1) of the Liquor Acts, 1912 to 1958, of the State of Queensland was invalid. The Attorney-General of the Commonwealth of Australia and the State of New South Wales and its Attorney-General intervened. By the order giving special leave to appeal, leave was reserved to the respondents in each appeal to raise as a preliminary point at the hearing of the appeal the plea that, in the absence of a certificate of the High Court of Australia granted under art. 74 of the Constitution of the Commonwealth of Australia, 1900, the appeal was incompetent. The facts are set out in the judgments of the Board.

- F DENNIS HOTELS PROPRIETARY, LTD. v. STATE OF VICTORIA AND ANOTHER.
Gregory Gowans, Q.C. (of the Australian Bar), *J. G. Le Quesne* and *J. R. O'Shea* (of the Australian Bar) for the appellants.

The Solicitor-General of the State of Victoria (Sir Henry Winneke, Q.C.), *John McI. Young*, *Z. Cowan* (all of the Australian Bar) and *R. A. Gatehouse* for the respondents.

- G *The Attorney-General of the Commonwealth of Australia (Sir Garfield Barwick, Q.C.)* and *M. N. Helsham* (both of the Australian Bar) for the intervener, the Attorney-General of the Commonwealth of Australia.

The Attorney-General of the State of New South Wales (R. R. Downing), *K. J. Holland* (both of the Australian Bar) and *Mervyn Heald* for the interveners, the State of New South Wales and the Attorney-General of the State of New South Wales.

- H *The Solicitor-General of the State of Tasmania (D. M. Chambers, Q.C.)*, *Z. Cowan* (both of the Australian Bar) and *R. A. Gatehouse* for the interveners, the State of Western Australia and the Attorney-General of the State of Western Australia, the State of South Australia and the Attorney-General of the State of South Australia, and the State of Tasmania and the Attorney-General of the State of Tasmania.

I WHITEHOUSE v. STATE OF QUEENSLAND AND OTHERS.

A. L. Bennett, Q.C. (of the Australian Bar), and *J. G. Le Quesne* for the appellant.

H. T. Gibbs, Q.C. (of the Australian Bar), and *Mervyn Heald* for the respondents.

The Attorney-General of the Commonwealth of Australia (Sir Garfield Barwick, Q.C.) and *M. N. Helsham* (both of the Australian Bar) for the intervener, the Attorney-General of the Commonwealth of Australia.

The Attorney-General of the State of New South Wales (R. R. Downing), *K. J. Holland* (both of the Australian Bar) and *Mervyn Heald* for the interveners,

the State of New South Wales and the Attorney-General of the State of New South Wales. A

DENNIS HOTELS PROPRIETARY, LTD. v. STATE OF VICTORIA AND ANOTHER.

LORD RADCLIFFE: The appeal in this case comes before the Board by special leave granted by Her Majesty by Order in Council dated Aug. 3, 1960. By this order, leave was reserved to the respondents to raise as a preliminary point at the hearing of the appeal the plea that, in the absence of a certificate of the High Court of Australia granted under art. 74 of the Constitution of the Commonwealth of Australia, the appeal was incompetent. This preliminary objection to jurisdiction was duly raised and argued before the Board concurrently with the opening of an appeal in similar circumstances, *Whitehouse v. State of Queensland* (1), and at the conclusion of the argument their Lordships intimated that, in their opinion, the objection succeeded and that it was not open to them to proceed to the hearing of the substantive appeals. It is now for their Lordships to state their reasons for this opinion. B C

Article 74 of the Constitution preserves the prerogative right of Her Majesty in Council to grant special leave of appeal from the High Court, but subjects that right to certain limitations which are set out in the article. The main limiting provision is to the effect that no appeal is to be permitted to the Queen in Council from a decision of the High Court on any question, howsoever arising, as to the limits inter se of the constitutional powers of the Commonwealth and those of any state or states, or as to the limits inter se of the constitutional powers of any two or more states, unless the High Court itself certifies that the question is one which ought to be determined by Her Majesty in Council. A lengthening line of judicial opinions of some complexity has by now made it clear that the meaning of these words is more elusive than at first sight it would appear to be. D E

The nature of the decision of the High Court from which it is sought to appeal can be stated with fortunate brevity. It is convenient to relate it in terms of the action that is the subject of the appeal now under consideration but there is no difference of any materiality between the facts and circumstances of this appeal and the considerations relevant to it and those of and relevant to the second appeal. Whatever is said with regard to the one is, therefore, equally valid with regard to the other. The appellants were the plaintiffs in the action. The relief which they claimed against the respondents as defendants was (i) a declaration that two provisions of the Licensing Act, 1928, of the State of Victoria, s. 19 (1) (a) and s. 19 (1) (b), were invalid, and (ii) the return of certain fees paid thereunder in respect of what were called a "victualler's licence" and a "temporary victualler's licence" prescribed by those provisions. The ground on which this claim of invalidity was rested was set out in para. 12 of the appellants' statement of claim, which ran as follows: F G

"The said provisions of the said s. 19 of the said Licensing Act purport to impose a duty of excise contrary to the provisions of art. 90 of the Constitution of the Commonwealth and are and at all times have been invalid." H

There was no other ground alleged; the whole issue lay in the question whether the fees imposed by s. 19 (1) (a) and (b) were duties of excise within the meaning of the Constitution Act and, as such, within the exclusive legislative power of the Federal Parliament. The respondents demurred to the whole of this statement of claim on the ground that neither of the impugned provisions imposed a duty of excise contrary to art. 90 of the Constitution, and that each of them was a law validly made by the Parliament of the State of Victoria. By the judgment of the High Court, from which it is now sought to appeal, this demurrer has been sustained so far as it relates to s. 19 (1) (a) by a majority I

(1) See p. 948, post.

A of four to three, but overruled, also by a majority of four to three, so far as it relates to s. 19 (1) (b). The court thus decided that s. 19 (1) (a) did not amount to the imposition of a duty of excise, but s. 19 (1) (b) did amount to the imposition of such a duty. The respondents do not seek to disturb the judgment in its application to s. 19 (1) (b), but the appellants seek its reversal so far as it relates to s. 19 (1) (a).

B It is apparent, therefore, that success or failure in the appeal would turn entirely on the question whether art. 90 of the Constitution applies to the statutory enactment which is contained in the impugned section of the state licensing law. The material words of art. 90 are as follows:

C “On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive.”

If s. 19 (1) (a) of the state Act does purport to impose a duty of excise within the meaning of art. 90, then the state does not possess legislative power to enact this because, under the Constitution, only the Commonwealth has legislative power in that field. On the other hand, if the state's enactment is not to be read as imposing an excise duty, then there is nothing in the Commonwealth's powers under the Constitution which impairs the state's legislative authority to make s. 19 (1) (a) into law. Does the determination of this question involve a question as to the limits inter se of the constitutional powers of the Commonwealth and those of the state, as the respondents contend that it does? There are, at any rate, two generally accepted descriptions of what constitutes an inter se question in this sense, and both of them lend support to the respondents' contention. First, it has always been recognised that the general purpose of the agreement enacted in art. 74 is to reserve for the final decision of the High Court in Australia, unless the court itself wishes to refer the matter to the Judicial Committee,

F “questions which arise in connexion with the federal distribution of power between the Commonwealth on the one hand and the states on the other”

(QUICK AND GARRON, *THE ANNOTATED CONSTITUTION OF THE AUSTRALIAN COMMONWEALTH*, p. 757). The clear intention of art. 74, as was said by ISAACS, J., in *Pirrie v. McFarlane* (2), is that

G “on the purely Australian question of the distribution of the totality of governmental powers on this continent, the High Court of Australia—the highest judicial organ created by the Australian people—was to be the final arbiter, unless it voluntarily requested the intervention of the Sovereign in Council.”

The questions so reserved are questions “characteristic of federalism” (per DIXON, J., in *Nelungaloo Pty., Ltd. v. Commonwealth* (3)). It would be a strange departure from this general conception if a case was not to be treated as raising an inter se question although the single proposition that it put in issue was that a state had no power to make a particular enactment because, under the Constitution, the power to pass such legislation had been allotted to the Commonwealth alone.

I Secondly, the words “inter se” are pregnant words, and what must be looked for is an issue that involves some reciprocal relation between the extent or nature of the powers on one side and the powers on the other. “The essential feature”, as was said by DIXON, J., in a well-known passage in *Ex p. Nelson* (No. 2) (4), is that there should be

“a reciprocal effect in the determination or ascertainment of the extent or the constitutional supremacy of either of them.”

(2) (1925), 36 C.L.R. at p. 196.

(3) (1952), 85 C.L.R. at p. 570.

(4) (1929), 42 C.L.R. at p. 272.

Here again it seems that, in any ordinary sense of language, there is plainly a reciprocal effect on the extent or supremacy of Commonwealth and state powers respectively when a decision is given on the question whether a state cannot pass a particular law simply because only the Commonwealth can. Indeed, their Lordships see nothing unreasonable in the view of a recent commentator on the Australian Constitution (see WYNES—LEGISLATIVE, EXECUTIVE AND JUDICIAL POWERS IN AUSTRALIA (2nd Edn.) (1956), at p. 681) that questions relating to the limits of the exclusive powers of the Commonwealth are “cases par excellence of inter se cases”, whatever be adopted as the precise definition of the test of reciprocity.

What is challenged in a case such as the present is the validity of a state law; what is argued is that, having regard to the powers exclusively allotted to the Commonwealth under the Constitution, the state's power of law-making does not extend to cover the enactment impugned. Such a proposition does not differ in any essential respect from that advanced in *Baxter v. Taxation Comrs.* (5), in which it was held that, having regard to the executive functions and powers vested in the Commonwealth by the Constitution, a state enactment was invalid to the extent that its full implementation according to its letter would trespass on that field of power; or from that advanced in *Pirrie v. McFarlane* (6), where the issue was whether a state law was within the legislative power of the state in so far as its operation trenching on the defence power reserved to the Commonwealth by the Constitution. A similar question was present, though it may not have been exposed, in *A.-G. for New South Wales v. New South Wales (Collector of Customs)* (7), in which the contest of power was between the exclusive power of legislation in the Commonwealth and the state executive powers. In all these cases (whatever the ultimate fate of the doctrine of the immunity of instrumentalities asserted in *Baxter's* case (5)) it was held judicially that inter se questions were involved.

There are, however, two recent opinions delivered by this Board which appear to contain general statements to the effect that no inter se question is capable of arising when the extent of an exclusive constitutional power of the Commonwealth is the subject of dispute; and the forcible argument of counsel for the appellants has naturally dwelt on these statements and endeavoured to propound a theory of the interpretation of art. 74 which would give support to such a view. The first passage consists of a sentence in the opinion of the Board in *Nelungaloo Pty., Ltd. v. Commonwealth of Australia* (8), in which LORD NORMAND said:

“Equally, when a power is declared to be exclusively vested in the Commonwealth no question can arise as to the limits inter se of the powers of the Commonwealth and those of any state, and on this point the reasoning of DIXON, J., in *Ex p. Nelson* (No. 2) (9) appears to their Lordships to be conclusive.”

The second passage occurs in *A.-G. of Commonwealth of Australia v. R. and Boilermakers' Society of Australia* (10), where VISCOUNT SIMONDS, in delivering the opinion of the Board, said:

“If the power is one, of which the exercise is exclusively vested in the Commonwealth, no such [inter se] question arises. It is only where the delimitation of the Commonwealth power necessarily implies a decision as to the extent of a subordinate state power that an inter se question truly arises.”

Their Lordships do not think that they can regard the law as settled by these statements. In neither case were they essential or even directly relevant to

(5) (1907), 4 C.L.R. 1087.

(6) (1925), 36 C.L.R. 170.

(7) [1909] A.C. 345.

(8) [1951] A.C. at p. 48.

(9) (1929), 42 C.L.R. at p. 272.

(10) [1957] 2 All E.R. at p. 59; [1957] A.C. at p. 324.

A the decisions come to; in each case, they appear as incidental to a more or less comprehensive summary of the various aspects in which inter se questions can arise under art. 74. When the proposition which they appear to state is scrutinised at close quarters, as has to be done for the purpose of deciding the preliminary objection in the present case, its very generality is sufficient to arouse doubts as to its correctness. This has already been pointed out by B the present Chief Justice (DIXON, C.J.) when giving his judgment in the High Court of Australia in *Nelungaloo Pty., Ltd. v. Commonwealth* (11). The first passage in question does not offer any reasoned analysis of the conclusion it states, since it merely assumes the point to have been established by the judgment of DIXON, J., in *Ex p. Nelson* (No. 2) (12), to which it will be necessary to turn. The second passage is evidently intended to re-state the same proposition without C re-considering its basis. The question to which their Lordships must now address themselves, therefore, is whether the reasoning employed by DIXON, J., in *Ex p. Nelson* (No. 2) (12), when dealing with the connexion between art. 92 of the Constitution and inter se questions, can safely or even properly be transferred to the consideration of this other article, art. 90, and its relation to inter se questions. For this purpose *Ex p. Nelson* (No. 2) (12) requires a few words D of introduction.

Article 92 contains the well-known injunction, "trade, commerce, and intercourse among the states . . . shall be absolutely free". It was accepted from the first that this overrode the exercise of constitutional powers by any authority to whom the injunction was addressed; but, over the years, judicial opinion in Australia fluctuated on the question whether it was addressed to the Commonwealth as well as to the states or to the states alone. At first the former view prevailed, and, so long as it did, no doubt seems to have been entertained that an inter se question was not raised by a case which involved the application of art. 92. Whether legislation of state or of Commonwealth or some other exercise of the powers of one or other was the subject of challenge, it was seen that a decision of the issue had no reciprocal bearing on the extent or nature of any F power of the other authority.

In course of time, however, judicial opinion changed, and in *W. & A. M'Arthur, Ltd. v. Queensland* (13), the High Court decided that art. 92 bound the states alone. This view was later to be overruled by the opinion of the Judicial Committee in *James v. Commonwealth of Australia* (No. 2) (14); but *Ex p. Nelson* (No. 2) (12) came before the High Court at a time when the *M'Arthur* decision (13) G represented the prevailing doctrine. On those premises, the court had before it the issue whether an attack on the validity of state legislation as infringing art. 92 raised an inter se question and whether, if it did, the instant case was one which justified the grant of a certificate under art. 74. Of the six judges who participated in hearing the application for a certificate, two, KNOX, C.J., and GAVAN DUFFY, J., expressed no opinion on the inter se question, since they were not in any event H in favour of granting a certificate; two, ISAACS and STARKE, JJ., held that an inter se question did arise, while two others, RICH and DIXON, JJ., held that it did not. Both ISAACS and STARKE, JJ., agreed that, in any event, there was no case for the grant of a certificate. The argument that was pressed on the court was that, as the Commonwealth had legislative power over "trade and commerce with other countries and among the states" under art. 51 (i), any decision that I the state could not pass a particular enactment because its terms came within the prohibition of art. 92 necessarily had a bearing on the powers of the Commonwealth as well as of the state, since it meant that over that matter at any rate the Commonwealth alone had legislative power. In essence, it was an argument that an art. 92 decision helped to define an exclusive power of the Commonwealth and so raised an inter se question. It was on the acceptance or rejection

(11) (1952), 85 C.L.R. at p. 574.

(13) (1920), 28 C.L.R. 530.

(12) (1929), 42 C.L.R. 258.

(14) [1936] 2 All E.R. 1449; [1936] A.C. 578.

of this proposition that the four members of the court divided. It seems plain from what was said by RICH and DIXON, JJ., that, had they been prepared to accept this premise that a decision on the effect of art. 92 did "say something about" the Commonwealth power, which would thus become exclusive, they would have joined ISAACS and STARKE, JJ., in holding that an inter se question was involved. One or two quotations from the judgments will serve to illustrate the reasoning employed. On the one side, STARKE, J., said (15):

"The decision, it appears to me, affects the distribution of constitutional power as between the Commonwealth and the states: it affirms certain constitutional power in the Commonwealth which it denies to the states: it measures out the area over which the Commonwealth and the states can respectively operate."

On the other side, RICH, J., said that, in his view, the real question was as to the extent and application of the prohibition laid on the states. The sole question was (16) "whether the power was withdrawn from the state irrespective of the extent or existence of the Commonwealth power". The word "irrespective" is the key word in this context. So, too, DIXON, J., speaking (17) of art. 92, said:

"Whether these provisions deny much or little power to the states must be immaterial as well for the purpose of defining the subject-matter of Commonwealth power as for the purpose of determining its supremacy, of measuring its constitutional strength."

And again (18):

"The ambit of the commerce power is the same because art. 51 (i) defines it, not art. 92. Indeed it is hard to see how a decision upon art. 92 could even provide a judicial precedent which, if followed, would determine a question upon art. 51 (i). For the power which is conferred upon the Commonwealth Parliament by art. 51 (i) is not coextensive with that denied to the states by art. 92. It is much greater . . ."

These observations of RICH and DIXON, JJ., as well as their conclusion, evidently commended themselves to this Board in *James v. Cowan* (19), and their Lordships accept them as authoritative. But the quotations that have been made above show that they are far from supporting the conclusion that a decision as to the extent of a power which is in truth declared by the Constitution to be vested exclusively in the Commonwealth and so denied to the states does not raise an inter se question. On the contrary, they tend to show that it does. For, while it was impossible, when interpreting art. 92, to say that the interpretation of it did anything to define the limits or nature of the Commonwealth legislative power over trade and commerce, it is equally impossible, when interpreting art. 90, to say anything else than that the interpretation of such words as "duties of customs and of excise" and "bounties" bears at one and the same time on the limits of the Commonwealth's powers in this field and on the limits of the state's powers in everything that is not within this field or otherwise reserved to the Commonwealth. For it is the limits of the Commonwealth power themselves that exclude the state power. To put it shortly, the considerations arising from the proposition "the state has no power to do this, whether or not the Commonwealth has" cannot be equated with the considerations implicit in the proposition which is involved in the present case, "the state has no power to do this, because only the Commonwealth has."

An explanation on these lines as to the different implications of art. 90 and art. 92 has already been offered by EVATT, J., in *Hopper v. Egg and Egg Pulp Marketing Board (Victoria)* (20). The learned judge there says (21):

(15) (1929), 42 C.L.R. at p. 269.

(16) (1929), 42 C.L.R. at p. 267.

(17) (1929), 42 C.L.R. at p. 272.

(18) (1929), 42 C.L.R. at p. 273.

(19) [1932] All E.R. Rep. 413; [1932] A.C. 542.

(20) (1939), 61 C.L.R. 665.

(21) (1939), 61 C.L.R. at p. 681.

- A "in dealing with art. 92 no question as to the limits inter se of the constitutional powers of the Commonwealth and the states arises; but in relation to art. 90 such a question is involved . . . The question whether a law passed by a state legislature imposes a duty of excise, however the question is answered, is a question as to the limits inter se of the constitutional powers of state and Commonwealth. For the question can be answered adversely to the state only by asserting that, however far the area of power of state powers is coextensive with Commonwealth powers in relation to taxation, the boundary of the state area of power falls far short of the power sought to be exercised."
- B

- C For the reasons which they have set out earlier, their Lordships regard this as a correct statement of the constitutional position. In their opinion, two points emerge with certainty from the analysis that they have made. One is that the considerations that would prevent a decision on art. 92 from involving an inter se question, assuming that the article bound the states alone, do not apply to a decision on the effect of art. 90 as denying to a state a power which it reserves to the Commonwealth. The second is that the reference to the position of an exclusive power of the Commonwealth in relation to the raising of inter se questions which is found in the *Nelungaloo* opinion (22) of this Board and is repeated in the *Boilermakers'* case (23) is not well founded.
- D

- E In arriving at this conclusion, their Lordships have given full attention to two arguments on which the appellants naturally placed much reliance. It was said that the principle of the judgment of DIXON, J., in the *Nelson* case (24) was properly applicable to art. 90 because the difference between the constitutional effects of art. 90 and art. 92 was merely one of form. Admittedly, art. 92 was no more than a prohibition but then, when art. 90 itself was analysed, there was nothing more in it than a prohibition either. It did not "give" any power to the Commonwealth—it simply withdrew it from a state. But their Lordships do not think that it can be right to interpret the words of art. 74 by recasting other articles of the Constitution in this way. The instrument that contains it was shaped as a whole, and the structure that it assumed and the phrases and forms of expression that were adopted cannot be treated as of no importance in relation to each other, merely because it is thought that, in substance, a form that was not chosen might as well have been used in place of one that was. Article 90 was directly expressed in terms that relate to the distribution of powers. It is impossible, therefore, by reasoning on these lines to obliterate the distinction between art. 90, a decision on which plots at any rate one point as falling on one side or other of the line that separates what the state can do from what the Commonwealth alone can do, and art. 92, a decision on which, even given the *Nelson* premises (24), could plot no point in relation to any such imaginary boundary. This consideration was, after all, the basis of the reasoning of DIXON, J., in that case, and it is materially reinforced by the observation of this Board in *James v. Commonwealth of Australia* (No. 2) (25):
- F
- G
- H

"... though trade and commerce mean the same thing in art. 92 as in art. 51 (i), they do not cover the same area, because art. 92 is limited to a narrower context by the word 'free' . . ."

- I Lastly, their Lordships have given most careful consideration to what was said by the present Chief Justice in *Nelungaloo Pty., Ltd. v. Commonwealth* (26), in suggested explanation of the sentence in the Board's *Nelungaloo* opinion (22) which has already been discussed. The purport of the explanation is to suggest that, while it could not have been in the mind of the Board to lay down a rule about exclusive powers in the absolute terms that were apparently employed,

(22) [1951] A.C. 34.

(23) [1957] 2 All E.R. 45; [1957] A.C. 288.

(24) (1929), 42 C.L.R. 258. (25) [1936] 2 All E.R. at p. 1477; [1936] A.C. at p. 632.

(26) (1952), 85 C.L.R. at p. 574.

they may have intended to rely on a distinction between an exclusive power over "part only" of a subject of federal power (such as excise and customs, looked at as part of taxation) and an exclusive power that is coextensive with the whole legislative subject (such as bounties). With great respect to the learned Chief Justice, who was plainly seeking to find an acceptable interpretation of a passage that was bound to cause difficulty, their Lordships do not think that it would be a satisfactory development to adopt his explanation. It is not one which proceeds by any necessity of reasoning from the observations made in the *Nelson* case (27) and the distinction between an exclusive power that forms part of a defined subject of an art. 51 placitum and one that is coextensive with such a subject seems to them to be somewhat too refined for a useful application of the words of art. 74. In their view, the "powers" referred to in that article can be exclusive powers just as much as powers of any other quality, the only difference being that powers that are exclusive offer the most obvious occasion for the drawing of reciprocal limits. Moreover, it does not appear to them that it is a significant consideration in this connexion that the words "excise" or "customs" are not the subject of a separate placitum in art. 51. Reading the Constitution as a whole, it would be impossible to doubt that the combined effect of art. 51, art. 52 and art. 90 is to confer on the Commonwealth alone what can properly be spoken of as the customs or excise power. In dealing with art. 90, therefore, their Lordships prefer to adhere to the simpler conception that any decision that directly bears on the constitutional distribution of powers between state and Commonwealth and so has a reciprocal effect on their delimitation is an inter se question.

Their Lordships will, therefore, humbly advise Her Majesty that they have no jurisdiction to hear this appeal, no certificate from the High Court having been obtained, and that it must be dismissed. Having regard to the special circumstances, their Lordships make no order for payment of costs with regard to the petition for special leave; the appellants must pay the respondents' costs of the appeal. There will be no order as to the costs of the interveners.

Their Lordships take this occasion to give notice that, in future, when a petition for special leave discloses a question as to the Board's jurisdiction to hear the appeal, they will make it their general practice to endeavour to give their final decision on the point before advising the grant of leave. The practice of reserving such preliminary points for the opening of the appeal is of long standing and has, no doubt, advantages as well as disadvantages. Unfortunately, it is impossible in any particular case to know on which side the balance of advantage inclines until the question of jurisdiction has been argued and decided; but their Lordships have come to the conclusion that, under modern conditions, the general rule which will be more likely to meet the interests of the parties and the convenience of their advisers, without prejudicing the cause of justice, would be to hear and express their opinion on an objection to their jurisdiction before making any recommendation as to the granting of special leave.

WHITEHOUSE v. STATE OF QUEENSLAND AND OTHERS.

LORD RADCLIFFE: The respondents in this appeal raised the same objection to the jurisdiction of the Board as was taken in the appeal *Dennis Hotels Proprietary, Ltd. v. State of Victoria* (28), and the arguments were heard concurrently on both appeals, since it was common ground that a decision on the objection to one must necessarily apply to the objection in the other. At the conclusion of the arguments, their Lordships announced that the objections must be upheld—their reasons for so deciding are set out in full in their opinion in the *Dennis Hotels* appeal (29) and they must be taken as governing this appeal.

For those reasons, their Lordships will humbly advise Her Majesty that

A the appeal must be dismissed. Having regard to the special circumstances, they make no order for payment of costs with regard to the petition for special leave; the appellant must pay the respondents' costs of the appeal. There will be no order as to the costs of the interveners.

Appeals dismissed.

B Solicitors: (In *Dennis Hotels Proprietary, Ltd. v. State of Victoria*) Markby, Stewart & Wadesons (for the appellants); Freshfields (for the respondents); Coward, Chance & Co. (for the intervener, the Attorney-General of the Commonwealth of Australia); Light & Fulton (for the interveners, the State of New South Wales and the Attorney-General of the State of New South Wales); Farrer & Co. (for the interveners, the States of Western Australia, South Australia and Tasmania, and their Attorney-Generals).

C (In *Whitehouse v. State of Queensland*) Markby, Stewart & Wadesons (for the appellant); Freshfields (for the respondents); Coward, Chance & Co. (for the intervener, the Attorney-General of the Commonwealth of Australia); Light & Fulton (for the interveners, the State of New South Wales, and the Attorney-General of the State of New South Wales).

D [Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

WILKINSON v. WILKINSON.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), June 5, 6, 7, 1961.]

E Divorce—Judicial separation—Reversal of decree—Limited appearance entered by husband, respondent in suit—Suit set down for hearing by wife petitioner, but notice of setting down not received by husband—Decree granted to wife—Husband not present at hearing—Application by husband to set aside decree—“Absence” of husband—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 14 (3).

F “Absence” in s. 14 (3) of the Matrimonial Causes Act, 1950, means physical absence from the hearing.

G A husband, respondent to a petition presented by his wife in 1957 for judicial separation, had entered a limited appearance, indicating in the memorandum of appearance that he did not intend to defend the case at the hearing. In 1958 he decided to defend and to bring cross-charges, but no answer or cross-petition was filed. In August, 1958, the case was set down for hearing, but no notice of setting down was received, so the court found, by or on behalf of the husband. A decree of judicial separation was granted in December, 1958, the husband not being present or represented at the hearing, of which he did not know. On petition by the husband under s. 14 (3) of the Matrimonial Causes Act, 1950, to reverse the decree,

H **Held:** as the husband had had no notice of the setting down of the petition and so was absent from the hearing, the court would, in the circumstances, exercise its discretion under s. 14 (3) of the Matrimonial Causes Act, 1950, and set aside the decree of judicial separation.

Phillips v. Phillips ((1866), L.R. 1 P. & D. 169) considered.

I [As to the reversal of decrees of judicial separation, see 12 HALSBURY'S LAWS (3rd Edn.) 286, para. 562; and for cases on the subject, see 27 DIGEST (Repl.) 602, 5630-5635.

For the Matrimonial Causes Act, 1950, s. 14 (3), see 29 HALSBURY'S STATUTES (2nd Edn.) 401.]

Case referred to:

Phillips v. Phillips, (1866), L.R. 1 P. & D. 169; 35 L.J.P. & M. 70; 14 L.T. 604; 27 Digest (Repl.) 602, 5630.

Petition.

In this case the husband applied by petition under the Matrimonial Causes Act, 1950, s. 14 (3), for the reversal of a decree of judicial separation made against him on Dec. 12, 1958.

In July, 1957, the wife, who was a Roman Catholic, presented a petition for judicial separation on the ground of the husband's cruelty and in her petition she claimed custody of the children, maintenance and secured provision and costs. The husband, who at that stage hoped that the wife would change her mind and petition for divorce, by his then solicitors entered an appearance limited to the wife's claims for custody, maintenance and secured provision, and costs. Towards the end of 1957 the husband changed his solicitors and notice of change was duly filed. Early in 1958 the husband told his then solicitors that he was anxious to defend the wife's charge of cruelty and to make a cross-charge of cruelty. The wife obtained an order for security for her costs but the husband's then solicitor told the husband that he did not think that the facts justified an application for leave to contest the suit. The solicitor took the opinion of two counsel and thought it tactically wise to do nothing until the end of September, 1958, by which time the husband might be entitled to allege desertion by the wife for the requisite period of three years. In October, 1958, there was paid on the husband's behalf the first instalment of security. At the end of December, 1958, the husband's solicitor forwarded to the husband a draft answer and cross-petition. In January, 1959, however, the husband wrote to his solicitor that he had been told by his wife that she had obtained "a court order for separation". The husband then instructed a third firm of solicitors, who after inquiries discovered that the wife had been granted a decree of judicial separation on Dec. 12, 1958. The wife's solicitors contended that on Aug. 20, 1958, they had written to the husband's then solicitors giving them notice that the suit had that day been set down for trial. The solicitors acting for the husband at that time denied ever having received that notice. Accordingly, on Mar. 3, 1959, the husband presented the present petition asking for a reversal of the decree granted to the wife on Dec. 12, 1958, on the ground, among others, that the decree had been obtained in the absence of the husband because neither he nor his then solicitors received the notice of setting down. The wife in answer alleged that in July, 1957, the husband had entered an appearance by his first solicitors, indicating in the memorandum of appearance that he did not intend to defend the case at the hearing and that her solicitors had given notice in writing on Aug. 20, 1958, that the suit had been set down for hearing.

N. H. Oster for the husband.

H. Lester for the wife.

KARMINSKI, J., considered the pleadings, stated the facts and reviewed the evidence adduced before him and found as a fact that the husband's then solicitors had never received the notice that the suit had been set down for hearing. His LORDSHIP continued: I have to consider now what the position is on that finding. There was a limited although not a general appearance entered on behalf of the husband. The notice of setting down was never received by him or by his solicitors. It now becomes necessary to look at s. 14 (3) of the Matrimonial Causes Act, 1950, which says this:

"The court may, on the application by petition of the husband or wife against whom a decree for judicial separation has been made, and on being satisfied that the allegations contained in the petition are true, reverse the decree at any time after the making thereof, on the ground that it was obtained in the absence of the person making the application, or, if desertion was the ground of the decree, that there was reasonable cause for the alleged desertion."

A There was no desertion alleged in this case, and the concluding sentence of that section therefore is not applicable. The important words of the section are "on the ground that it was obtained in the absence of the person making the application."

It was argued on behalf of the wife here that a person cannot be absent when an appearance, although a limited appearance, had been entered in the suit.

B In support of that proposition counsel for the wife cited the one authority which I think is an authority on this point, *Phillips v. Phillips* (1). That case was decided in 1866, early in the history of this court. The husband, who was seeking the reversal of a decree, said that he was ignorant of the course of practice of the court; that he had not a legal adviser or legal assistance, and was defending himself, feeling assured that he had a satisfactory answer to the petition. He

C said that he had had no notice of the hearing, which he was expecting to receive as he had been served personally in accordance with the rules, and, therefore, did not know that it was coming on for trial with the result that he could not attend the hearing, which he intended to do, and to oppose the petition, and in his absence the decree was made. It seems that he heard of the decree having been pronounced from a friend who saw it in the newspaper, and he asked for the decree to be set aside. The wife demurred to the petition and also traversed it. The matter having been argued on demurrer before the Judge Ordinary, LORD PENZANCE, he directed it to be argued before the full court which in addition to himself included KEATING, J., and MELLOR, J. The matter was very fully argued by Dr. Spinks for the demurrer (the wife) and Mr. Willis for the petitioner (the husband). Both counsel must have been very familiar at that

E date with the practice of the ecclesiastical courts before 1857. It is not necessary to deal with the arguments of counsel, which are referred to in the judgment of LORD PENZANCE. He said this (2):

"I conceive that the argument on both sides has been pressed too far. I think the contention on the part of the wife that the word 'absence' means 'absence without citation', and that only, is too wide. The

F argument on the other side is, that the word absence means that the party has not appeared, and that provided the petitioner can show that he was absent in that sense when the decree was obtained, and that the decree was improperly obtained, he is, without going any further, entitled to succeed. I think that argument also goes too far. The only construction satisfactory

G to my mind which can be put on the section is something between the two, namely, that where the respondent has not in fact appeared, he may present a petition under this section; that in his petition he must state the reasons of his absence, and the ground on which he asks to be relieved from the results of it; in other words, he must state how it happened that the decree was obtained in his absence, and he must explain the circumstances

H that gave rise to his absence; and that he must further state circumstances calculated to satisfy the court that the decree was wrong."

I pause there for a moment because counsel for the wife has argued that that means that if the husband appeared he was not absent. I do not think that the judgment of the full court means anything of the kind. Indeed, MELLOR, J., who with KEATING, J., agreed with the Judge Ordinary, said this (3):

I "Absence in the sense of non-appearance, is therefore a well known and well understood condition of things, and I think that is the sense in which it is used in the section, for although the petitioner was served with the citation, he was absent for all the purposes of the suit, as by not appearing, he was unable to take any part in the proceedings."

(1) (1866), L.R. 1 P. & D. 169.

(2) (1866), L.R. 1 P. & D. at p. 173.

(3) (1866), L.R. 1 P. & D. at p. 175.

The section which was there being argued was for practical purposes the same as the present section, and I think that the full court were taking this view, that absence in the sense of non-appearance was something which meant simply this, that the party complaining was not there. I do not accept counsel for the wife's argument that the mere existence of a general appearance would make this section inapplicable in a case where, because no notice of trial had been given, the person concerned did not know. A

It is interesting to observe that the court had cited to them a number of text-books, including AYLIFFE'S *PARERGON JURIS CANONICA ANGLICANI*, and that there the learned author, dealing with absence in a chapter of its own entitled "On Absence and Presence", seems to have treated absence as a physical thing. B
The author divides absence into a fourfold kind of species, which I need not discuss. He deals, too, with malicious absence, that is deliberate absence, and C
he points out that

"absence may be said to be blameable or malicious when a man goes away and leaves his jurisdiction on the receipt of a citation, with a purpose of avoiding justice, and such a person shall be punished for his contumacy; and in some cases, according to the canon law, it may be proceeded even to a definitive sentence." D

It is interesting to observe that AYLIFFE who was dealing with the canon law in the early part of the eighteenth century was treating absence, as I think the ecclesiastical courts always did, as a physical absence, meaning thereby that the man was not in court when his suit was heard. I think that *Phillips v. Phillips* (4) is not an authority for the proposition which counsel for the wife has put E
forward. Indeed I think it makes it clear that what the court has to look at is not the formalities of appearance, general or limited, important though they may be, but absence in the physical sense from the original hearing of the party making the application.

That leaves me with this point: this section is discretionary, the words used are "The court *may* . . . reverse the decree", and counsel for the wife has F
rightly urged on me the importance of that discretionary power. I have to consider all the circumstances in the present case and I have done my best to do so. Having found that the husband, who was anxious to proceed not only with a defence but also to attack his wife by cross-petition, had in fact no notice that the case was set down, I am as I think bound to exercise my discretion in favour of applying s. 14 (3) and I do so. In the result, therefore, I must accede G
to the prayer in the present petition and reverse the decree of judicial separation pronounced by this court on Dec. 12, 1958.

Order accordingly.

Solicitors: *Leonard Kasler* (for the husband); *Darracotts* (for the wife).

[*Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.*]

A CLOSE v. STEEL COMPANY OF WALES, LTD.

[HOUSE OF LORDS (Lord Denning, Lord Goddard, Lord Morton of Henryton, Lord Morris of Borth-y-Gest and Lord Guest), April 24, 25, 26, June 23, 1961.]

B *Factory—Dangerous machinery—Duty to fence—Hand drill—Breaking of revolving bit—Fragments flying out and causing injury—Danger not foreseeable in ordinary course—Whether machinery dangerous—Whether duty to fence against fragments of broken machinery flying out—Factories Act, 1937 (1 Edw. 8 & 1 Geo. 6 c. 67), s. 14 (1).*

C The appellant, while employed by the respondents in their instrument workshop, operated an electric drilling machine drilling a hole in a gear wheel. The bit of the drill shattered and a piece entered his left eye. Although bits not infrequently shattered, there was no evidence of any such accident having happened previously, for the fragments of a shattered bit were light and did not fly out with force. On appeal against dismissal of a claim for damages for breach of statutory duty under the Factories Act, 1937, s. 14 (1)*, to fence a dangerous part of machinery,

D **Held:** (i) the respondents were not in breach of their duty under s. 14 (1) of the Factories Act, 1937, because danger from the use of the bit in the drill in the ordinary course of affairs was not a reasonably foreseeable danger, and the bit was not, therefore, a “dangerous” part of machinery.

Dictum of WILLS, J., in *Hindle v. Birtwistle* ([1897] 1 Q.B. at p. 195) applied.

E (ii) (per LORD GODDARD, LORD MORTON OF HENRYTON, LORD MORRIS OF BORTH-Y-GEST and LORD GUEST; LORD DENNING dissenting) if, however, the bit were a dangerous part of machinery, then—

F (a) the obligation to fence securely imposed by s. 14 (1) of the Factories Act, 1937, was a requirement that the dangerous part should be fenced securely for the purpose of preventing the body of the operator coming into contact with the machinery.

Nicholls v. Austin (Leyton), Ltd. ([1946] 2 All E.R. 92) and *Carroll v. Andrew Barclay & Sons, Ltd.* ([1948] 2 All E.R. 386) followed and accepted as binding.

G and (b) (LORD MORRIS OF BORTH-Y-GEST not concurring) the obligation to fence securely, so imposed, did not require the dangerous part to be fenced for the purpose of preventing fragments of it, if it shattered (or fragments of the material on which the machine was working) flying out of the machine.

Dickson v. Flack ([1953] 2 All E.R. 840), *Newnham v. Taggart Morgan & Coles, Ltd.* (July 19, 1956, unreported) and *Rutherford v. R. E. Glanville & Sons (Bovey Tracey), Ltd.* ([1958] 1 All E.R. 532) disapproved in so far as they were at variance with *Nicholls v. Austin (Leyton), Ltd.*, supra.

H Per LORD GODDARD: if in a factory there is a machine which it is known from experience has a tendency to throw out parts of the machine itself or of the material on which it is working, so as to be a danger to the operator, the absence of a shield to protect him may well afford him a cause of action at common law (see p. 961, letter D, post).

I Decision of the COURT OF APPEAL ([1960] 2 All E.R. 657) affirmed on (i) above.

[**Editorial Note.** Distinction must be observed between the effect of the words “shall be securely fenced” in s. 14 (1) of the Factories Act, 1937, which are also in s. 12 and s. 13 (1), and the question whether a particular part of machinery is dangerous. To the latter question a probability of shattered parts

* Section 14 (1) is set out at p. 961, letter G, post.

frequently flying out of the machine when working is directly relevant; but that does not determine the scope of the obligation imposed by the words "securely fenced", which, in the opinions of the majority, are directed, on the true interpretation of the statute, to prevent the body of the operator moving into contact with the dangerous part. LORD MORRIS OF BORTH-Y-GEST intimates, however, that securely fencing a part of machinery which was dangerous because it was likely to break into fragments would incidentally involve such fencing as would check the outward movement of the fragments (see p. 969, letter E, and p. 973, letter B, and cf. p. 972, letter C, post).

Section 14 (1) of the Factories Act, 1937, is prospectively repealed by, and replaced by s. 14 (1) (2) of, the Factories Act, 1961, with effect from Apr. 1, 1962; this Act is a consolidating Act and the effect of s. 14 remains unaltered.

As to the requirement of secure fencing of dangerous machinery, see 17 HALSBURY'S LAWS (3rd Edn.) 71, para. 123; and for cases on the subject, see 24 DIGEST (Repl.) 1049-1055, 177-218.

For the Factories Act, 1937, s. 14, see 9 HALSBURY'S STATUTES (2nd Edn.) 1009.]

Cases referred to:

Atkinson v. London & North Eastern Ry. Co., [1925] All E.R. Rep. 346; [1926] 1 K.B. 313; 95 L.J.K.B. 266; 134 L.T. 217; 90 J.P. 17; 24 Digest (Repl.) 1052, 199.

Caledonian Ry. Co. v. Walker's Trustees, (1882), 7 App. Cas. 259; 46 L.T. 826; 46 J.P. 676; 11 Digest (Repl.) 149, 274.

Carr v. Mercantile Produce Co., Ltd., [1949] 2 All E.R. 531; [1949] 2 K.B. 601; [1949] L.J.R. 1597; 113 J.P. 488; 24 Digest (Repl.) 1052, 205.

Carroll v. Andrew Barclay & Sons, Ltd., [1948] 2 All E.R. 386; [1948] A.C. 477; [1948] L.J.R. 1490; 24 Digest (Repl.) 1056, 221.

Davies v. Owen (Thomas) & Co., [1918-19] All E.R. Rep. 276; [1919] 2 K.B. 39; 88 L.J.K.B. 887; 121 L.T. 156; 83 J.P. 193; 24 Digest (Repl.) 1049, 183.

Dickson v. Flack, [1953] 2 All E.R. 840; [1953] 2 Q.B. 464; [1953] 3 W.L.R. 571; 24 Digest (Repl.) 1051, 194.

Harrison v. Metropolitan Plywood Co., [1946] 1 All E.R. 243; [1946] K.B. 255; 115 L.J.K.B. 187; 174 L.T. 190; 110 J.P. 130; 24 Digest (Repl.) 1091, 420.

Hindle v. Birtwistle, [1897] 1 Q.B. 192; 76 L.T. 159; 61 J.P. 70; sub nom. *Birtwistle v. Hindle*, 66 L.J.Q.B. 173; 24 Digest (Repl.) 1053, 207.

Kinder v. Camberwell Borough Council, [1944] 2 All E.R. 315; 109 J.P. 81; 24 Digest (Repl.) 1025, 29.

Nash v. High Duty Alloys, Ltd., [1947] 1 All E.R. 363; [1947] K.B. 377; 24 Digest (Repl.) 1059, 241.

Newnham v. Taggart Morgan & Coles, Ltd., (July 19, 1956), unreported.

Nicholls v. Austin (Leyton), Ltd., [1946] 2 All E.R. 92; [1946] A.C. 493; 115 L.J.K.B. 329; 175 L.T. 5; 24 Digest (Repl.) 1091, 419.

Quinn v. Leathem, [1901] A.C. 495; 70 L.J.P.C. 76; 85 L.T. 289; 65 J.P. 708; 14 Digest (Repl.) 123, 860.

Rutherford v. R. E. Glanville & Sons (Bovey Tracey), Ltd., [1958] 1 All E.R. 532; [1958] 1 W.L.R. 415; 3rd Digest Supp.

Stimson v. Standard Telephones & Cables, Ltd., [1939] 4 All E.R. 225; 161 L.T. 387; sub nom. *Stimpson v. Standard Telephones & Cables, Ltd.*, [1940] 1 K.B. 342; 109 L.J.K.B. 315; 24 Digest (Repl.) 1050, 188.

Summers (John) & Sons, Ltd. v. Frost, [1955] 1 All E.R. 870; [1955] A.C. 740; [1955] 2 W.L.R. 825; 24 Digest (Repl.) 1055, 217.

Walker v. Bletchley Flettons, Ltd., [1937] 1 All E.R. 170; 24 Digest (Repl.) 1054, 212.

A Appeal.

Appeal by Leo Close from an order of the Court of Appeal (LORD EVERSHED, M.R., ORMEROD, L.J., and DAVIES, J.), dated June 2, 1960, and reported [1960] 2 All E.R. 657, affirming an order of WINN, J., at Swansea Assizes, dated July 8, 1959, dismissing the appellant's action against the respondents, the Steel Company of Wales, Ltd., for damages for negligence and breach of the duty imposed by the Factories Act, 1937, s. 14 (1). The facts are set out in the opinion of LORD DENNING.

Gerald Gardiner, Q.C., H. E. Hooson, Q.C., and B. Griffiths for the appellant. Marven Everett, Q.C., A. T. Davies, Q.C., and D. C. Powell for the respondents.

Their Lordships took time for consideration.

June 23. The following opinions were read.

C

LORD DENNING: My Lords, Mr. Leo Close was employed by the Steel Company of Wales, Ltd. at their Abbey Works, Margam, Glamorganshire. On Jan. 24, 1956, he was in the instrument workshop working with an electric drilling machine drilling a hole in a gear wheel. The bit of the drill shattered, and a piece of it entered his left eye. He claimed damages from his employers on the ground that they were negligent at common law or in breach of their duty under the Factories Act, 1937. WINN, J., rejected his claim on both heads. The appellant did not challenge the finding that there was no negligence at common law, but he appealed to the Court of Appeal on the claim for breach of statutory duty. His appeal was dismissed, and he now appeals to your Lordships' House. His claim is based on s. 14 (1) of the Factories Act, 1937, which provides that "Every dangerous part of any machinery... shall be securely fenced..." Those words can be traced back to 1891, where it was provided, by s. 6 (2) of the Factory and Workshop Act, 1891, that "all dangerous parts of the machinery" in a factory shall be securely fenced; and this was re-enacted in the consolidation Acts of 1901 and 1937 in substantially the same words.

D**E****F****G**

The meaning of the words "dangerous part" first came up for discussion in 1896 in the leading case of *Hindle v. Birtwistle* (1). It concerned looms in a cotton factory. A shuttle flew out and struck and injured a weaver. The Divisional Court held that it was capable of being a dangerous part of the machinery. It depended on the frequency with which shuttles were likely to fly out. If it was so frequent as to be a reasonably foreseeable cause of injury, it was dangerous. But, if it was so rare as to be a minimal risk, it was not dangerous. WILLS, J., gave a definition which has been repeatedly approved (2):

"It seems to me that machinery or parts of machinery is and are dangerous if in the ordinary course of human affairs danger may be reasonably anticipated from the use of them without protection."

And WRIGHT, J., said (3) that

H

"The mere fact that the shuttle will sometimes fly out, and that when it flies out it is dangerous, is not enough. It is a question of degree and of fact in all cases whether the tendency to fly out is a tendency to fly out often enough to satisfy a reasonable interpretation of the word 'dangerous'."

I

My Lords, anyone who has practised in the Queen's Bench Division knows that *Hindle v. Birtwistle* (1) has been cited very, very many times. DU PARCQ, L.J., vouched for it up to 1940 in *Stimson v. Standard Telephones & Cables, Ltd.* (4); and I can vouch for it since. There was a tendency in the time when LORD HEWART was Lord Chief Justice to adopt a stricter test. He was inclined to make the happening of an accident proof positive that a part of the machinery was dangerous; but this tendency was corrected by my noble and learned friend, LORD GODDARD, when he became Lord Chief Justice. In *Carr v. Mercantile*

(1) [1897] 1 Q.B. 192. (2) [1897] 1 Q.B. at p. 195. (3) [1897] 1 Q.B. at p. 196.

(4) [1939] 4 All E.R. at pp. 235, 236; [1940] 1 K.B. at pp. 360, 361.

Produce Co., Ltd. (5), he re-established the test of foreseeability laid down in *A Hindle v. Birtwistle* (6), and it has never been doubted since. It received the support of your Lordships' House in *John Summers & Sons, Ltd. v. Frost* (7), where my noble and learned friend, LORD REID, quoted the judgment of WILLS, J., with approval and added the apt comment (8): "Subsequent statements of the law have added little to this . . ."

Applying the test enunciated in *Hindle v. Birtwistle* (6), I have come to the clear conclusion that the bit of this drill is not a dangerous part of machinery. This drilling machine is a well-known machine which is used by men at their own homes in doing things for themselves as well as in factories. It is true that the bit occasionally shatters, it may be as often as once a week in a factory like this. But there was no evidence of any previous accidents having happened on that account. The reason is because fragments are so small and light that they usually go only a few inches or at most a foot or two. They have not sufficient force to penetrate clothing, and, although the judge thought there was a distinct possibility that a man's hands might be scratched or cut, there was no evidence of even this having happened. No one had ever known of an accident to an eye before, and the chances of such a grave injury were, as the judge said, "extremely remote". No one ever used goggles for the work, and there was no evidence to suggest that goggles should be worn. In these circumstances, it seems clear that, in the ordinary course of human affairs, danger could not reasonably be anticipated from the use of the drill unfenced. It cannot, therefore, be classed as dangerous. True it is that, in one or two passages of his judgment, WINN, J., seems, albeit with considerable hesitation, to have held the contrary. But his finding on the point—involving as it did the true application of the word "dangerous" to the facts of the case—was, I think, open to review by the Court of Appeal, and they were quite right to hold, as they did, that this part of the machinery was not dangerous.

That is sufficient to decide the case, so that it is not strictly necessary to discuss the further point of law which was argued before your Lordships. It was this: the respondents said that, even if the bit of the drill was dangerous, it did not have to be fenced, because the danger lay only in the tendency of broken fragments to fly out of the machine. There is no duty under s. 14, they said, to fence against flying bits of machine. The Court of Appeal expressed the hope that this House would consider this point and gave leave to appeal for that purpose; and, as it was fully argued before your Lordships, we ought perhaps to do so. In considering this point, it is very necessary to realise that it involves two distinct sub-questions: First, can the part in question properly be said to be a "dangerous part of any machinery"? Second, if it is, what must be done to see that it is "securely fenced"?

On the first question, I think it plain, as matter of common sense, that a part of machinery is dangerous if it is likely in the ordinary course of working to throw off flying bits so as to imperil those around. This was clearly the view of the judges who decided *Hindle v. Birtwistle* (6). They held that, if the shuttles were likely to fly out frequently and cause injury, they were "dangerous parts" of the machinery which ought to be fenced. And Sir Edward Clarke, Q.C., himself, who appeared for the occupiers of the factory, must have thought so also, for he did not argue the contrary. And whenever the judges have had since that time to consider flying pieces, they have taken the same common-sense view. Take the vertical spindle-moulding machine which was before the judges in *Harrison v. Metropolitan Plywood Co.* (9) and *Dickson v. Flack* (10). It revolved at a very high speed and contained sharp cutters which often broke

(5) [1949] 2 All E.R. 531; [1949] 2 K.B. 601.

(6) [1897] 1 Q.B. 192.

(7) [1955] 1 All E.R. 870; [1955] A.C. 740.

(8) [1955] 1 All E.R. at p. 882; [1955] A.C. at p. 765.

(9) [1946] 1 All E.R. 243; [1946] K.B. 255.

(10) [1953] 2 All E.R. 840; [1953] 2 Q.B. 464.

- A off or came loose and were hurled away from the machine with great velocity, causing many accidents yearly. No one could suggest that the cutters were not "dangerous parts" of the machine. Or take the cut-off machine which the Court of Appeal had before them in *Rutherford v. R. E. Glanville & Sons (Bovey Tracey), Ltd.* (11). It contained an abrasive carborundum wheel which was driven at four thousand revolutions per minute. It was apt to disintegrate
- B because of the high speed at which it was working, and, when it did disintegrate, the bits flew out with great force. LORD GODDARD, C.J., and MORRIS, L.J., together with MCNAIR, J., were all quite clear that the carborundum wheel was a "dangerous part" of the machine; and no man surely would say the contrary. None of your Lordships, not even those who differ from me on other points, have doubted that a part of machinery is a "dangerous part" if it is apt to
- C throw off broken or loose bits and cause injury. No one has suggested that *Hindle v. Birtwistle* (12) was wrongly decided.

- Now here comes the point: Accepting that the part in question is a dangerous part, what must the occupier do to see that it is "securely fenced"? I should have thought it plain that he must erect a fence so as to guard against this dangerous propensity. If the danger lies in broken or loose pieces flying out and
- D injuring workmen, it must be fenced against that danger. Seeing that the part acquires its dangerous character by reason of the danger which might reasonably be anticipated from the use of it (*Hindle v. Birtwistle* (12)), it follows that it must be "so fenced as to give security from such dangers as may be reasonably expected". That was the test propounded by LORD DU PARCQ in *Carroll v. Andrew Barclay & Sons, Ltd.* (13), and it is supported by the decision of the
- E Court of Appeal in *Rutherford v. Glanville* (11), where the carborundum wheel was apt to disintegrate and throw off flying pieces. LORD GODDARD, C.J., put the point simply and forcibly when he said (14):

- "... this machine cannot be said to be securely fenced if it does not protect the workman when the very thing happens against which the fence is required to protect him ... the machine has to be fenced because of the risk of disintegration ..."
- F

and MORRIS, L.J., said likewise (15):

- "There was an obligation to prevent the dangers that would result from this dangerous part of this machine. The dangers to which the plaintiff was exposed included the liability to encounter the forces of disintegration."
- G
- I would be prepared to hold, therefore, that, once there is a dangerous part of machinery, the statutory obligation to see that it is "securely fenced" means that it must be so fenced as to give security from such dangers as may reasonably be expected in the working of the machine. But it is said that your Lordships are compelled by two decisions of this House to hold that the words
- H "securely fenced" mean something less than this. The dangerous part, it is said, need not be fenced so as to keep the worker safe, but it is sufficient if there is a fence to keep him out—to keep him from putting his hand into the machine; not to prevent pieces flying out and hitting him.

- The first decision relied on is *Nicholls v. Austin (Leyton), Ltd.* (16). Now, if you read that case carefully, and particularly the opening words of LORD SIMONDS where he states the question (17), you will see that it was a decision on the words
- I "every dangerous part" of any machinery. It was not a decision on the words "securely fenced". So it really does not touch the point now under discussion. In that case, a girl was feeding a wooden slab into a circular saw.

(11) [1958] 1 All E.R. 532.

(12) [1897] 1 Q.B. 192.

(13) [1948] 2 All E.R. at p. 391; [1948] A.C. at p. 486.

(14) [1958] 1 All E.R. at p. 534.

(15) [1958] 1 All E.R. at p. 536.

(16) [1946] 2 All E.R. 92; [1946] A.C. 493.

(17) [1946] 2 All E.R. at p. 98; [1946] A.C. at p. 504.

A small sliver of wood flew out and struck her hand. There was a guard to stop her putting her fingers into the saw, but it did not stop small slivers flying out. It was held that the piece of wood was not a dangerous part of the machinery. It was the material being worked on, which is a different thing. True it is that there is no logic or common sense in fencing one and not the other. A part of machinery which ejects injurious fragments of material may be just as dangerous as a part which throws off injurious fragments of itself. As Sir Charles Doughty, K.C., put it in his apt metaphor: "An animal which throws dangerous things at one is just as dangerous as an animal which bites one". But the statute draws a distinction which the courts must obey, no matter what logic or common sense has to say about it. Section 14 (1) only requires dangerous parts of machinery to be fenced. It does not require dangerous materials or articles in motion in it to be fenced; for they can be made the subject of separate regulation under the concluding paragraph of s. 14. That was the one single submission made by Mr. Beney, K.C., for the occupiers in his recorded argument and the House accepted it. Each one of their Lordships stressed the paragraph which enables "materials" or "articles" to be dealt with by regulation and made it a determining factor in his decision.

So much for the actual decision in *Nicholls v. Austin* (18). Now for the observations. Things were undoubtedly said about the nature of fencing that should be provided; but they were only said in passing, and I am afraid they have sometimes since been quoted out of their context. Thus, my noble and learned friend, LORD SIMONDS, used the arresting aphorism (19): "The fence is intended to keep the worker out, not to keep the machine or its product in". But if you look at a few lines earlier you will see that he is basing it on the last six words of the proviso to s. 14 (1), just as did LORD MACMILLAN (20) when he used words to the same effect. Now that proviso was first introduced in 1937 so as to deal with certain kinds of machinery (such as the power press described in *Nash v. High Duty Alloys, Ltd.* (21)) which could not be used at all if they had to be fenced by means of a fixed guard (as SALTER, J., had pointed out in *Davies v. Thomas Owen & Co.* (22)). So the proviso was inserted to enable the occupier to provide an automatic guard which would come into place at the critical moment. It dealt with cases where the only danger is of a man getting caught in the machine, and provides that an automatic guard will suffice if it prevents him from "coming into contact with that part". The proviso does not deal with cases such as we are considering here, where the danger consists of pieces of machinery flying out. In such cases, *Hindle v. Birtwistle* (23) has stood as the classic authority since 1897, and it cannot have been the intention of the legislature to overrule it by a proviso which was only inserted in 1937 for another purpose, or, as the latinists say, alio intuitu. Nor do I think that any of their Lordships in *Nicholls v. Austin* (18) intended by a side-wind to throw any doubt on *Hindle v. Birtwistle* (23). Their observations about fencing were, I am sure, not intended to apply to cases where the danger consists in the tendency of pieces of the machine itself to fly out and cause injury. Else it would mean that there was no protection at all under the Act against those admittedly dangerous parts of machinery; whereas the Act clearly states that they must be securely fenced.

The second decision relied on is *Carroll v. Andrew Barclay & Sons, Ltd.* (24). Now this was a decision on the words "securely fenced". It was a case of transmission machinery under s. 13 of the Factories Act, 1937. The words

(18) [1946] 2 All E.R. 92; [1946] A.C. 493.
(19) [1946] 2 All E.R. at p. 98; [1946] A.C. at p. 505.
(20) [1946] 2 All E.R. at p. 96; [1946] A.C. at p. 501.
(21) [1947] 1 All E.R. 363; [1947] K.B. 377.
(22) [1918-19] All E.R. Rep. at p. 278; [1919] 2 K.B. at p. 41.
(23) [1897] 1 Q.B. 192. (24) [1948] 2 All E.R. 386; [1948] A.C. 477.

- A “dangerous part” do not come into it. There was a driving shaft in a boiler shop. It was driven by a motor by means of a balata belt. There was fencing up to a height of five or six feet which was sufficient for every possible contingency except the extremely remote possibility of the belt breaking. On one occasion, however, the belt did break and lashed out and injured a workman. Inasmuch as it formed part of transmission machinery, it fell under s. 13, and had to be
- B “securely fenced”. This House held that it was securely fenced; and that the workman could not recover.

- What is the distinction (for there must be one) between *Carroll v. Barclay* (25) and *Hindle v. Birtwistle* (26)? In the one case the belting (as it was transmission machinery) had to be “securely fenced”; in the other case the shuttle (if it was a dangerous part) had to be “securely fenced”. The words “securely fenced” must have the same meaning in each case. Yet the one had to be guarded, the other not. Wherein lies the difference? Mr. Paull, K.C., for the workman said that there was none. He said that the occupiers in *Carroll v. Barclay* (25) could not succeed in resisting the workman’s claim unless *Hindle v. Birtwistle* (26) was wrongly decided. Yet their Lordships did decide against the workman’s claim; and they did so without overruling *Hindle v. Birtwistle*
- D (26) or even throwing the least doubt on it. Wherein then lies the difference? Only in this: that in *Carroll v. Barclay* (25) the contingency of the belt breaking was extremely remote and could not reasonably be contemplated; whereas in *Hindle v. Birtwistle* (26) the contingency of the shuttle flying out was so probable that it might reasonably be contemplated. And this distinction can be found in four out of five of the speeches. LORD PORTER himself explained *Hindle v. Birtwistle* (26) on this very footing (27):

“... where there was danger, *which should have been anticipated*, that part of the machine (e.g., a spindle) *would fly out*, as in *Hindle v. Birtwistle* (26), it was held that the machine itself was dangerous in that respect and should have been fenced.”

- F LORD DU PARCQ said in terms that (28):

“If machines exist, or are hereafter invented and used, which are dangerous because *fragments or loose parts of the machinery are sometimes ejected from them*, then I am not prepared to say that s. 14 does not require such machines to be fenced for the purpose of protecting workmen against that danger. If the dictum of my noble and learned friend LORD SIMONDS in *Nicholls v. Austin (Leyton), Ltd.* (29), is to be understood as meaning that such a machine need not be fenced, I respectfully doubt its accuracy, and must reserve my opinion on it.”

- LORD NORMAND, as I read his speech, also reserved his opinion on it. He said (30) that

- H “... if a machine *may be expected* to throw off detachable or broken parts in working, these parts may fall to be treated as dangerous and subject to the requirements of secure fencing.”

And, referring to the dictum of LORD SIMONDS, he expressly said (31) that

“... it may still be necessary to reserve the case of a machine which in working *may be expected* to throw off loose or broken parts.”

- I The Lord Chancellor, VISCOUNT JOWITT, too, expressly left open the point for further consideration. In view of these reservations, it seems to me that *Carroll v. Barclay* (25) only decided that a part of machinery need not be fenced against

(25) [1948] 2 All E.R. 386; [1948] A.C. 477.

(26) [1897] 1 Q.B. 192.

(27) [1948] 2 All E.R. at p. 390; [1948] A.C. at p. 485.

(28) [1948] 2 All E.R. at p. 391; [1948] A.C. at p. 486.

(29) [1946] 2 All E.R. at p. 98; [1946] A.C. at p. 505.

(30) [1948] 2 All E.R. at p. 393; [1948] A.C. at p. 490.

(31) [1948] 2 All E.R. at p. 394; [1948] A.C. at p. 492.

a remote possibility of breakage which no one would anticipate, leaving open the question of machinery which may be expected to throw off loose or broken parts. This analysis satisfies me that there is no decision of your Lordships' House on the point in question; and I would invite your Lordships, in answer to the request of the Court of Appeal to hold that, when a part of machinery is dangerous by reason of its tendency to throw off broken or loose pieces, it must be so fenced as to give security from that danger. By so doing, you will not only be casting no doubt on *Hindle v. Birtwistle* (32), but you will be affirming the opinion of the Court of Appeal in the three successive cases of *Dickson v. Flack* (33), *Newnham v. Taggart Morgan & Coles, Ltd.* (34) and *Rutherford v. Glanville* (35). By so holding, they have given a protection to the workman which the common law itself does not give. Take, for instance, *Rutherford v. Glanville* (35). The carborundum machine was supplied, complete with guard, to the occupier by a manufacturer. The occupier was not himself negligent and was not liable at common law. But he was rightly held liable under the Factories Act.

Since preparing this opinion, I have had the opportunity of reading the opinions prepared by the rest of your Lordships; and I find that a majority of your Lordships think that the point is concluded by what was said in the speeches in *Nicholls v. Austin* (36). Not by the decision itself, but what was said in four of the speeches. I read the speeches differently, but, accepting that they are to be read contrary to my view, I must express my emphatic dissent from your Lordships being bound by them. The doctrine that your Lordships are bound by a previous decision of your own is, as I have always understood it, limited to the decision itself and to what is necessarily involved in it. It does not mean that you are bound by the various reasons given in support of it, especially when they contain "... propositions, wider than the case itself required ...". In saying this, I am only repeating what LORD SELBORNE, L.C., said in *Caledonian Ry. Co. v. Walker's Trustees* (37), and the EARL OF HALSBURY, L.C., in *Quinn v. Leathem* (38). As SIR FREDERICK POLLOCK has well said (39):

"Judicial authority belongs not to the exact words used in this or that judgment, nor even to all the reasons given, but only to the principles accepted and applied as necessary grounds of the decision":

and his words were indorsed by SIR WILLIAM HOLDSWORTH in his *ESSAYS IN LAW AND HISTORY*, p. 159. And I would remind your Lordships that the statute says that "every dangerous part of any machinery" shall be securely fenced. I fail to see how any speeches in this House can bind your Lordships to hold that a dangerous part of machinery need not be fenced, when the statute expressly says it shall be. As it happens, it makes no difference in the present case, for all your Lordships are agreed, I believe, that here there was no dangerous part of any machinery; and it is on this ground that I would dismiss this appeal.

LORD GODDARD: My Lords, the evidence in this case satisfies me that the risk of injury, serious and regrettable as it proved to be, was not reasonably foreseeable, and I entirely agree with the Court of Appeal that, on this ground alone, the appellant's claim must fail, whether it is based on negligence at common law or on a breach of statutory duty.

The Court of Appeal, however, have asked your Lordships' guidance as to the extent to which, if at all, the decision of this House in *Nicholls v. Austin (Leyton), Ltd.* (36), ought now to be regarded as qualified. Concisely stated,

(32) [1897] 1 Q.B. 192.

(33) [1953] 2 All E.R. 840; [1953] 2 Q.B. 464.

(34) (July 19, 1956), unreported.

(35) [1958] 1 All E.R. 532.

(36) [1946] 2 All E.R. 92; [1946] A.C. 493.

(37) (1882), 7 App. Cas. at p. 275.

(38) [1901] A.C. at p. 506.

(39) In *CONTINENTAL LAW IN THE NINETEENTH CENTURY* (Continental Legal History Series) xliv.

- A that case decided that the Factories Act, 1937, requires a dangerous part of a machine to be securely fenced, but for the purpose of preventing an operator from coming into contact with it and not for the purpose of keeping parts of the machine or of the material on which it is being worked from flying out. Reluctantly, I have come to the conclusion that *Nicholls v. Austin* (40), reinforced as I think it was by *Carroll v. Andrew Barclay & Sons, Ltd.* (41), cannot be regarded as qualified. The opinions of my noble and learned friends, LORD MORTON OF HENRYTON and LORD GUEST, which I have had the advantage of seeing, convince me that these decisions settled the law on this subject with regard to a cause of action under the Factories Act, 1937, which can only be qualified by legislation, or, perhaps, as at least some of their Lordships thought, by a regulation made by the Secretary of State. I was a party to the decision in the Court of Appeal of *Rutherford v. R. E. Glanville & Sons (Bovey Tracey), Ltd.* (42), in which the facts were very similar to those in the present case. There, however, the employers admitted that the machine ought to have been fenced. But for that admission, I now agree with Lord MORTON OF HENRYTON that it was wrongly decided, and so, also, was *Newnham v. Taggart Morgan & Coles, Ltd.* (43) to which I was also a party and referred to in the judgment of the Master of the Rolls (LORD EVERSHED) in the present case (44). It was wrong to hold that the Factories Act gave a cause of action. But at the same time, if in a factory there is a machine which it is known from experience has a tendency to throw out parts of the machine itself or of the material on which it is working, so as to be a danger to the operator, the absence of a shield to protect him may well afford him a cause of action at common law.
- E I agree that this appeal must be dismissed.

LORD MORTON OF HENRYTON: My Lords, this appeal is the result of a most unfortunate accident, whereby the appellant suffered an injury to his left eye. The facts have already been stated. By his statement of claim, the appellant alleged that the respondents had been negligent in a number of respects, and further alleged breach of a statutory duty imposed by s. 14 (1) of the Factories Act, 1937. The learned trial judge, WINN, J., negatived all the allegations of negligence, and the only question argued in this House was whether the respondents failed to perform their statutory duty under the section just mentioned. That section is in the following terms:

- G "14.—(1) Every dangerous part of any machinery, other than prime movers and transmission machinery, shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced: Provided that, in so far as the safety of a dangerous part of any machinery cannot by reason of the nature of the operation be secured by means of a fixed guard, the requirements of this subsection shall be deemed to have been complied with if a device is provided which automatically prevents the operator from coming into contact with that part.

- H " (2) Where the Secretary of State is satisfied that there is available and suitable for use in connexion with machinery of any class any type or description of safety device which—(a) prevents the exposure of a dangerous part of machinery whilst in motion; or (b) stops a machine forthwith in case of danger, he may make regulations directing that the type or description of device shall be provided for use in connexion with such class of machinery as may be specified in the regulations: Provided that, in any proceedings in respect of a contravention of this subsection, it shall be a sufficient defence

(40) [1946] 2 All E.R. 92; [1946] A.C. 493.

(41) [1948] 2 All E.R. 386; [1948] A.C. 477.

(42) [1958] 1 All E.R. 532.

(43) (July 19, 1956), unreported.

(44) [1960] 2 All E.R. at p. 666; [1960] 2 Q.B. at p. 315.

to prove that a device at least equally effective was being used in connexion with the machinery in respect of which the contravention occurred.

"(3) Any part of a stock-bar which projects beyond the head-stock of a lathe shall be securely fenced unless it is in such a position as to be as safe to every person employed or working on the premises as it would be if securely fenced. The Secretary of State may, as respects any machine or any process in which a machine is used, make regulations requiring the fencing of materials or articles which are dangerous while in motion in the machine."

My Lords, I postpone consideration of the question whether any part of the machine at which the appellant was working can properly be described as a "dangerous part" of that machine, within the meaning of s. 14 (1), and shall first consider the question of general importance raised by this appeal, namely, what is the extent of the duty imposed by the words "shall be securely fenced" in that subsection. In *Nicholls v. Austin (Leyton), Ltd.* (45), this House held that the obligation to fence imposed by s. 14 (1) was an obligation to provide a guard against contact with any dangerous part of a machine and not an obligation to guard against dangerous materials or articles ejected from the machine in motion. These words are taken from the speech of LORD THANKERTON (46), and three of the other noble and learned Lords expressed opinions to the same effect. Clearly these opinions, if they still hold good as statements of the law, are fatal to the appellant's case, but three recent decisions of the Court of Appeal have caused some uncertainty as to the present position. The learned Master of the Rolls, in delivering the judgment of the Court of Appeal in the present case, referred to these decisions, and said (47):

"What is the conclusion of these cases on which this court should act? It is in our judgment this: that by decisions of the court which it is our duty to follow, the speeches of the noble Lords in *Nicholls v. Austin* (45) should be treated as qualified to the extent (a) that s. 14 of the Act of 1937 ought not now to be read as limited in scope solely to the prevention of a workman's getting into contact with moving parts of a machine and (b) that the duty imposed by the section comprehends the duty to protect workmen from injury caused by ejected or flying pieces of the machine itself (as distinct from injury caused by flying or ejected pieces of the material on which the machine is working); but that liability in such latter event will not arise save in cases which would have fallen within the scope of the rationes of the judgments of WILLS, J., and WRIGHT, J., in *Hindle v. Birtwistle* (48) . . ."

Later, the Master of the Rolls said (49):

"We would add in conclusion the hope that, on some occasion, the matter should be further considered in the House of Lords. The House alone can determine for the future guidance of the courts the extent to which (if at all) the speeches in *Nicholls v. Austin* (45) ought now to be regarded as qualified."

My Lords, in order to determine this question, I shall have to examine in some detail the speeches delivered in *Nicholls'* case (45) and in *Carroll v. Andrew Barclay & Sons, Ltd.* (50). In *Nicholls'* case (45), the employee had been injured by a piece of wood ejected from a circular saw in the course of its operation, whereas in the present case the injury was caused by a piece of the machine itself. Counsel for the appellant rely strongly on this distinction, but it is plain that the

(45) [1946] 2 All E.R. 92; [1946] A.C. 493.

(46) [1946] 2 All E.R. at p. 95; [1946] A.C. at p. 499.

(47) [1960] 2 All E.R. at p. 667; [1960] 2 Q.B. at p. 316. (48) [1897] 1 Q.B. 192.

(49) [1960] 2 All E.R. at p. 667; [1960] 2 Q.B. at p. 317.

(50) [1948] 2 All E.R. 386; [1948] A.C. 477.

A words used by LORD THANKERTON and other noble and learned Lords were quite wide enough to cover both of these sources of injury. LORD THANKERTON said (51):

“At the trial, the first point argued before the judge was whether the obligation to fence imposed by s. 14 (1) is an obligation not only to protect against direct injury by contact with the machine, but also against indirect injury from something that flies off from the machine.”

In the present case, the appellant undoubtedly suffered indirect injury from something which flew off from the machine, namely, a fragment from the “bit” which broke in pieces. LORD THANKERTON answered the question thus stated as follows (52):

“... the obligation to fence imposed by sub-s. (1) is an obligation to provide a guard against contact with any dangerous part of a machine, and that it does not impose any obligation to guard against dangerous materials or articles ejected from the machine in motion, that matter depending solely on the making of regulations by the Secretary of State under the discretionary power conferred on him by the last paragraph of the section.”

LORD MACMILLAN said (53):

“The obligation under s. 14 to fence the dangerous part of a machine, as I read it, is an obligation so to screen or shield the dangerous part as to prevent the body of the operator from coming into contact with it, and this obligation was in the present instance amply fulfilled.”

LORD SIMONDS said (54):

“I find nothing in this language to suggest that the section aims at protecting the worker from any indirect danger arising out of the functional operation of the machine. If there was any ambiguity, it would be set at rest by the proviso, which provides that: ‘... in so far as the safety of a dangerous part ... cannot by reason of the nature of the operation be secured by means of a fixed guard, the requirements of this subsection shall be deemed to have been complied with if a device is provided which automatically prevents the operator from coming into contact with that part.’ These last six words make it clear that the security at which the substantive part of the subsection aims is security from unintentional, or, I suppose, even intentional, contact with a dangerous part. The fence is intended to keep the worker out, not to keep the machine or its product in.”

LORD UTHWATT said (55):

“Section 14 (1) applies to ‘every dangerous part of any machinery other than prime movers and transmission machinery.’ That dangerous part is to be securely fenced unless it—i.e., the dangerous part—is in such a position or of such construction as to be safe. The proviso to the subsection is of assistance. Where a fixed guard is not practicable as respects a dangerous part, the provision of a device which prevents contact between the operator and that part is to satisfy the obligation contained in the leading provision of the subsection. The prevention of contact between the worker and the dangerous part is to be sufficient.”

LORD WRIGHT’s speech pursued a somewhat different course, but he did not express disagreement with any of the passages which I have quoted.

The decision against the workman in *Nicholls’* case (56) was based entirely

(51) [1946] 2 All E.R. at p. 94; [1946] A.C. at p. 498.

(52) [1946] 2 All E.R. at p. 95; [1946] A.C. at p. 499.

(53) [1946] 2 All E.R. at p. 96; [1946] A.C. at p. 501.

(54) [1946] 2 All E.R. at p. 98; [1946] A.C. at p. 504.

(55) [1946] 2 All E.R. at p. 99; [1946] A.C. at p. 506.

(56) [1946] 2 All E.R. 92; [1946] A.C. 493.

on the construction of s. 14 so clearly stated by four of the noble and learned Lords. I have always understood that, when this House clearly expresses a view on the construction of an Act of Parliament, and bases its decision on that view, the Act must bear that construction unless and until Parliament alters the Act. I must now, however, narrate the somewhat surprising events which followed on the decision in *Nicholls' case* (57). In *Carroll's case* (58), already mentioned, the appellant workman had been injured by a belt forming part of the transmission machinery which broke in the course of working and lashed out on him. He alleged a breach of the duty to fence imposed by s. 13 of the Factories Act, 1937. Subsection (1) of that section is as follows:

"Every part of the transmission machinery shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced."

My Lords, it is to be observed that the words "shall be securely fenced" are identical with the words used in s. 14 (1). The same words appear in s. 12, and it must surely be right to give the words the same meaning in each one of this group of three sections. This House unanimously held that the employers were not liable, but counsel for the appellant rely on certain observations of noble Lords in that case, and, in particular, on the following passage in the speech of LORD DU PARCQ (59):

"I wish to add, however, that, while I agree with LORD NORMAND that the words 'securely fenced' must be given the same meaning in each of the three sections (ss. 12, 13 and 14), I think that they may well mean 'so fenced as to give security from such dangers as may be reasonably expected'. If machines exist, or are hereafter invented and used, which are dangerous because fragments or loose parts of the machinery are sometimes ejected from them, then I am not prepared to say that s. 14 does not require such machines to be fenced for the purpose of protecting workmen against that danger. If the dictum of my noble and learned friend LORD SIMONDS in *Nicholls v. Austin (Leyton), Ltd.* (60), is to be understood as meaning that such a machine need not be fenced, I respectfully doubt its accuracy, and must reserve my opinion on it."

LORD DU PARCQ, however, agreed with the decision in favour of the employers, and so did VISCOUNT JOWITT, L.C., though he made the same reservation as LORD DU PARCQ. LORD PORTER, LORD NORMAND (subject to one qualification) and I expressly adopted the construction of the words "shall be securely fenced" which was so clearly expressed by this House in *Nicholls' case* (57). LORD PORTER dealt very fully with the meaning of the words "shall be securely fenced", on which the whole of the argument had turned, and stated his conclusion as follows (61):

"Fencing, in my opinion, means the erection of a barricade to prevent any employee from making contact with the machine, not an enclosure to prevent broken machinery from flying out."

These words apply directly to the present case. LORD NORMAND quoted the observations of LORD SIMONDS in *Nicholls' case* (60):

"The fence is intended to keep the worker out, not to keep the machine or its product in",

and continued (62):

(57) [1946] 2 All E.R. 92; [1946] A.C. 493.

(58) [1948] 2 All E.R. 386; [1948] A.C. 477.

(59) [1948] 2 All E.R. at p. 391; [1948] A.C. at p. 486.

(60) [1946] 2 All E.R. at p. 98; [1946] A.C. at p. 505.

(61) [1948] 2 All E.R. at p. 390; [1948] A.C. at p. 486.

(62) [1948] 2 All E.R. at p. 393; [1948] A.C. at p. 492.

A "So far as the noble and learned Lord dealt with keeping in the machine as opposed to its product, his observation was unnecessary for the decision of the case. Nevertheless, it was a deliberate expression of opinion which I respectfully adopt, though it may still be necessary to reserve the case of a machine which in working may be expected to throw off loose or broken parts."

B LORD NORMAND had already said (64):

"It is possible, therefore, that, if a machine may be expected to throw off detachable or broken parts in working, these parts may fall to be treated as dangerous and subject to the requirements of secure fencing. That is, however, a question on which I express no opinion."

C Notwithstanding this reservation, LORD NORMAND mentioned a number of indications in the Act of 1937, which (to quote his words) (65)

"... seem to me to show that the purpose of the fencing is to provide against contact with the machinery which, rather than the breaking of machinery, is the characteristic danger to be apprehended by workmen in factories."

D After referring to other indications, he said (66):

"These indications that the danger in contemplation is the danger of contact between the workman and the machinery working in situ are, I think, conclusive, but there are other indications also to which my noble and learned friend, LORD PORTER, has directed attention. I agree with what my noble and learned friend said about them and I need say no more."

E I began my speech by quoting the words (67): "Every part of the transmission machinery shall be securely fenced", in s. 13 (1) of the Act of 1937, and continued:

"Do these words mean that every part of the transmission machinery shall be so fenced as to prevent any person employed or working on the premises from moving into contact with it, or do they bear the wider meaning that every part of the transmission machinery shall be so fenced as to prevent contact occurring in any way between any part of the machinery and any person employed or working on the premises?"

F I added "No other question falls to be determined by your Lordships' House". Later, I stated my conclusion that the narrower construction was correct.

G My Lords, I would sum up the effect of *Carroll's* case (68) as follows.—(i) In that case, the injury was the result of a portion of the machinery breaking and flying out. This fact is of some importance in view of the subsequent decisions of the Court of Appeal to which I must shortly refer. (ii) This House unanimously held that the employers were not liable to the injured man. (iii) Not one of them expressed a definite opinion that the construction placed on the words "shall be securely fenced" in *Nicholls' case* (69) was wrong. (iv) Three of them (one with a reservation) expressly adopted that construction.

H I now come to three decisions of the Court of Appeal—*Dickson v. Flack* (70), *Newnham v. Taggart Morgan & Coles, Ltd.* (71), and *Rutherford v. R. E. Glanville & Sons (Bovey Tracey), Ltd.* (72). These were the decisions which the Court of Appeal felt bound to follow in the present case. In *Dickson v. Flack* (70) the plaintiff workman was testing a vertical spindle-moulding machine when one

(64) [1948] 2 All E.R. at p. 393; [1948] A.C. at p. 490.

(65) [1948] 2 All E.R. at p. 392; [1948] A.C. at p. 490.

(66) [1948] 2 All E.R. at p. 393; [1948] A.C. at p. 491.

(67) [1948] 2 All E.R. at p. 394; [1948] A.C. at p. 492.

(68) [1948] 2 All E.R. 386; [1948] A.C. 477.

(69) [1946] 2 All E.R. 92; [1946] A.C. 493.

(70) [1953] 2 All E.R. 840; [1953] 2 Q.B. 464. (71) (July 19, 1956), unreported.

(72) [1958] 1 All E.R. 532.

of the cutters flew off and he was struck in the eye and injured by a flying bolt or nut. The Court of Appeal held that the employer committed a breach of reg. 17 of the Woodworking Machinery Regulations, 1922 and 1945, but two members of the court also held that there was a breach of the obligation to fence contained in s. 14 of the Factories Act, 1937. Neither of them referred to the decision of this House in *Nicholls' case* (73), but they relied on the reservations contained in the speeches of VISCOUNT JOWITT and LORD DU PARCQ in *Carroll's case* (74). They thus, in effect, proceeded on the view that the construction of the relevant words in s. 14 which was adopted by this House in *Nicholls' case* (73) was wrong. In so far as *Dickson v. Flack* (75) was based on s. 14 of the Factories Act, 1937, it was, in my opinion, wrongly decided, for the reasons which I shall shortly state. In *Rutherford v. Glanville* (76) the question of liability for injury from flying parts of a machine again came before the Court of Appeal. It is true, as WINN, J., observed in the present case, that the decision may be said primarily to have rested on the view that, the necessity of fencing having been conceded, the fence used was shown not to have been secure, but the court seems to have accepted the view that a known risk of injury through flying parts of the machine involved a duty to guard it under s. 14. In *Newnham's case* (77), a similar view was expressed obiter by two members of the court, though the workman's claim was dismissed on other grounds.

In my opinion, my Lords, the decisions and dicta in these three cases cannot be supported in so far as they departed from the clear view expressed by this House in *Nicholls' case* (73) as to the construction of s. 14 of the Act of 1937. Your Lordships' House having based its decision on that view, I do not think it was open to the Court of Appeal to act on a different construction of the section, notwithstanding the reservations made by three of the noble Lords who decided *Carroll's case* (74). If, however, the opinions expressed by this House in *Nicholls' case* (73) are open to review and reconsideration I still think that these opinions were correct. I rely on (i) the reasons given by this House in *Nicholls' case* (73), (ii) the views expressed by LORD PORTER and LORD NORMAND in *Carroll's case* (74), as to the meaning of the words "shall be securely fenced" and (iii) the considerations brought before this House in the argument of counsel for the respondents. He invited your Lordships to have regard to the wording of Part 2 of the Act of 1937 as a whole, and I find many indications in s. 15 to s. 40 inclusive, which deal with "Safety", that the opinion expressed by this House in *Nicholls' case* (73) was well founded. I shall not delay your Lordships further by travelling through these numerous sections, but I would add that the result of the three cases in the Court of Appeal is to draw a distinction between fragments which are part of the machine and fragments which come from the object on which the machine is working. This seems to me a somewhat artificial distinction, especially as the object which caused the damage in *Carroll's case* (74) was a part of the machine. I fully realise that the three cases just mentioned were "hard cases", but the decisions left the law in a state of considerable doubt, and led to the present case reaching this House. I would invite your Lordships to remove that doubt by saying that the law as stated in *Nicholls' case* (73) is still the law.

So far I have expressed no opinion on the question whether the "bit" which broke and caused the injury in the present case was a "dangerous part" of the machine, within the meaning of s. 14. In my opinion, it was not. On this part of the case I entirely agree with the reasoning of my noble and learned friend, LORD DENNING.

I would dismiss the appeal.

LORD MORRIS OF BORTH-Y-GEST: My Lords, the question which is raised in this appeal is whether the appellant suffered his injury because there

(73) [1946] 2 All E.R. 92; [1946] A.C. 493.

(74) [1948] 2 All E.R. 386; [1948] A.C. 477.

(75) [1953] 2 All E.R. 840; [1953] 2 Q.B. 464.

(76) [1958] 1 All E.R. 532.

(77) (July 19, 1956), unreported.

A was a "dangerous part" of the "machinery" which he was operating which was not "securely fenced". It first becomes necessary to decide whether there was a dangerous part.

The question whether there was a dangerous part is one of degree and of fact, and one which must be resolved by considering the relevant evidence. In *Hindle v. Birtwistle* (78), WILLS, J., said:

B "It seems to me that machinery or parts of machinery is and are dangerous if in the ordinary course of human affairs danger may be reasonably anticipated from the use of them without protection."

A part of a machine might be dangerous which might be a reasonably foreseeable cause of injury to anybody acting in a way in which a human being might be reasonably expected to act in circumstances which might be reasonably expected to occur (see *Walker v. Bletchley Flettons, Ltd.* (79) and *John Summers & Sons, Ltd. v. Frost* (80)). My Lords, if there were some machine which when being operated had a part which constantly emitted fragments of itself with such force as to be likely to injure anyone who was operating the machine, I would deem such part to be dangerous. The tests denoted by the cases above referred to as also plain ordinary common sense would alike point to such a conclusion. So, also, if there was some part of a machine which was known to have a propensity from time to time but at unpredictable moments to cast off fragments of itself in such manner as to be likely to injure anyone operating the machine, I would consider that such part could and ought reasonably to be called a dangerous part. It would be dangerous for any operator if he were not kept out of the area within which there were flying fragments which could injure.

E Was there, then, any part of the electric drill which the appellant was operating which was dangerous? Into the drill chuck an operator would insert a bit which was made of very hard steel. At the time when the appellant was hurt, he was drilling holes through a small mild-steel gear wheel and the revolutions of the bit were up to two thousand per minute. The appellant was hurt because the bit shattered and one or more fragments went into his left eye. The learned judge found that it was not uncommon for a bit to break and, in doing so, to throw its fragmented parts outwards. There was evidence that, at the respondents' works, there might be one bit each week that would shatter. Though this was the case, no one had ever been hurt before. This was because fragments had never had force or speed. There was no evidence that anyone had ever sustained a scratch or even a minor penetrating wound. The appellant's injury was an exceptional happening and an entirely unexpected mischance. The facts did not establish that any operator of one of the drills had been subjected to any significant risk of injury. In agreement with the Court of Appeal, I consider that, if anyone had closely reflected, he would have said that the chance of the occurrence of the appellant's accident was extremely remote. In these circumstances, I am not persuaded that the bit ought to be characterised as a "dangerous part".

H If, however, the view had been held that the bit was a dangerous part because of a tendency to cast off fragments that would injure an operator then the question would have arisen whether it was securely fenced. As there was no fence at all the conclusion would seem to be irresistible that there would have been a breach of s. 14 (1). If the bit was a "dangerous part", then there was an imperative statutory obligation requiring that it should be securely fenced. The words of exception in sub-s. (1), i.e., the words

I "unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced"

would have had no application. The proviso to sub-s. (1) reads:

(78) [1897] 1 Q.B. at p. 195.

(79) [1937] 1 All E.R. 170.

(80) [1955] 1 All E.R. 870; [1955] A.C. 740.

" Provided that, in so far as the safety of a dangerous part of any machinery cannot by reason of the nature of the operation be secured by means of a fixed guard, the requirements of this subsection shall be deemed to have been complied with if a device is provided which automatically prevents the operator from coming into contact with that part."

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Even if that proviso could be shown to be applicable, the only result would be that the obligation securely to fence would " be deemed to have been complied with " by providing a device which automatically prevented the operator from coming into contact with the bit.

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If the position had been that the bit was a dangerous part, then there was a positive requirement that it should be securely fenced. It is said, however, that an application of the decision in *Nicholls v. Austin (Leyton), Ltd.* (81) has the result that on the assumption made there was no need to fence. My Lords, I cannot think that this is so. In that case, the appellant, while operating a circular saw, was struck by a fragment which flew off from a block of wood which she was engaged in cutting into strips and she thereby suffered injury to her hand. The issue which arose was thus stated by LORD MACMILLAN (82):

C

" The question of importance in the case is whether the statutory duty imposed by s. 14 of the Act of 1937 to fence securely every dangerous part of any machinery is fulfilled when the dangerous part is so fenced as to prevent the operator from coming into contact with it; or whether the duty also extends to fencing the dangerous part so as to prevent any part of the material on which the machine is working from flying off and striking the operator."

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In that case, the circular saw was a " dangerous part ". There was no doubt that it had to be securely fenced. It was, in fact, securely fenced so as to prevent an operator coming into contact with it. But the fencing did not prevent a fragment of wood flying off while the saw was working. It was held that the wording of the statute did not impose a liability to prevent that possibility. The statute recognises the distinction between danger arising from the operation of the machine itself and danger arising from the material on which the machine is operating. The concluding words of s. 14 are:

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" The Secretary of State may, as respects any machine or any process in which a machine is used, make regulations requiring the fencing of materials or articles which are dangerous while in motion in the machine."

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No regulations had been made. As, therefore, the wood that was being cut was not a " dangerous part of any machinery ", there was no breach of s. 14. In the context of that case, the speeches described the nature of the duty to fence. My Lords, the speeches demonstrate that there is a duty to fence so as to prevent an operator from coming into contact with any dangerous part. In very many cases, a part of a machine is dangerous for the reason that, if the operator touches that part, or if his body comes into contact with it, some personal injury may result. There may be some cases as those now being considered (though, on the facts, not the present case) where a part of a machine is dangerous for the reason that, while the machine is being operated, such part either emits fragments of itself with force or disintegrates so as to emit its fragments with force. There would in such circumstances be a radius of danger, and the obligation securely to fence the dangerous part would necessitate keeping the operator away from the danger. The extent of the exclusion would naturally be limited if the fencing to exclude the operator was designed closely to contain the danger. The situation

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(81) [1946] 2 All E.R. 92; [1946] A.C. 493.

(82) [1946] 2 All E.R. at p. 96; [1946] A.C. at p. 501.

A would be in contrast with that which gave rise to *Carroll v. Andrew Barclay & Sons, Ltd.* (83). In that case, there was no question of a "dangerous part". The action was brought under s. 13, which requires that every part of transmission machinery must be securely fenced. A belt broke and injured the pursuer. There was fencing which, being of a height of five feet, would effectively keep the operator away from the transmission machinery of which the belt was a part. The words "securely fenced" appear in s. 13, and must have the same meaning as the words "securely fenced" in s. 14. Accordingly, just as under s. 14 there is an obligation securely to fence so as to keep an operator away from a dangerous part, so under s. 13 there is an obligation securely to fence so as to keep an operator away from transmission machinery. In *Carroll v. Andrew Barclay & Sons, Ltd.* (83), that obligation was fulfilled. The statutory requirement does not involve that transmission machinery must be so encased that, in the event of some fortuitous accidental breaking, no part of the machinery could by any chance be flung out.

My Lords, though in *Nicholls v. Austin (Leyton), Ltd.* (84) the conclusion emerged that there was no dangerous part of the machine which was not securely fenced, the speeches contain guidance as to the meaning of the words "securely fenced". Such guidance does not, however, lead to the conclusion that, if there is a dangerous part of a machine, the statutory obligation to fence is absolved if the danger is of some particular variety. Thus, if a part is dangerous for the reason that it may cast off fragments of itself at speed, the speeches, as I read them, do not say that, in such a case, there is some exemption from the statutory obligation to fence. The statute itself contains no such exemption. The guidance that is given shows the nature of the obligation—which is one to fence so as to keep the operator away from the dangerous part. If the dangerous features of the dangerous part consist of a tendency to cast off fragments or to disintegrate into fragments, then the required secure fencing which will keep the operator away will incidentally at the same time check the outward travel of the fragments. It may be sufficient in illustration of what I have said to refer to certain passages from the speeches. LORD THANKERTON (85) said that the obligation to fence which is imposed by s. 14 (1) is an obligation to provide a guard against contact with any dangerous part of a machine, and that it does not impose any obligation to guard against dangerous materials or articles ejected from the machine in motion, that matter depending solely on the making of regulations by the Secretary of State under the discretionary power conferred on him by the last paragraph of the section. He pointed out that dangerous materials or articles do not necessarily emanate from a dangerous part of a machine. LORD MACMILLAN said (86):

"The obligation under s. 14 to fence the dangerous part of a machine, as I read it, is an obligation so to screen or shield the dangerous part as to prevent the body of the operator from coming into contact with it . . ."

To a similar effect were the clear words of LORD SIMONDS. Remembering that the case was one in which it was not disputed that the dangerous part of the machine (i.e., the circular saw) was securely fenced and that the issue was whether there was any liability arising out of the circumstances that in some way the operator's hand was struck by an off-cut from a piece of wood which was being cut in the machine, it is helpful to note the way in which the appellant's case was put. LORD SIMONDS said (87):

(83) [1948] 2 All E.R. 386; [1948] A.C. 477.

(84) [1946] 2 All E.R. 92; [1946] A.C. 493.

(85) [1946] 2 All E.R. at p. 95; [1946] A.C. at p. 499.

(86) [1946] 2 All E.R. at p. 96; [1946] A.C. at p. 501.

(87) [1946] 2 All E.R. at p. 98; [1946] A.C. at p. 504.

"The first question is, I think, correctly stated in the appellant's case in these words: Whether the words 'every dangerous part' referred to in the Factories Act, 1937, s. 14, refer only to parts which are directly dangerous by reason that the part itself is liable to cause injury so that such parts only are required to be fenced by the said section, or whether the said words 'every dangerous part' include parts which are indirectly dangerous in that they are liable to throw out material with such force that the material is liable to cause injury to the worker so that such parts also are required to be fenced by the said section. My Lords, I have no doubt that this question should be answered by saying that the words 'every dangerous part' in their context refer only to parts which are directly dangerous by reason that the part itself is liable to cause injury."

LORD SIMONDS said that it was clear that s. 14 (1) deals with a physical part of a machine, not with its function. He added (88):

"I find nothing in this language to suggest that the section aims at protecting the worker from any indirect danger arising out of the functional operation of the machine. If there was any ambiguity, it would be set at rest by the proviso, which provides that: '... in so far as the safety of a dangerous part ... cannot by reason of the nature of the operation be secured by means of a fixed guard, the requirements of this subsection shall be deemed to have been complied with if a device is provided which automatically prevents the operator from coming into contact with that part.' These last six words make it clear that the security at which the substantive part of the subsection aims is security from unintentional, or, I suppose, even intentional, contact with a dangerous part. The fence is intended to keep the worker out, not to keep the machine or its product in."

LORD UTHWATT was of the same opinion. He said (89) that the contention of the appellant was that the phrase "every dangerous part" includes parts which are indirectly dangerous in that they are liable to throw out material with such force as to be liable to cause injury to the worker. He pointed out that acceptance of that contention would involve an obligation to fence the machine viewed as a single operating unit so as to avoid the possibility of danger arising to a worker from its operation, whereas the scheme of the Act is to require the several parts of any machinery to be considered separately "in light of their construction, position or dangerous nature". My Lords, the speeches in *Nicholls v. Austin (Leyton), Ltd.* (90) show clearly that, in considering s. 14 (1), it must be decided whether there is a "dangerous part" of a machine—if there is, then there is an obligation to guard so as to prevent the body of the operator coming into contact with such dangerous part.

In the later case of *Carroll v. Barclay* (91), consideration was given to the requirement imposed by s. 13 (1) that "every part of the transmission machinery shall be securely fenced". The injured worker operated a lathe which was six-and-a-half feet behind a motor which drove a main shaft. That shaft was operated from the motor by means of a belt. The belt did not ascend vertically to the shaft (which was at a height of twenty-five feet above the ground) but sloped at an angle away from the position of the worker. In his position at his lathe, he would be in a direct line with the revolving belt. He was protected from the motor by a fence which was five feet high. The belt broke and lashed out over the fence and struck the worker. The breaking of a belt was itself a very infrequent occurrence,

(88) [1946] 2 All E.R. at p. 98; [1946] A.C. at p. 504.

(89) [1946] 2 All E.R. at p. 99; [1946] A.C. at p. 506.

(90) [1946] 2 All E.R. 92; [1946] A.C. 493.

(91) [1948] 2 All E.R. 386; [1948] A.C. 477.

- A but such an occurrence as a belt coming out from its guard and causing injury to someone who was outside the guard or fence enclosing the motor or belt had never been known to have happened. The motor and the belt and the shaft were all part of the "transmission machinery", and it was held that there was no breach of s. 13. This was in accord with the reasoning in the earlier case in regard to the words "securely fenced". It was made plain that the obligation securely to fence is not one that can cover the contingency of the accidental breaking of machinery with a consequence that some piece or pieces of broken machinery may fly out and injure.
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LORD PORTER pointed out that all machinery is potentially dangerous because it may break, but that the Act is not concerned with danger in that sense but that it is "danger in working" against which it is framed to give security. He

- C said (92):

"Any risk arising from the working of a dangerous machine must be guarded against under s. 14 . . . Fencing, in my opinion, means the erection of a barricade to prevent any employee from making contact with the machine, not an enclosure to prevent broken machinery from flying out."

- D The contrast between any such fortuitous abnormal breaking and a risk arising from the working of a dangerous machine was illustrated by LORD PORTER in the following passage (93):

"On the other hand, where there was danger, which should have been anticipated, that part of the machine (e.g., a spindle) would fly out, as in *Hindle v. Birtwistle* (94), it was held that the machine itself was dangerous in that respect and should have been fenced. So, too, where a driving shaft was situated thirteen feet up, but it could not be assumed that the shaft would never be approached by any person employed in the factory, as in *Atkinson v. London & North Eastern Ry. Co.* (95), and in a case where the handle of a machine flew up and in the ordinary course of affairs danger might be anticipated from the use of the machine without protection, as in *Kinder v. Camberwell Borough Council* (96), the employers have been held under a duty to fence. In each case, however, it was injury caused by the working of the machine and the danger which might reasonably be anticipated from its working. Even in the case of the flying spindle it was not a breaking of a part of the machine, but an accident which might have been anticipated from its ordinary working which had to be guarded against. The machine was found to be a dangerous one because of the liability of spindles to fly out, and it was that danger which was liable to occur in the course of its ordinary working, not its abnormal action in breaking, for which a fence had to be provided."

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H LORD NORMAND was also of the opinion that (97)

"... the purpose of the fencing is to provide against contact with the machinery which, rather than the breaking of machinery, is the characteristic danger to be apprehended by workmen in factories . . ."

- I and (98) that "... the danger in contemplation is the danger of contact between the workman and the machinery working in situ . . ."; and he adopted the words of LORD SIMONDS at the concluding part of the passage which I have above cited. LORD DU PARCQ was in general agreement both with LORD PORTER and with LORD NORMAND, and said (99) that it would be wrong to hold that the

(92) [1948] 2 All E.R. at p. 390; [1948] A.C. at p. 486.

(93) [1948] 2 All E.R. at p. 390; [1948] A.C. at p. 485.

(94) [1897] 1 Q.B. 192.

(95) [1925] All E.R. Rep. 346; [1926] 1 K.B. 313.

(96) [1944] 2 All E.R. 315.

(97) [1948] 2 All E.R. at p. 392; [1948] A.C. at p. 490.

(98) [1948] 2 All E.R. at p. 393; [1948] A.C. at p. 491.

(99) [1948] 2 All E.R. at p. 391; [1948] A.C. at p. 487.

legislature had in mind the remote possibility of the transmission gear breaking and so coming into contact with a workman's body. LORD MORTON OF HENRYTON said (100) that he preferred to express no opinion on the construction of s. 14 (1), inasmuch as the case was concerned only with s. 13 and, in regard to the opening words of s. 13 (1), he said (101) that their meaning was

"... that every part of the transmission machinery shall be so fenced as to prevent any person employed or working on the premises from moving into contact with it..."

My Lords, it seems to me that the two cases afford clear guidance as to the meaning of the words "securely fenced". But in the latter case, certain points were expressly reserved. It seems to me, my Lords, that the effect of the reservations was to draw a contrast between the case where there is some abnormal accidental breaking of machinery and the case of a machine which in working may be expected to throw off loose or broken parts. In the latter case, depending on particular and individual circumstances, there may be a "dangerous part" of a machine. If there is, then there is a positive statutory obligation securely to fence—and that will involve fencing so as to prevent an operator moving into contact with it or, stated otherwise, to prevent the body of the operator coming into contact with it. A certain reservation was made by LORD DU PARCQ in his speech in *Carroll v. Barclay* (102) in the following words:

"I wish to add, however, that, while I agree with LORD NORMAND that the words 'securely fenced' must be given the same meaning in each of the three sections (ss. 12, 13 and 14), I think that they may well mean 'so fenced as to give security from such dangers as may be reasonably expected'. If machines exist, or are hereafter invented and used, which are dangerous because fragments or loose parts of the machinery are sometimes ejected from them, then I am not prepared to say that s. 14 does not require such machines to be fenced for the purpose of protecting workmen against that danger. If the dictum of my noble and learned friend LORD SIMONDS in *Nicholls v. Austin (Leyton), Ltd.* (103), is to be understood as meaning that such a machine need not be fenced, I respectfully doubt its accuracy, and must reserve my opinion on it."

My Lords, I doubt whether the words of LORD SIMONDS would be so understood. LORD NORMAND evidently did not think so for, while expressly respectfully adopting LORD SIMONDS' words, he added (101) that it might

"... still be necessary to reserve the case of a machine which in working may be expected to throw off loose or broken parts."

LORD NORMAND could not have reserved consideration of such a case if he had thought that the words that he was expressly adopting precluded consideration of such a case. He had previously in his speech (104) said that in s. 14 no assumption is made that the machinery is in itself dangerous and that the obligation does not apply except to parts of machinery which can be shown to be dangerous. He added (104):

"It is possible, therefore, that, if a machine may be expected to throw off detachable or broken parts in working, these parts may fall to be treated as dangerous and subject to the requirements of secure fencing. That is, however, a question on which I express no opinion."

(100) [1948] 2 All E.R. at p. 395; [1948] A.C. at p. 494.

(101) [1948] 2 All E.R. at p. 394; [1948] A.C. at p. 492.

(102) [1948] 2 All E.R. at p. 391; [1948] A.C. at p. 486.

(103) [1946] 2 All E.R. at p. 98; [1946] A.C. at p. 505.

(104) [1948] 2 All E.R. at p. 393; [1948] A.C. at p. 490.

- A VISCOUNT JOWITT, L.C., expressly stated that he desired to leave open for further consideration the question raised by LORD DU PARCQ. My Lords, it seems to me that the matters referred to in the foregoing reservations will, in particular cases (which may well be infrequent and uncommon), fall to be decided as questions of fact. If, by way of example, a case arises where it can be expected that a part of a machine will throw off detachable or broken fragments of itself in such manner that, if an operator puts his head near to the machine, he might be blinded or might receive head injuries passing beyond the trivial and negligible, then I would consider that as a determination of fact such part could (to use LORD NORMAND'S words) "fall to be treated as dangerous" and be subject to the requirements of secure fencing.

- C My Lords, my consideration of the speeches in the two cases leads me to the view that those delivered in the latter of them are not to be regarded as qualifying those in the former. The speeches in both cases give guidance as to the meaning of the words "securely fenced". They do not seek to define or to limit the nature of those "parts" of a machine which may be dangerous. No absolution from the duty securely to fence is in any way suggested in the case of any such "parts" as, on particular facts and in particular cases, are shown to be dangerous. My D Lords, if it is a strange and unfortunate result that the words of the statute do not compel fencing where there is the ejection of fragments of some inserted material or substance on which a machine is working, this is not a matter which it is within the power of the courts to remedy.

- E My Lords, I have not in terms expressed any conclusions in regard to certain recent Court of Appeal decisions to which our attention was directed. I have not done so for the reason that it seems to me that they depend on a consideration of their own facts. It follows, however, from the views that I have expressed, that, subject to any issues of fact, I see no reason to suppose that they were wrongly decided.

- F Inasmuch as, on the facts of this case, I am not persuaded that there was a "dangerous part" of the drill, I consider that the appeal fails.

- G LORD GUEST: My Lords, two questions were argued before the House, first, whether an obligation is imposed on the occupier of a factory under s. 14 of the Factories Act, 1937, to provide a secure fence against parts of the machine disintegrated in motion being ejected in such a way as to strike the operator; second, if so, were the parts of this machine dangerous, within the meaning of s. 14?

- H The accident arose from an injury to the appellant's eye when he was engaged in operating an electric drill equipped with a high-speed steel bit and clamped to a stand so that it worked in a vertical position. The bit was revolving at a speed up to two thousand revolutions per minute when it broke and was shattered into fragments, one or more of which flew into the appellant's eye. The appellant argued that the obligation under s. 14 was not only to keep the operator from contact with the machine but also to prevent pieces of the machine which had been shattered in operation flying out and hitting the operator's eye, if the propensity of the machine to eject such pieces was known to the respondents. In my view, such a construction of s. 14 is not open having regard to decisions of this House. A number of decisions of the Court of Appeal, commencing with I *Hindle v. Birtwistle* (105), were relied on by the appellant in justification of his construction of s. 14. But, in my opinion, it is not necessary to go further back than 1946 to find the answer to the problem. In that year, *Nicholls v. Austin (Leyton), Ltd.* (106) was decided by this House. This case, which was under s. 14 of the Act of 1937, concerned material which flew out from the machine in the course of operation and injured the workman. But, in deciding

that s. 14 did not extend to guarding against dangerous materials ejected from the machine, the House had to consider in general the scope of this section. All their Lordships, with the exception of LORD WRIGHT, indicated their view that the obligation was to guard against the employee coming in contact with the dangerous part. LORD THANKERTON said (107) that the obligation was to provide a guard against contact with any dangerous part of a machine. LORD MACMILLAN said (108):

“The obligation under s. 14 to fence the dangerous part of a machine, as I read it, is an obligation so to screen or shield the dangerous part as to prevent the body of the operator from coming into contact with it . . .”

LORD SIMONDS said (109): “The fence is intended to keep the worker out, not to keep the machine or its product in”. In some of the speeches, reliance was placed on the concluding words of s. 14 relating to the power of the Secretary of State to make regulations requiring the fencing of materials or articles which are dangerous while in motion in the machine. But, as the quotations from the speeches show, this was not by any means the only or even the chief ground of the decision. It is implicit, in my view, in the decision that the scope of the section only extended to protecting the operator against contact with the dangerous part. For my part, I am unable to see the distinction between parts of a machine which are dangerous because they eject pieces of material when the machine is in motion and parts of a machine which are dangerous because the operator may come in contact with them. If the section requires fencing against the one danger, it would be logical to suppose that fencing was required against the other. A rifle which is shattered by an internal explosion is as dangerous as a rifle which ejects bullets spontaneously.

This case was followed two years later by *Carroll v. Andrew Barclay & Sons, Ltd.* (110). The action was brought under s. 13 of the Factories Act, 1937, whereby every part of the transmission machinery requires to be securely fenced. The pursuer was injured by a belt which broke and then lashed out on him. This House held that he was not entitled to recover under s. 13 because the section did not require the occupier to erect a barricade to prevent any broken machinery from flying out and injuring him. So stated, the decision would appear fatal to the appellant's argument in this case. And, when the speeches are examined, it becomes quite obvious that the ratio of the judgments followed the ratio in *Nicholls v. Austin* (111). LORD PORTER, LORD NORMAND and LORD MORTON OF HENRYTON expressed the opinion that the purview of the section was limited to the provision of a secure fence to keep the workman away from the machine and did not extend to keep the machine away from the workman. “Securely fenced” must be given the same meaning in the group of s. 12 to s. 14 (LORD NORMAND and LORD DU PARCQ in *Carroll v. Barclay* (112)).

Appended to s. 14 (1) occurs the proviso:

“Provided that, in so far as the safety of a dangerous part of any machinery cannot by reason of the nature of the operation be secured by means of a fixed guard, the requirements of this subsection shall be deemed to have been complied with if a device is provided which automatically prevents the operator from coming into contact with that part.”

If the appellant's construction of the section were sound, one would have expected to find in the exception mention of an automatic device to prevent the dangerous part from being ejected and hitting the workman. No such provision occurs. It

(107) [1946] 2 All E.R. at p. 95; [1946] A.C. at p. 499.

(108) [1946] 2 All E.R. at p. 96; [1946] A.C. at p. 501.

(109) [1946] 2 All E.R. at p. 98; [1946] A.C. at p. 505.

(110) [1948] 2 All E.R. 386; [1948] A.C. 477.

(111) [1946] 2 All E.R. 92; [1946] A.C. 493.

(112) [1948] 2 All E.R. at p. 391; [1948] A.C. at pp. 488, 486.

A is said, however, that LORD DU PARCQ, whose speech was concurred in by VIS-COUNT JOWITT, L.C., reserved his opinion on the question of machines which are dangerous because fragments or loose parts of the machinery are sometimes ejected. He also doubted the accuracy of LORD SIMOND's dictum in *Nicholls v. Austin (Leyton), Ltd.* (113). I cannot find that this view was concurred in by the majority of their Lordships and, with all respect to LORD DU PARCQ, I doubt if it was consistent with the ratio of the decision. For these reasons, I consider that the construction of s. 14 has already been decided by this House in a sense adverse to the appellant's contention and it is not open to this House to review the matter.

The Court of Appeal decided this point of law in the appellant's favour. LORD EVERSHED, M.R., who gave the leading judgment, appears to have been impressed with the force of *Nicholls v. Austin* (113) when he says at (114):

C " . . . *Nicholls v. Austin* (113) if it had stood unqualified would have been, in our view, decisive against the present plaintiff . . . the language which I have cited seems to us clearly to show that the conclusion was reached on the basis that s. 14 (1) of the Act of 1937 should be construed as intended to limit the duty thereby imposed to a duty to guard against contact with the machine."

D The Master of the Rolls appears to find the qualification in LORD DU PARCQ's reservation already referred to in *Carroll v. Barclay* (115) which is the case he next quotes. So far from finding any qualification of *Nicholls v. Austin (Leyton), Ltd.* (113), I consider that the decision in *Carroll* (115) reinforces the reasoning of

E *Nicholls* (113) and is as I have already said, conclusive of the question before the House. For these reasons, I consider that the Court of Appeal were wrong in holding that the duty imposed by s. 14 comprehends the duty to protect the workman from injury caused by ejected or flying pieces of the machine. It follows that the decisions of the Court of Appeal such as *Dickson v. Flack* (116), *Rutherford v. R. E. Glanville & Sons (Bovey Tracey), Ltd.* (117), and *Newnham v. Taggart Morgan & Coles, Ltd.* (118), were wrongly decided. These cases stem from *Hindle*

F *v. Birtwistle* (119), a case which concerned s. 5 of the Factory and Workshop Act, 1878, and s. 6 of the Act of 1891. While it may be that this case has been accepted by the profession until 1946 as authority for the view that s. 14 or its predecessors comprehended a duty to fence against a piece of machine being ejected in motion, it is pertinent to observe that the point taken in *Nicholls v.*

G *Austin* (113) and *Carroll v. Barclay* (115) was never argued. The case turned primarily on the meaning to be given to the word "dangerous". The recorder had held the machinery was only dangerous if it was so in the case of careful working. The court disagreed with this view and remitted the case to the sessions for reconsideration. WILLS, J., said (120):

H " . . . machinery or parts of machinery is and are dangerous if in the ordinary course of human affairs danger may be reasonably anticipated from the use of them without protection."

But it was never suggested in argument that no duty to fence arose to prevent the shuttle flying off the cotton-weaving machine.

I This construction of s. 14 would be sufficient for the decision of the case, but, as an argument was advanced on the question whether the particular machine was dangerous, it is proper that I should express my views. I take the test whether a part of a machine is dangerous from the dictum of DU PARCQ, J., in

(113) [1946] 2 All E.R. 92; [1946] A.C. 493.

(114) [1960] 2 All E.R. at p. 663; [1960] 2 Q.B. at p. 311.

(115) [1948] 2 All E.R. 386; [1948] A.C. 477.

(116) [1953] 2 All E.R. 840; [1953] 2 Q.B. 464.

(117) [1958] 1 All E.R. 532.

(118) (July 19, 1956), unreported.

(119) [1897] 1 Q.B. 192.

(120) [1897] 1 Q.B. at p. 195.

Walker v. Bletchley Flettons, Ltd. (121), as qualified by LORD REID in *John A Summers & Sons, Ltd. v. Frost* (122), whether it might be

"... a reasonably foreseeable cause of injury to anybody acting in a way in which a human being may be reasonably expected to act in circumstances which may be reasonably expected to occur."

So regarded, this part of the machine was not, in my view, dangerous. There is room for doubt what was the view of WINN, J., of the matter, but I think, fairly read, he must have regarded it as not dangerous. The Court of Appeal clearly expressed this view. Although it was a not infrequent occurrence for bits to break, no accident of any kind had ever occurred before. The tendency of the flying pieces of bit was to go downwards but not more than a couple of feet. Adopting the words of LORD EVERSHED, M.R. (123): "the ... accident was not one which could or would be reasonably foreseeable in the ordinary course ...", no reasonable employer could have been expected to anticipate any risk of significant injury. It was a wholly exceptional and unique accident and not, in my opinion, reasonably foreseeable.

For these reasons, I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Evill & Coleman* (for the appellant); *Kenneth Brown, Baker, Baker*, agents for *Gee & Edwards*, Swansea (for the respondents).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

[END OF VOLUME TWO.]



(121) [1937] 1 All E.R. at p. 175.

(122) [1955] 1 All E.R. at p. 882; [1955] A.C. at p. 765.

(123) [1960] 2 All E.R. at p. 661; [1960] 2 Q.B. at p. 307.

